

2014

The Stormy Seas of Situs: Reevaluating the Situs Requirement of the Longshore and Harbor Workers' Compensation Act

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Recommended Citation

Davies, Gillian S. "The Stormy Seas of Situs: Reevaluating the Situs Requirement of the Longshore and Harbor Workers' Compensation Act." *American University Law Review* 63, no.6 (2014): 1901-1955.

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The Stormy Seas of Situs: Reevaluating the Situs Requirement of the Longshore and Harbor Workers' Compensation Act

THE STORMY SEAS OF SITUS: REEVALUATING THE SITUS REQUIREMENT OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

GILLIAN S. DAVIES*

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INTRODUCTION

The Longshore and Harbor Worker’s Compensation Act (LHWCA),¹ first passed in 1927 and significantly amended in 1972, provides compensation for employees injured in the course of certain maritime employment.² Initially, the Act’s strict location-based requirement allowed only those injured on “navigable waters” to receive compensation, but the 1972 amendments extended coverage to workers who were injured on certain “adjoining areas,” provoking much controversy over which workers could receive coverage and where they must be working.³ Today, claimants must satisfy both a status (employment) requirement and a situs (geographical) requirement to receive coverage.⁴ Essentially, the question becomes how far to extend coverage, and the courts have split, most favoring one extreme or the other.⁵

1. Longshore and Harbor Workers’ Compensation Act, 33 U.S.C §§ 901–950 (2012) (originally enacted as Longshoremen’s and Harbor Workers’ Compensation Act, Pub. L. No. 69-803, 44 Stat. 1424 (1927) (amended 1972)) [hereinafter LHWCA].

2. *Id.* § 903(a).

3. *See id.* (1972 statutory language); Longshoremen’s and Harbor Workers’ Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 2(b), 86 Stat. 1251, 1251 (1972); Longshoremen’s and Harbor Workers’ Compensation Act, Pub. L. No. 69-803, § 3(a), 44 Stat. 1424, 1426 (1927) (amended 1972) [hereinafter LHWCA of 1927] (1927 statutory language); Thomas C. Fitzhugh III, *Who Is Covered? Recent Cases Regarding Longshore Situs and Status*, 16 U.S.F. MAR. L.J. 265, 295–312 (2003–04) (discussing the evolution of LHWCA situs case law and the varied approaches of the First, Fourth, Fifth, and Eleventh Circuits in particular).

4. *Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 264–65 (1977); *see also* *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 73–75, 78 (1979) (considering the scope of the “maritime employment” status requirement for non-enumerated workers in light of the Act’s legislative history and Congress’s discernable intent).

5. *See infra* Part I.A–B (deducing this question from the continued expansion of the LHWCA and the differences in circuit court interpretations). For a broad

On April 29, 2013, the U.S. Court of Appeals for the Fifth Circuit decided a worker's compensation case under the LHWCA, holding that the worker's injury had not occurred on a qualifying situs.⁶ The court looked to the "plain meaning" of the Act, overruling its former precedent in *Texports Stevedore Co. v. Winchester*,⁷ and adopted an approach similar to the Fourth Circuit's narrow interpretation of the situs requirement.⁸ This result differs significantly from the Third and Ninth Circuits' broad interpretations of the Act, which focus on Congress's intent in passing the Act, rather than the plain meaning of the statute.⁹ Such liberal interpretations provide that sites further from navigable waters qualify for coverage, but they also potentially fail to put appropriate bounds on the Act; as a result, some courts utterly disregard the Act's situs requirement in cases that satisfy the status requirement and provide over-inclusive coverage beyond what Congress likely intended.¹⁰

This Comment argues that the Fifth Circuit inappropriately overruled its own precedent, using a simplistic, plain-meaning interpretation of the LHWCA to discard Congress's purpose in passing the Act and create further inconsistency in the relief provided to injured workers by the various circuit courts. Part I of this Comment examines the LHWCA's background and legislative history and discusses relevant case law from the circuit courts. Part II analyzes the courts' implementation of the LHWCA using the canons of construction and compares the Fourth and Fifth Circuits' narrow approaches with the Third and Ninth Circuits' broad approaches.

interpretation of coverage, see *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978), and *Sea-Land Serv., Inc. v. Dir., Office of Workers' Comp. Programs*, 540 F.2d 629 (3d Cir. 1976). For a strict statutory construction of coverage, see *New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs*, 718 F.3d 384 (5th Cir. 2013) (en banc), and *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134 (4th Cir. 1995).

6. *New Orleans Depot Servs.*, 718 F.3d at 386, 394 (describing the company as a container repair and maintenance facility located on a site 300 yards from shore without access to water and surrounded by non-maritime businesses).

7. 632 F.2d 504 (5th Cir. 1980) (en banc), *overruled in part* by *New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs*, 718 F.3d 384 (5th Cir. 2013) (en banc).

8. See *New Orleans Depot Servs.*, 718 F.3d at 394–95 (adopting a plain meaning interpretation of the statute as the best way to correctly follow congressional intent and avoid subverting Congress's policy concerns for the Court's own); see also *Sidwell*, 71 F.3d at 1138 (espousing a plain-meaning interpretation of the statute that differed from the expansive interpretations of other circuits at the time).

9. See *Herron*, 568 F.2d at 141 (employing a factors test to determine whether Congress would likely have intended coverage for injuries sustained on a given situs); *Sea-Land*, 540 F.2d at 638 (eliminating the situs requirement in cases satisfying the status requirement under the theory that it would undermine Congress's goal of eradicating shifting or uncertain coverage).

10. See, e.g., *Sea-Land*, 540 F.2d at 638 (discarding the situs requirement after determining that the status requirement made it superfluous).

This Comment concludes that Congress should abolish the Act's situs requirement in favor of a status-only test and revise its statutory language to clearly reflect its intent. In the meantime, the circuit courts should standardize their approaches to the situs question so that arbitrary line-drawing does not lead to inconsistent results among similarly-situated employees in different jurisdictions. The resulting approach would reflect the Ninth Circuit's flexible—but not overbroad—factors test, which considers whether the site is appropriate for maritime use, whether nearby properties are dedicated to maritime activity, whether the site is close to the waterway, and whether it could feasibly be closer.¹¹

I. BACKGROUND

Grasping the currently muddled state of LHWCA jurisprudence and the need for statutory revision¹² requires an examination of the Act's evolution from its initial passage in 1927 to the present day. Such an examination of the Act and the related jurisprudence reveals that problems of fair and coherent line-drawing have plagued

11. *Herron*, 568 F.2d at 141. Most of the LHWCA literature thus far focuses on the Act's history or its status requirement. See, e.g., George R. Alvey, Jr. & John O. Pieksen, Jr., *Falling in and out of Coverage: Jurisprudential Legislating Eviscerates the Status Requirement of the Longshore and Harbor Workers' Compensation Act*, 19 TUL. MAR. L.J. 227, 248–52 (1995) (discussing erosion of the status requirement); F. Nash Bilisoly, *The Relationship of Status and Damages in Maritime Personal Injury Cases*, 72 TUL. L. REV. 493, 518 (1997) (outlining the relationship between status and damages and concluding that statutory revision will not improve the situation); Charles Clark, *The Expanding Coverage of the Longshoremen's and Harbor Worker's Compensation Act*, 43 LA. L. REV. 849, 849 (1983) (focusing on LHWCA history); Fitzhugh, *supra* note 3, at 266 (detailing the history of the LHWCA, the effect of the 1972 amendments, and the ways in which courts have managed to blur seemingly clear statutory lines); David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 37 TUL. MAR. L.J. 401, 412–16 (2013) (descriptive piece detailing developments in the Fifth and Eleventh Circuits); Stephen P. Hall, Note, *The LHWCA Situs Requirement—Adjoining Area Construed Broadly in Keeping with the Remedial Purpose of the Act—Texports Stevedore Co. v. Winchester*, 6 MAR. LAW. 118 (1981) (describing the contents of the *Winchester* decision). However, there are a few exceptions. See, e.g., Nicole J. Dulude & Todd Greenwood, *Close-Hauling Toward Simplified Eligibility Under the Longshore and Harbor Workers' Compensation Act: A Proposal for Congressional Action or Judicial Clarification to Rectify Persistent Ambiguity*, 35 TUL. MAR. L.J. 45, 59 (2010) (proposing both a congressional and a judicial solution to the problem of off-shore oilfields, whose drilling platforms have been termed “artificial islands”); Donald S. Morton, Comment, *The Longshoremen's and Harbor Workers' Compensation Act: Coverage After the 1972 Amendments*, 55 TEX. L. REV. 99, 125 (1976) (identifying the ambiguous terms in the situs requirement without suggesting a means to resolve these ambiguities). In the course of discussing the history of the Act and analyzing various problems, all of these articles touch on Congress's legislative intent to varying degrees.

12. See Fitzhugh, *supra* note 3, at 266 (outlining the courts' confusion regarding the limits of coverage under the Act).

Congress, courts, and plaintiffs since before the statute's inception.¹³ This section will first outline the specific conditions prompting Congress's passage of the LHWCA and its subsequent revisions and then scrutinize specific court opinions that have influenced or contributed to the current circuit split.

A. *The Longshore and Harbor Workers' Compensation Act (LHWCA)*

Most pertinent among the various iterations of the LHWCA are the 1927 version—for a historical understanding of the Act—and the 1972 amendments, which significantly expanded the scope of the Act. Accordingly, this Comment addresses these critical developments in the following two sections.

1. *The 1927 enactment*

In 1927, Congress enacted the first iteration of the Longshoremen's¹⁴ and Harbor Workers' Compensation Act (LHWCA)¹⁵ in response to failed attempts to cover maritime workers under state and federal workers' compensation schemes.¹⁶ In the seminal 1917 case, *Jensen v. Southern Pacific Co.*,¹⁷ the Supreme Court ruled unconstitutional New York State's attempt to provide compensation for maritime workers under the New York Workmen's Compensation Act because it infringed on the federal government's exclusive jurisdiction over all cases in admiralty and maritime law.¹⁸ It also held inapplicable both the 1906 and 1908 Federal Employers'

13. See *infra* Part I.A-B (noting that over the years, Congress has struggled to amend the LHWCA adequately, courts have struggled to interpret the Act properly, and plaintiffs have struggled for relief under it).

14. A longshoreman is "one who is employed at a seaport to work at the loading and unloading of ships." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1334 (Philip Babcock Gove ed. 1981) [hereinafter WEBSTER'S DICTIONARY].

15. LHWCA of 1927, Pub. L. No. 69-803, § 3(a), 44 Stat. 1424, 1426 (1927) (amended 1972).

16. See, e.g., First Federal Employers' Liability Act of 1906, Pub. L. No. 59-219, 34 Stat. 232 (acting as the first congressional compensation attempt, which was overruled by *Howard v. Illinois Central Railroad Co.*, 207 U.S. 463, 499, 504 (1908)); Federal Employers' Liability Act of 1908, Pub. L. No. 60-100, 35 Stat. 65 (serving as the second congressional compensation attempt, which was held invalid by *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 212 (1917)); *Jensen v. S. Pac. Co.*, 109 N.E. 600, 601 (N.Y. 1915) (citing the New York Workmen's Compensation Act's 1914 statutory language, which grants coverage in New York to injured employees engaged in intrastate, interstate, and foreign commerce), *rev'd*, 244 U.S. 205 (1917); see also *Jensen*, 244 U.S. at 217–18 (rejecting the States' authority to provide state workers' compensation coverage to maritime employees injured on shore); N.Y. WORKERS' COMP. LAW § 113 (McKinney 2006) (current amended version of the 1914 law cited in *Jensen*, 109 N.E. at 601).

17. 244 U.S. 205 (1917).

18. *Id.* at 217–18.

Liability Acts, determining that they applied exclusively to common carriers with significant railroad operations.¹⁹ The absurd consequence of this decision was that the plaintiff in *Jensen* had no remedy for her husband's death, which took place on board a steamship as he was unloading it with a small electric freight truck.²⁰

Initially, the LHWCA read:

Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock^[21]) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.²²

In effect, the new law contained a strictly defined situs requirement and no status requirement.²³ Only those injured on "navigable waters" could recover for their injuries, while those injured on land, certain docks, piers, or wharves received compensation through state compensation schemes.²⁴ This meant that where a worker's misfortune occurred determined how he would receive compensation, despite the arbitrariness of changing his coverage as he crossed the gangplank onto the pier.²⁵ Under the 1927 version of the LHWCA, a longshoreman injured on the landward side of his

19. *Id.* at 212–13.

20. *Id.* at 208, 218; see also H.R. REP. NO. 67-639, at 8 (1922) (bemoaning the pre-LHWCA state of affairs as "extremely confusing [and] doubly deplorable, for it works not only a great injustice to the men themselves, but to their employers as well, who are compelled to carry double insurance").

21. A dry dock is "a dock that can be kept dry for use during the construction or repairing of ships." WEBSTER'S DICTIONARY, *supra* note 14, at 697. Dry docks are often located in "navigable waters" but either raise ships out of the water or permit water to be temporarily drained away so that the ship is not *literally* "upon . . . navigable waters." 33 U.S.C. § 903(a) (2012).

22. LHWCA of 1927, Pub. L. No. 69-803, § 3(a), 44 Stat. 1424, 1426 (1927).

23. See LHWCA of 1927 §§ 2(3), 3(a) (listing who is not an "employee," rather than defining the term to create a status requirement, and providing compensation only for employees injured on "navigable waters"); *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 73 (1979) (recognizing the rigidity of the 1927 Act's situs-only test and the potential inequities that might arise from it); *Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 264–65 (1977) (explaining the 1972 transition from a narrow situs-only test to the 1972 amendments' broader situs and status test); MORTON, *supra* note 11, at 102 (observing that pre-1972 coverage was location-based and that those injured on a pier only had recourse to state compensation regimes).

24. See LHWCA of 1927 § 3 (situs-only requirement); *P. C. Pfeiffer Co.*, 444 U.S. at 72 (remarking on the *Jensen* prohibition against LHWCA coverage for longshoremen injured on land); *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1135 (4th Cir. 1995) (noting the 1927 statute's exclusive use of a "locality test," which only provided coverage on navigable waters while depriving those injured on shore of LHWCA coverage).

25. See *Sea-Land Serv., Inc. v. Dir., Office of Workers' Comp. Programs*, 540 F.2d 629, 632 (3d Cir. 1976) (commenting on the effects of the *Jensen* decision, which provided for state workers' compensation coverage while on the pier but resulted in a complete lack of coverage after stepping onto the gangplank toward the ship).

work site might receive highly inadequate state coverage for a crippling injury, while his colleague, suffering the same injury on board a ship, received generous federal compensation benefits.²⁶

Over the years, the Supreme Court of the United States has typically recommended a liberal interpretation of the Act, as in *Voris v. Eikel*,²⁷ where it noted that the Act should be “liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.”²⁸ Because Congress enacted this bill specifically to cover those who would not otherwise have coverage, the courts typically tried to ensure that maritime workers received coverage under either the LHWCA or state workers’ compensation laws, even if an employee failed to meet certain technical requirements.²⁹ However, this tendency toward liberal statutory construction did not resolve the significant disparity between state and federal coverage.³⁰

2. *The 1972 amendments*

Despite courts’ preference for a liberal interpretation, coverage problems persisted for longshoremen, and in 1972, Congress amended the Act to afford broader coverage.³¹ New loading techniques, like “containerization and the use of LASH-type vessels,”³²

26. See, e.g., S. REP. NO. 92-1125, at 12 (1972) (noting the inadequacy of state benefits, even under the more generous state compensation programs); H.R. REP. NO. 92-1441, at 10–11 (1972) (using the same language as the Senate Report).

27. 346 U.S. 328 (1953).

28. *Id.* at 333; see also *Balt. & Phila. Steamboat Co. v. Norton*, 284 U.S. 408, 414 (1932) (citing *Jamison v. Encarnacion*, 281 U.S. 635, 640 (1930)) (explaining that courts should interpret the Act to avoid inequitable results); *Luckenbach S.S. Co. v. Norton*, 106 F.2d 137, 138 (3d Cir. 1939) (declaring that a hyper-technical construction of the statute “has not been favored” historically). In fact, the Court has suggested that such laws serve the public interest and spread the costs of injury to the industries and customers, who can handle the cost collectively far better than a single injured individual could. See *Balt. & Phila. Steamboat Co.*, 284 U.S. at 414. In 1966, practitioner Carl O. Bue, Jr. remarked on “a noticeable increase in emphasis upon equitable considerations in the admiralty decisions,” particularly in personal injury cases. Carl O. Bue, Jr., *Admiralty Law in the Fifth Circuit—A Compendium for Practitioners: 1*, 4 HOUS. L. REV. 347, 350 (1966).

29. See, e.g., *Voris*, 346 U.S. at 333–34 (discarding the technical written notice requirement where the employer had constructive notice of the injury, and the employee was illiterate and thus unable to notify his employer in writing).

30. See *Dulude & Greenwood*, *supra* note 11, at 52 (noting that even the best state laws did not come close to meeting the nationally recommended standards).

31. Longshoremen’s and Harbor Workers’ Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 2, 86 Stat. 1251, 1251 (1972); see *Dulude & Greenwood*, *supra* note 11, at 51–53 (detailing pre-1972 coverage difficulties, particularly the lack of coverage for some workers, overlapping coverage for others, and limited state workers’ compensation funds in many jurisdictions).

32. *Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 263 (1997) (citing H.R. REP. NO. 92-1441, at 10–11 (1972), and S. REP. NO. 92-1125, at 12–13 (1972)). Containerization allows traditional longshoring tasks—like loading and unloading a ship—to take place entirely on land. See *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 74

had effectively moved a good portion of longshoremen's duties in loading and unloading cargo to shore, and Congress wanted to ensure that coverage did not depend on a worker's "fortuitous circumstance of whether the injury occurred on land or over water."³³ Congress specifically stated that:

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. . . . The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.³⁴

It also noted the arbitrariness of the 1927 version of the Act and the significant disparity in benefits resulting from different coverage.³⁵ For Congress, the issue was not simply lack of clarity as to which laws applied in a given situation; it also involved concern that longshoremen received *different* coverage depending on where they sustained injury and that such a disparity was potentially unfair.³⁶

By enacting the 1972 amendments to the LHWCA, Congress attempted to eliminate this disparity and ensure that workers who would normally receive federal coverage for part of their activity would be eligible for federal coverage throughout.³⁷ This would solve what courts and commentators have referred to as the problem of longshoremen and harbor workers "walking in and out of coverage."³⁸ Congress also noted the unsatisfactory coverage that

(1979). LASH stands for "lighter aboard ship" and refers to certain types of lighters, or barges. *Caputo*, 432 U.S. at 273 n.35. After loading and towing a LASH barge to a larger main vessel—a LASH vessel or "mother ship"—the larger vessel can load the barge and its contents on board via crane and store them there for transport. *Id.*

33. See S. REP. NO. 92-1125, at 13 (1972) (observing that pure (mis)fortune could lead a worker injured over water to receive coverage while one injured over land doing the same work would not receive coverage); H.R. REP. NO. 92-1441, at 10-11 (using identical language to the Senate Report).

34. S. REP. NO. 92-1125, at 13 (clarifying that employees who only engage in further land shipment or clerical duties would not receive coverage); H.R. REP. NO. 92-1441, at 11 (using the same language as the Senate Report).

35. S. REP. NO. 92-1125, at 13; H.R. REP. NO. 92-1441, at 10-11; see also *Caputo*, 432 U.S. at 262-63 (citing S. REP. NO. 92-1125, 12-13 and H.R. REP. NO. 92-1441, 10-11) (noting that an injury occurring over water would be covered by adequate federal benefits under the Act, but the same injury occurring on land would be subject to highly inadequate compensation under state compensation laws).

36. S. REP. NO. 92-1125, at 13; H.R. REP. NO. 92-1441, at 10.

37. S. REP. NO. 92-1125, at 13; H.R. REP. NO. 92-1441, at 10-11; see also *P. C. Pfeiffer Co.*, 444 U.S. at 75 (affirming this idea with reference to the *Caputo* decision's treatment of the Act's legislative history).

38. See, e.g., *Caputo*, 432 U.S. at 257 (noting the "amphibious nature" of longshoremen's work and the need to provide more extensive coverage); *Dir., Office of Workers' Comp. Programs v. Perini N. River Assocs.*, 459 U.S. 297, 332-33 (1983) (Stevens, J., dissenting) (commenting on the problem of longshoremen "walking in and out of coverage"); *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 511 (5th

most state workers' compensation laws provided as one reason to provide uniform coverage for all of a maritime employee's work; those workers covered under state compensation laws received inadequate benefits, even in generous states.³⁹

These amendments created separate status and situs requirements.⁴⁰ A worker had to be a qualifying employee working in a qualifying location.⁴¹ As a result, the LHWCA currently states that

[e]xcept as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).⁴²

The Act also defines "employee" to mean "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker."⁴³ This new formulation so vastly expanded coverage that in 1984, Congress

Cir. 1980) (en banc) (reiterating the Court's language from *P.C. Pfeiffer Co.*, which described the problem as one in which workers "walk[] in and out of coverage" despite remaining in the situs area), *overruled in part* by New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs, 718 F.3d 384 (5th Cir. 2013) (en banc); S. REP. NO. 92-1125, at 13 (expressing a desire to eliminate the arbitrary nature of LHWCA coverage and enact a comprehensive, reliable compensation scheme); H.R. REP. NO. 92-1441, at 10-11 (using the same language as the Senate Report); Dulude & Greenwood, *supra* note 11, at 81 (discussing the problem in relation to the plight of those engaged in off-shore oil drilling, where fixed oil platforms have been termed "artificial islands"); *see also* H.R. REP. NO. 67-639, at 1-2 (1922) (indicating a desire for uniformity of coverage even in 1922).

39. S. REP. NO. 92-1125, at 12; H.R. REP. NO. 92-1441, at 10.

40. The amendments therefore "eliminated the longshoremen's maximum compensation rate by 1975, removed unseaworthiness as a basis for recovery by longshoremen against shipowners, and abolished shipowner indemnity actions against the stevedore." Morton, *supra* note 11, at 102 (footnotes omitted); *see also* Stockman v. John T. Clark & Son of Bos., Inc., 539 F.2d 264, 266 (1st Cir. 1976) (defining "stevedore" as "a firm engaging directly in the unloading of vessels").

41. *See P. C. Pfeiffer Co.*, 444 U.S. at 73-74 (describing the new two-part status and situs test, which takes into account the type of work in which an employee engages and the place where the injury occurs); *Caputo*, 432 U.S. at 264-65 (explaining the change to a two-part situs-status test); New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs, 718 F.3d 384, 389 (5th Cir. 2013) (en banc) (repeating that a claimant must establish both status—type of employee—and situs—location—elements to be eligible for recovery); Morton, *supra* note 11, at 102-03 (explaining the expansion of the definition of "employee" and "navigable waters").

42. LHWCA, 33 U.S.C. § 903(a) (2012) (situs requirement).

43. *Id.* § 902(3) (status requirement).

added a list of “statutes” or types of employment that did not qualify for coverage under the Act.⁴⁴

B. Circuit Split: Approaches to the Situs Requirement

In the wake of the 1972 amendments, longshoring cases began to rise through the circuits for adjudication, and varying approaches to the new situs and status requirements evolved, necessitating a Supreme Court pronouncement to unify the circuits.⁴⁵ The Supreme Court thus ruled on a number of occasions that claimants must separately satisfy both the status and the situs requirement to qualify for benefits.⁴⁶ Unfortunately, such “clarifications” did little to remediate the confusion, and courts continued to struggle with the specifics of how to interpret Congress’s revised statutory language, generally advocating for a liberal interpretation.⁴⁷ However, in *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*,⁴⁸ the Supreme Court abolished the “true doubt rule,” determining that Administrative Law Judges (ALJs) should no longer give claimants the benefit of the doubt in close cases.⁴⁹ Since then, certain Circuits—specifically the Fourth and Fifth Circuits—have stopped examining Congress’s purpose and intent when adjudicating cases,

44. See Longshore and Harbor Workers’ Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 2(a), 98 Stat. 1639, 1639 (1984) (codified as amended at 33 U.S.C. § 902(3)(A)–(H)) (defining “employee,” by listing eight specific types of employees disqualified from coverage under the Act); Dulude & Greenwood, *supra* note 11, at 55–56 (elaborating on Congress’s 1984 response to confusion over the 1972 amendments and noting that “the vocations [excluded from coverage] predominately included those in which workers were engaged in nontraditional occupations associated with burgeoning coastal development”).

45. *Herb’s Welding, Inc. v. Gray*, 470 U.S. 414, 415–16 (1985) (revisiting the two part status and situs test); *P. C. Pfeiffer Co.*, 444 U.S. at 74 (asserting the use of the two part status and situs test and referring to the requirements as “distinct”); *Caputo*, 432 U.S. at 264–65 (delving into the two part status and situs test requirements).

46. *Herb’s Welding*, 470 U.S. at 415–16; *P. C. Pfeiffer Co.*, 444 U.S. at 74; *Caputo*, 432 U.S. at 264–65; see, e.g., *New Orleans Depot Servs.*, 718 F.3d at 389 (distinguishing situs from status as independent elements that a claimant must demonstrate to recover).

47. See *Clark*, *supra* note 11, at 857–58 (describing the various expansive interpretations that the Fifth Circuit has given to the Act, such as the decision in *Jacksonville Shipyards v. Perdue*, 539 F.2d 533 (5th Cir. 1976), which disfavored a strict technical interpretation of the LWHCA).

48. 512 U.S. 267 (1994).

49. *Id.* at 281 (ruling that the Department of Labor’s “true doubt rule,” which placed the burden of persuasion on the party opposing the benefits claim, was contrary to § 7 of the Administrative Procedure Act, which stated that when the evidence is evenly balanced the claimant loses); see also Fitzhugh, *supra* note 3, at 266 (observing that *Greenwich Collieries* turned on plain-language analysis and positing that this, too, had an impact on the Fourth Circuit’s shift to an overly restrictive approach).

taking a narrower approach to coverage that potentially deprives injured parties of much-needed compensation for their injuries.⁵⁰

1. *1972–1995: An initially broad interpretation of the situs requirement*

Courts initially interpreted the statute broadly, especially vis-à-vis the situs requirement. For example, in the 1976 decision *Sea-Land Service, Inc. v. Director, Office of Workers' Compensation Programs*,⁵¹ the Third Circuit concluded that a truck driver employed by an intermodal freight carrier was on a qualifying situs when he sustained injuries in a trucking accident that occurred on a public street near the port.⁵² The court stated that the statute's list of covered areas did not constitute an exclusive list.⁵³ Furthermore, it discarded the situs requirement as unnecessary in cases where the employee's employment maintained a "nexus" to maritime employment, implying that the situs requirement does not matter if an employee meets the status requirement.⁵⁴ The Court claimed that to hold otherwise would interfere with Congress's intent to avoid shifting coverage for employees who meet the status requirement.⁵⁵ Therefore, the court remanded the case to the district court to determine whether the claimant satisfied the Act's status requirement.⁵⁶

Just a year later, the Supreme Court decided *Northeast Marine Terminal Co. v. Caputo*,⁵⁷ which clarified questions over the situs test and specifically indicated that what used to be a strict "situs" test was now a two-part "situs" and "status" test.⁵⁸ It paid close attention in its analysis to Congress's intent⁵⁹ and rejected as overly restrictive the point-of-rest theory, which suggests that a longshoreman's coverage ends once he has removed the cargo from a ship and placed it somewhere on the pier or adjoining area—its point of rest.⁶⁰ The Court paid particular attention to the fact that such a theory would exacerbate the problem of shifting coverage, which the 1972

50. See *infra* notes 85, 111 and accompanying text (describing Fourth and Fifth Circuit decisions that limited coverage along with a plaintiff's ability to recover for an injury).

51. 540 F.2d 629 (3d Cir. 1976).

52. *Id.* at 632, 639.

53. *Id.* at 638.

54. See *id.* (suggesting that the situs of the maritime vessel, not that of the employee, be the determinative situs). The use of situs to limit coverage for an employee who has already established status exacerbates the problem of shifting coverage for affected employees, a result that Congress wanted to avoid. *Id.*

55. *Id.*

56. *Id.* at 640.

57. 432 U.S. 249 (1977).

58. *Id.* at 264–65.

59. *Id.* at 269–70.

60. *Id.* at 274–76.

amendments aimed to cure.⁶¹ Instead, the Court found the claimant eligible for LHWCA coverage for an injury that he sustained after he slipped on ice at the pier while checking a cargo container that arrived over land from a different pier.⁶² However, the Court refused to dismiss the situs requirement entirely, suggesting that the Third Circuit's interpretation in *Sea-Land* left something to be desired.⁶³ It reaffirmed the *Caputo* decision in *P.C. Pfeiffer Co. v. Ford*,⁶⁴ which focused on maritime employment status, rather than on situs.⁶⁵ In *P.C. Pfeiffer*, the Court revisited *Caputo's* analysis of legislative intent, paying particular attention to the remedial nature of the Act.⁶⁶

In the meantime, the Ninth Circuit also took a liberal approach to coverage, though it refused to discard the situs requirement in its entirety following the Supreme Court's *Caputo* decision. In its 1978 decision, *Brady-Hamilton Stevedore Co. v. Herron*,⁶⁷ the Ninth Circuit ruled that the claimant, Herron, met the status and situs requirements and was therefore eligible for coverage.⁶⁸ Herron's job at a gear locker involved a number of duties, some of which required him to transport items to the pier and perform work on board ships.⁶⁹ While unloading steel plates at the gear locker, he sustained injury.⁷⁰ The court explained that

the phrase "adjoining area" should be read to describe a functional relationship that does not in all cases depend upon physical contiguity. Consideration should be given to the following factors, among others[:] . . . the particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all of the circumstances in the case.⁷¹

In 1980, the Fifth Circuit followed a similar approach in *Texports Stevedore Co. v. Winchester*, when it elected to employ a totality-of-the-circumstances test to determine whether a situs qualified for coverage

61. *Id.*

62. *Id.* at 253, 281.

63. *Id.* at 264-65, 278 n.40.

64. *See P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 73 (1979) (affirming the two-part situs and status test).

65. *Id.* at 71.

66. *See id.* at 74-75 (noting the remedial intent behind the expansion of coverage in the 1972 Act).

67. 568 F.2d 137 (9th Cir. 1978).

68. *Id.* at 141.

69. *Id.* at 139.

70. *Id.*

71. *Id.* at 141.

under the Act.⁷² Based on its own precedent, it rejected physical distance from the shore as decisive and determined that Winchester, a longshoreman employed in Texports' gear rooms, qualified for LHWCA coverage when he tripped over a forklift in the gear room and disfigured his face.⁷³ In particular, the Fifth Circuit emphasized Congress's intent in enacting the 1972 amendments, as have many other LHWCA cases.⁷⁴ Although Winchester's injury took place in a gear room five blocks from the nearest dock, the gear room itself bore enough of a functional nexus to longshoring tasks that the court ruled that Winchester should receive compensation.⁷⁵ The court also discussed the definition of "area," which it found to support a broader reading of the statute.⁷⁶ Though it acknowledged concerns that "area" might be extended to include downtown Houston, the court concluded that "to sweep that widely would be absurd."⁷⁷ It added that the "perimeter of an area is defined by function" and must have "some nexus with the waterfront."⁷⁸

Thus, in the years directly following passage of the 1972 amendments, courts focused primarily on Congress's remedial intent and downplayed the importance of the situs requirement to effectuate significantly broader coverage for longshoremen who fell victim to the hazards of their employment.⁷⁹ Following the "true doubt rule," ALJs gave claimants the benefit of the doubt when evidence was equally balanced, essentially placing the burden of

72. *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 512–15 (5th Cir. 1980) (en banc), *overruled in part by* *New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs*, 718 F.3d 384 (5th Cir. 2013) (en banc).

73. *Id.* at 506–07, 511–13 (citing cases for their analyses of "other adjoining areas"). Gear rooms store the equipment that longshoremen use for loading and unloading ships; Winchester's tasks took him from the gear room to the docks and aboard ships. *Id.* at 506–07 & n.1.

74. *Id.* at 510–11, 513, 516 (emphasizing that courts should reject a rule that would frustrate Congress's goal of uniformity); *see, e.g.,* *Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 261–65 (1977) (examining the Senate and House reports and detailing Congress's development of the 1972 amendments); *Sea-Land Serv., Inc. v. Dir., Office of Workers' Comp. Programs*, 540 F.2d 629, 633–34 (3d Cir. 1976) (deducing Congress's intent from the history of the Act); *Stockman v. John T. Clark & Son of Bos., Inc.*, 539 F.2d 264, 274–75 (1st Cir. 1976) (turning to the legislative history to find a desire for uniform compensation, a wish to extend the Act to cover otherwise ineligible longshoremen, and a concern that modern cargo handling techniques might preclude coverage for some employees without such amendments).

75. *Winchester*, 632 F.2d at 506–07, 515 (defining the Act's limitation on recovery as the functional character of an area and finding that the gear room was a function within the limits of longshoring).

76. *Id.* at 514–15.

77. *Id.* at 515.

78. *Id.* at 514–15.

79. *Supra* text accompanying notes 72–74.

persuasion on the party opposing the claim.⁸⁰ If a case did reach the circuit courts, injured claimants could trust that courts would look to the totality of the circumstances and favor much-needed coverage unless patently unreasonable.⁸¹ However, in 1994, the Supreme Court abolished the “true doubt rule,” deeming it inconsistent with Section 7 of the Administrative Procedure Act.⁸² With this development, certain circuit courts also took a step back, chipping away at coverage for injured workers.⁸³

2. 1994–Present: Narrowing the situs requirement

Despite years of case law supporting a liberal interpretation of the LHWCA, in 1995, courts began to interpret the statute more narrowly, particularly with regard to the situs requirement. The Fourth Circuit initiated this trend in *Sidwell v. Express Container Services, Inc.*,⁸⁴ when it ruled that a situs must literally adjoin navigable waters; mere proximity was insufficient to establish coverage.⁸⁵ Therefore, the plaintiff’s injury, which occurred as he repaired a shipping container at a location 0.8 miles from shore, did not qualify for LHWCA coverage.⁸⁶ The opinion criticized *Winchester, Sea-Land*, and *Herron* for rejecting the LHWCA’s statutory language and, in the case of *Sea-Land*, for abolishing the situs requirement entirely.⁸⁷ The Fourth Circuit therefore refused to adopt any other circuit’s test, charting its own “plain-language” course.⁸⁸ It searched dictionaries for the meaning of “adjoining” and found both “neighboring” and “in the vicinity of” as possible definitions.⁸⁹ However, the court determined that these were not among the ordinary meanings of

80. *Dir., Office of Workers’ Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 269 (1994).

81. *Supra* text accompanying notes 72–73.

82. *Greenwich Collieries*, 512 U.S. at 280–81 (observing that the “true doubt rule” would defer to the judgment of each agency, whereas the APA required uniformity and standardization); *see also* Administrative Procedure Act, 5 U.S.C. § 556(d) (2012).

83. *Infra* text accompanying notes 98–103.

84. 71 F.3d 1134 (4th Cir. 1995).

85. *Id.* at 1138–39.

86. *Id.* at 1135 (indicating that the plaintiff had already received compensation under the state workers’ compensation scheme but wanted additional compensation under LHWCA).

87. *Id.* at 1136–37 (claiming that the *Herron* factors do not really address whether a site adjoins navigable waters and asserting that *Winchester*’s “broad and nebulous” approach, like the *Sea-Land* holding, utterly eviscerates the situs requirement (internal quotation marks omitted)).

88. *Id.* at 1138.

89. *Id.*

“adjoining.”⁹⁰ The court did not elaborate on how it ascertained the “ordinary meaning,” which suggests that it likely applied its own preferences. *Sidwell* also noted the potential applicability of the canon of construction *noscitur a sociis*, which requires courts to look at the words surrounding “adjoining” to derive its meaning.⁹¹

In its analysis, the court referred to the legislative history simply to prove that the legislative history supported the court’s own view, stating that the Act covers longshore-related injuries “occurring in the *contiguous* dock area.”⁹² However, the court supposedly did not use the legislative history to help it choose between the possible plain meanings evidenced in the dictionary,⁹³ which still leaves the reader wondering why it dismissed certain definitions but not others.⁹⁴ The court also neglected the fact that “contiguous,” like “adjoining,” can simply mean “nearby [or] close” according to a dictionary definition.⁹⁵ Interestingly, the concurring opinion agreed only with the result and believed that the *Herron* test⁹⁶ should apply to determine whether the injury occurred on a qualifying situs.⁹⁷

Based on the *Sidwell* decision, the Fourth Circuit subsequently denied other workers coverage.⁹⁸ For example, in *Parker v. Director*,

90. *Id.* (noting that the “ordinary meaning” of “adjoin” can signify “to lie next to,” to “be in contact with,” to “abut upon,” or to be “touching or bounding at some point,” but asserting that “adjoin” does not ordinarily mean “neighboring” or “in the vicinity of”).

91. *Id.* at 1139.

92. *Id.* at 1138 (emphasis in original) (citing S. REP. NO. 92-1125, at 2).

93. *See id.* (asserting that the Fourth Circuit would gladly heed Congress’s intent if demonstrated within its statutory text and referring to the legislative history only in confirmation of the court’s analysis).

94. *Cf.* Robert G. Vaughn, *A Comparative Analysis of the Influence of Legislative History on Judicial Decision-Making and Legislation*, 7 *IND. INT’L & COMP. L. REV.* 1, 8–9 (1996) (noting that a court’s reliance on legislative history can be limited by strict adherence to the “plain meaning” rule).

95. *WEBSTER’S DICTIONARY*, *supra* note 14, at 492. More to the point, a narrow interpretation of “contiguous” as “next to” would still contradict the other portions of the House and Senate Reports further describing Congress’s intent. *See* S. REP. NO. 92-1125, at 2, 12–13 (1972); H.R. REP. NO. 92-1441, at 10–11 (1972) (both for additional context on legislative intent); *infra* text accompanying notes 213–18 (further analyzing the court’s view on the word “contiguous” in the context of the plain meaning of “adjoining”).

96. The *Herron* test requires that the area bear a “functional relationship” to the maritime uses referenced in the Act and considers certain factors. *Supra* text accompanying notes 68–71.

97. *See Sidwell*, 71 F.3d at 1142 (Beatty, J., concurring) (explaining that the test “provides a sufficient mechanism to resolve, on a case by case basis, situs issues raised by [the Act]”).

98. *See, e.g.*, *Walker v. Metro Mach. Corp.*, 50 F. App’x 104, 105, 107 (4th Cir. 2002) (refusing coverage to a ship repairman whose work did not regularly take him to the water’s edge); *Parker v. Dir., Office of Workers’ Comp. Programs*, 75 F.3d 929, 933 (4th Cir. 1996) (spurning every reasonable explanation for the company’s expansion inland when analyzing the situs requirement).

Office of Workers' Compensation Programs,⁹⁹ an inspector and a container mechanic sustained injuries in the course of their employment at Farrell Lines, Inc.¹⁰⁰ The container repair company's expansion had forced it to transfer most of its operations from its small portside facility to a larger facility, located five miles from shore.¹⁰¹ Even though employees transferred between the two locations, and despite the company's inability to find an equally suitable location closer to shore, the court denied the men coverage, claiming that the facility failed the situs test because it did not abut navigable waters.¹⁰² Under this test, harbor workers particularly suffer because much of their work repairing ships and manufacturing parts now takes place further inland at facilities near but not adjacent to "navigable waters," thereby precluding coverage.¹⁰³

Around the same time, the Third Circuit, narrowing its approach after the *Caputo* decision, began to apply the situs test, though still in a liberal fashion. In 1998, for example, it applied the *Herron* test¹⁰⁴ to *Nelson v. American Dredging Co.*¹⁰⁵ and determined that the claimant's injury took place on a qualifying situs.¹⁰⁶ In doing so, the court referred to *Sidwell's* analysis and determined that, as in the *Sidwell* decision, it must investigate the plain meaning of the statute.¹⁰⁷ However, using the same dictionary as the *Sidwell* court, the Third Circuit judges came to a different conclusion and rejected the *Sidwell* construction of the LHWCA statutory language.¹⁰⁸ Additionally, the Third Circuit declined to apply the canon *noscitur a sociis* in the manner that the Fourth Circuit did, viewing the Fourth Circuit's interpretation as contrary to both the plain language of the LHWCA

99. 75 F.3d 929 (4th Cir. 1996).

100. *Id.* at 931.

101. *Id.* at 931–32.

102. *Id.* at 933 (asserting that the relevant inquiry is whether the injury occurred in an area that qualifies as a maritime situs under the LHWCA).

103. See *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 220, 222 (4th Cir. 1998) (determining that a facility located 1000 feet from a river and whose property extended to the water's edge was not an "adjoining area" because the facility itself did not abut the shore: "the employees' work did not routinely take them from within the plant, onto adjoining water, and back again into the plant," as a longshoreman's work would, and the property's contiguity to navigable waters was "simply fortuitous").

104. *Supra* text accompanying note 71.

105. 143 F.3d 789 (3rd Cir. 1998).

106. *Id.* at 795–97 (agreeing that *Herron* was the appropriate standard to apply to an injury that occurred in a beach area but disputing the ALJ's and the Board's application of that standard to the facts).

107. *Id.* at 797.

108. *Id.* (rejecting a broad definition of "area" and explaining that the court is required to cease its inquiry into the meaning of specific language if the language is plain and unambiguous).

and to Congress's goals in enacting the statute.¹⁰⁹ Thus, the Third Circuit afforded coverage to the claimant while also narrowing its approach to LHWCA statutory construction.

Nearly twenty years after the *Sidwell* decision, the Fifth Circuit abandoned its former approach in *Winchester* and adopted a plain-language approach to the LHWCA mirroring that of the Fourth Circuit. In *New Orleans Depot Services, Inc. v. Director, Office of Worker's Compensation Programs*,¹¹⁰ the court adopted the *Sidwell* plain-meaning definition of "adjoining" to mean "border on" or "contiguous with," so the claimant failed to meet the situs requirement.¹¹¹ It deemed a contextual approach unworkable, with particular reference to *Winchester's* focus on "the circumstances" of the case.¹¹² Yet other courts, like the Ninth Circuit, have listed concrete factors to assess and consistently succeed in applying that approach.¹¹³ As a result of this new approach, the Fifth Circuit determined that a company located 300 yards from shore with a bottling plant between the company and the shore did not constitute a qualifying situs, even though the plaintiff's job entailed "repair, maintenance, and storage of shipping containers and chassis," some of which transport ocean cargo.¹¹⁴

The narrower interpretations championed over the last two decades cannot but limit coverage for maritime workers.¹¹⁵ This reality contravenes Congress's intent to afford broad coverage and, more importantly, deprives workers of benefits based solely on an erroneously narrow and arbitrary approach to statutory interpretation.¹¹⁶ While only the Fourth and Fifth Circuits currently follow such an extreme approach, the Fifth Circuit was historically the "principal maritime circuit" of the United States.¹¹⁷ As such, its decision may

109. *Id.* at 797–98 (rejecting as too narrow a construction of the Act that would only cover injuries that occurred on certain definable structures and claiming that such an interpretation would be inconsistent with the broader construction that Congress intended).

110. 718 F.3d 384 (5th Cir. 2013) (en banc).

111. *Id.* at 393–94.

112. *Id.* at 390 (lamenting that the court in *Winchester* offered little guidance on which circumstances are required for a claimant to satisfy the situs test).

113. *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 141 (9th Cir. 1978) (including "the particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all of the circumstances in the case").

114. *New Orleans Depot Servs.*, 718 F.3d at 386–87.

115. *Supra* text accompanying notes 111–14.

116. *See Nelson v. Am. Dredging Co.*, 143 F.3d 789, 795 (3d Cir. 1998) (contending that an expansive rather than a narrow view of the Act is more consistent with Congress's intent based on its use of broad language).

117. *See Bue, supra* note 28, at 350 (acclaiming the Fifth Circuit's broad sweep and the array of unique issues it deals with, despite a heavily burdened docket); Dulude &

prompt a shift in opinion among the courts, leading other circuits to abandon broad coverage as the circumstances of the LHWCA enactments fade into the annals of history. At the very least, claimants employed within the Fourth and Fifth Circuits can expect limited benefits based on the sheer misfortune of their geographic location.

C. *Statutory Interpretation and the Canons of Construction*

Clarifying precisely how the Fourth and Fifth Circuit interpretations err requires turning to the language of the statute and traditional tools of statutory interpretation. Thus, the next section will furnish background knowledge on theories of statutory construction and the most pertinent canons of construction, thereby providing a framework for the statutory analysis in Part II.

1. *Theories of statutory interpretation*

Over the years, a variety of theories and techniques of statutory interpretation have developed in the United States, but three primary theories prevail: intent-based, textual, and hybrid.¹¹⁸ Naturally, intent-based theories inquire into Congress's intent, frequently relying on some combination of legislative history sources and investigation into the social, political, and historical context of the law's enactment.¹¹⁹ Textualist approaches, on the other hand, posit that judges should focus exclusively on the text and apply the

Greenwood, *supra* note 11, at 62, 77–78 (explaining that the Fifth Circuit is the “principal maritime circuit” based on the sheer quantity of maritime decisions it makes and the fact that, as of 2010, the Fifth Circuit is “the site of the lion’s share of the nation’s maritime labor”). This status dates back to before the creation of the Eleventh Circuit, when the Fifth Circuit extended from Texas to Florida, covering the entire Gulf area, and its jurisdiction basically included all maritime cases arising along the southern border of the United States. Bue, *supra* note 28, at 350.

118. WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 219 (2d ed. 2006). Others theories of statutory interpretation are often subsets or offshoots of intentionalism or textualism; they include purposivism (statutes should be construed according to their purpose), originalism (statutory terms retain the meaning they had when Congress enacted the text), and pragmatism (“statutes should be construed to produce sensible, desirable results, since that is what the legislature must have intended”). *Id.* at 228–30; ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 18–22, 78 (2012) (railing against purposivism and pragmatism and explaining the rationale behind originalism); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 426 (1989) (debating the strengths and weaknesses of purposivism). Although the terms “intentionalist” and “textualist” typically describe opposite ends of a spectrum of interpretation preferences, many judges will fall closer to the middle of the spectrum. Thus, this Comment uses the terms very generally to denote judges’ broad preferences, rather than ends of a polar spectrum.

119. See ESKRIDGE, *supra* note 118, at 219–20 (emphasizing that a methodological conflict over proper statutory interpretation exists among the three approaches as well as within each individual approach).

statute's "plain meaning" when possible because the text either specifically evidences Congress's intent or simply provides the only decisive interpretive authority.¹²⁰ In doing so, textualists often reject recourse to legislative history or socio-historical indicators, preferring instead text-linked sources, like dictionaries, grammar books, other parts of the statute, and interpretations of similar provisions in comparable statutes.¹²¹ A hybrid approach would combine the intentionalist and textualist approaches, hopefully gleaning the best of both for a "more dynamic, pragmatic assessment of institutional, textual, and contextual factors."¹²²

Regardless of which theory a judge espouses, his inquiry will almost invariably begin by contemplating the text of the statute itself.¹²³ In addition to reviewing the text and the applicable precedent, he may apply any number of canons of construction to reach a conclusion, and he may also research Congress's specific intent regarding scope and application of the law, its purpose in enacting the statute, and the evolution and historical context of the statute, among other options.¹²⁴ Although some argue that congressional intent is not discoverable, lawmaking presupposes a method for making known to the courts the intent of the lawmakers, and inquiry into legislative intent derives from this concept that courts must have a way to understand and apply legislators' work.¹²⁵ Legal scholar James M. Landis asserts that such intent is discoverable, stating that "[t]o insist that each individual legislator besides his aye vote must also have expressed the meaning he attaches to the bill" would be to ignore that each vote builds on what was previously said, indicating agreement with the statements and interpretations already expressed

120. *Id.* at 231; Sunstein, *supra* note 118, at 416 (drawing attention to the fact that only statutory terms have undergone the constitutional procedures for enacting law, meaning that legislative history and other tools have no actual authority or force of law).

121. ESKRIDGE, *supra* note 118, at 236.

122. *Id.* at 219.

123. *See, e.g.,* Comm'r v. Engle, 464 U.S. 206, 214 (1984) (remarking that the Court's exclusive task was to determine Congress's intent in enacting the statute, a task that naturally begins by reference to the statutory text); SCALIA & GARNER, *supra* note 118, at 16 (stating that textualism "begins and ends" with the text and its reasonable implications).

124. *See* ESKRIDGE, *supra* note 118, at 250, 257 (diagramming the customary way in which statutory interpretation has proceeded for the last century, with judges starting from the most concrete (textual) sources and gradually expanding the source field as needed to guide interpretation); *see also* James M. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 892-93 (1930) (explaining that interpretive rules do not automatically bear results but rather attune the interpreter's mind to the legislature's vision).

125. *See* Landis, *supra* note 124, at 886 (recognizing that although such a concept has caused some judges to invent inaccurate legislative intents to effectively "legislate" their own preferences, the occasional abuse does not invalidate the concept).

in the record.¹²⁶ However, textualists would likely respond that the intent—if it is even pertinent—should be discoverable from the text of the statute itself.¹²⁷

2. *Techniques of statutory interpretation: Canons of construction*

For those judges hesitant to rely on legislative and historical sources, the canons of construction provide a variety of techniques, both textual and substantive, to guide logical interpretation of statutes. Of course, those concerned that “citing legislative history is . . . akin to ‘looking over a crowd and picking out your friends’” could target the same criticism toward the canons of construction, which, though based in text and logic, often lead to contradictory interpretations depending on which canon is selected.¹²⁸ However, Professor William Eskridge believes that textual sources settle most simple issues.¹²⁹ Though the more difficult cases may result in a confrontation between theories of interpretation and preferred sources, the canons of construction provide a framework that most judges draw from when interpreting statutory texts.¹³⁰ This section will examine some of the most time-tested canons and apply them to the LHWCA below to explain that a broad interpretation of the LHWCA is more appropriate in determining coverage for injured workers.

a. *Canon I: Plain meaning canon*

This canon typically requires judges to give words “the meaning an ordinary speaker of the English language would draw from the statutory text,”¹³¹ unless the statute indicates that the words bear a

126. *Id.* at 888–89.

127. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824) (“[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.”); SCALIA & GARNER, *supra* note 118, at 70 (implying that legislators do intend a particular use of a word, which can often be discovered through context).

128. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950) (listing twenty-eight pairs of common but contradicting canons); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (citing a conversation between herself and Harold Levantahl).

129. ESKRIDGE, *supra* note 118, at 257.

130. See Wald, *supra* note 128, at 206–07 (observing the Supreme Court’s emphasis on using canons and noting that historically, judges accustomed to common law interpretation drafted canons of construction and general principles to assist them in interpreting difficult statutory language).

131. ESKRIDGE, *supra* note 118, at 236. Who is an “ordinary,” “everyday” speaker of English anyway? In 2004, David Crystal asserted that second-language speakers of English currently equal native speakers in quantity and will inevitably outnumber first-language speakers in the future due to the relatively huge population growth in areas where English is a second language. DAVID CRYSTAL, *THE LANGUAGE*

technical meaning.¹³² Though one of the most ubiquitous and fundamental canons,¹³³ it often overlooks and oversimplifies the intrinsic complexity of language.¹³⁴ Essentially, this rule forbids the use of extra-textual sources when the statute is unambiguous.¹³⁵ However, plain meaning can prove more elusive than this rule implies because a determination of a word's ordinary or general meaning inevitably involves a judge's discernment, often guided by other canons of construction or by historical and legislative sources.¹³⁶ Although the proverbial sign "No vehicles in the park" will be easy to interpret as to cars, buses, motorcycles, and the like, application of

REVOLUTION 8 (2004). These statistics do not even include foreign-language learners of English. *Id.* at 8–9. By "ordinary" or "everyday" meaning, do judges presume a white, educated, native-English-speaking, American male? At which identities do judges draw the line? According to Scalia, "[w]hat the rule presumes is that a thoroughly fluent reader can reliably tell in the vast majority of instances from contextual and idiomatic clues which of several possible senses a word or phrase bears," but this only answers the question part way. SCALIA & GARNER, *supra* note 118, at 70.

132. SCALIA & GARNER, *supra* note 118, at 69.

133. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824) (assuming early in our country's history that words must carry their "natural sense"); SCALIA & GARNER, *supra* note 118, at 69 (calling this rule "the most fundamental semantic rule of interpretation"); NORMAN J. SINGER & SHAMBIE SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION § 46:1 (7th ed. 2014) (giving an overview of the plain meaning rule and referencing hundreds of federal and state cases that discuss or employ the plain meaning rule); Llewellyn, *supra* note 128, at 403 (listing the plain meaning canon among other examples of common canons).

134. Interestingly, language usage differs far more than one might think, both between native speakers from different countries and between native and second-language speakers of English. In Indian English, for example, "let's make a move" simply means "let's go," whereas an American hearing the same phrase might assume that the speaker wanted to seduce another person. LONELY PLANET, INDIAN ENGLISH LANGUAGE AND CULTURE 38 (2008). Less confusing would be the native British English and American English uses of words like "bathroom" and "pants." In the United Kingdom, a bathroom is very clearly a room that contains a bath (or at least a shower) within it, and "pants" refer to underpants, not a pair of khakis, jeans, or trousers. Mike Etherington & Sarah Etherington, *Around the House*, THE VERY BEST OF BRITISH, <http://effingpot.com/house.shtml> (last visited Aug. 2, 2014); Mike Etherington & Sarah Etherington, *Clothing*, THE VERY BEST OF BRITISH, <http://effingpot.com/clothing.shtml> (last visited Aug. 2, 2014). Even within the United States, there are differences: does "soda" mean fizzy water? Or does it mean Coca-Cola and similar fountain beverages? See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, 1115 (Frederick C. Mish et al., eds., 10th ed. 1995) (defining soda as "2a: SODA WATER b: SODA POP c: a sweet drink consisting of soda water, flavoring, and often ice cream").

135. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1754–55 (2010) (examining several state supreme court interpretive frameworks and advocating for the "methodological stare decisis," practiced among some of them, which dictates application of particular techniques in state statutory interpretation).

136. See ESKRIDGE, *supra* note 118, at 233 (questioning whether one can confidently deduce the plain meaning of a statute without examining legislative deliberations and the statute's practical consequences); SCALIA & GARNER, *supra* note 118, at 70 (noting the role that context plays in statutory interpretation, a theory exemplified in Canons III–V *infra*); see Sunstein, *supra* note 120, at 416–17 (explaining that interpretation is necessary to infer the precise meaning of statutory terms).

the plain meaning canon may result in ambiguous or even unwanted results concerning tricycles (and perhaps bicycles) in the park without consideration of sources beyond the rule's stated language.¹³⁷

Though Justice Antonin Scalia notes that common experience shows that "[i]n everyday life, the people to whom rules are addressed continually understand and apply them," cases that actually come to trial hardly represent the typical cases of everyday life.¹³⁸ In fact, the argument often revolves around one or two select words from the statutory text.¹³⁹ By the time a case comes to trial, the plain meaning rule may not generate easy answers without help from other canons or outside sources. And though judges may use a dictionary or other tools to aid their interpretation, some dictionary definitions are "quite abstruse and rarely intended," leaving judges of difficult cases right where they started.¹⁴⁰ In other words, a case that comes to trial likely involves some degree of ambiguity, rendering the plain meaning rule superfluous.¹⁴¹

b. Canon II: The whole act rule

Essentially, the universally-followed whole act rule maintains that courts should take a macroscopic view of the text, construing it as a whole.¹⁴² This theory also provides the basis for a number of other canons, including Canons III-V *infra*, which elaborate on the idea that context is crucial to statutory interpretation.¹⁴³ Specifically, certain parts of a statute provide context that potentially elucidates more

137. ESKRIDGE, *supra* note 118, at 257.

138. SCALIA & GARNER, *supra* note 118, at 71. Even among cases filed, those that come to trial are a small minority, less than two percent in federal civil cases and less than five percent in federal criminal cases. Pat Vaughan Tremmel, *Much Celebrated American Trial Is Dying in Real Life*, NW. U. (Mar. 31, 2009), <http://www.northwestern.edu/newscenter/stories/2009/03/burnstrial.html>.

139. See *Nix v. Heddon*, 149 U.S. 304, 306 (1893) (examining whether "tomato" refers to a fruit or a vegetable); ESKRIDGE, *supra* note 118, at 257 (interpreting the word "vehicle" with regard to tricycles); SCALIA & GARNER, *supra* note 118, at 74 (illustrating the impact of interpreting the word "consideration" under its ordinary meaning versus its technical legal meaning); see also *Frigalment Importing Co. v. B.N.S. Int'l Sales Corp.* 190 F. Supp. 116, 117-18 (S.D.N.Y. 1960) (debating how to construe the word "chicken" in a contract for the sale of goods and what interpretive sources would be appropriate).

140. SCALIA & GARNER, *supra* note 118, at 70.

141. See ESKRIDGE, *supra* note 118, at 271-72 (debunking the assumption that a "single minded and omniscient" legislature writes statutes that provide clear and consistent meaning).

142. See ESKRIDGE, *supra* note 118, at 271 (noting that federal and state courts each follow this rule, which applies in both common law and civil law countries, as well); SCALIA & GARNER, *supra* note 118, at 167.

143. See SCALIA & GARNER, *supra* note 118, at 168.

obscure portions of the same statute.¹⁴⁴ Based on this canon, interpreters may presume that a given word is not used gratuitously but rather has a consistent meaning throughout the statutory text; interpretations that harmonize two potentially contradictory terms are preferable.¹⁴⁵ However, Eskridge notes that this presumption may be faulty; the legislature hardly constitutes a single omniscient author, and the need to compromise sometimes results in duplications or omissions, as well as provisions that undermine each other.¹⁴⁶ This subverts the further presumption that any intent will be evident on the face of the statute when viewed as a whole.¹⁴⁷ Alternatively, if the entirety of the statute *does* reveal a particular intent, this risks the tendency, which Scalia condemns, to eliminate readings of the statute that conflict with the overall intent of the statute; such a technique would correspond well with intentionalist goals.¹⁴⁸ Merits debate aside, statutes anticipate and even require use of the whole act rule, if only by including a definitions section—as in the LHWCA—or by explicitly cross-referencing other provisions of a statute.¹⁴⁹

c. Canon III: Noscitur a sociis

Related to the whole act rule, the *noscitur a sociis* canon asserts that associated words “bear on one another’s meaning” and modify each other.¹⁵⁰ Therefore, courts must examine surrounding words to derive meaning.¹⁵¹ The words generally must connect in such a way that they imply commonality, as with a list of terms.¹⁵² This canon proves particularly useful for elucidating otherwise ambiguous terms.¹⁵³ For example, if a sign reads “No motorized vehicles in the

144. *Id.* at 167–68 (explaining that the possible meaning of a word or phrase in a statute can be determined by examining the use of the same word elsewhere in the statute).

145. See ESKRIDGE, *supra* note 118, at 271; SCALIA & GARNER, *supra* note 118, at 168.

146. ESKRIDGE, *supra* note 118, at 271–72.

147. *Id.* (defending the whole act rules on the grounds that it provides the most objective method for ascertaining what the statute requires).

148. See SCALIA & GARNER, *supra* note 118, at 168.

149. See LHWCA, 33 U.S.C. § 902 (2012) (definitions sections). See generally Immigration and Nationality Act, 8 U.S.C. § 1182 (2012) (providing an example of ubiquitous cross-references in a statute).

150. See SCALIA & GARNER, *supra* note 118, at 168, 195; see also ESKRIDGE, *supra* note 118, at 261 (explaining that this canon also leads to the conclusion that, in a group of related words, specific words will limit or qualify general terms).

151. See *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1139 (4th Cir. 1995) (employing *noscitur a sociis* to the LHWCA situs provision and refusing to define words in the statute in isolation because to do so would be to ignore the statute’s “definitional limits”).

152. SCALIA & GARNER, *supra* note 118, at 196–97 (adding, however, that “a listing is not [a] prerequisite”).

153. See 73 AM. JUR. 2D *Statutes* § 125 (2014) (asserting that neighboring words can more precisely define an ambiguous term).

park,” a person would naturally look to the term “motorized” to clarify which vehicles he could legally bring to the park. Grammatically, adjectives modify nouns, so “motorized” bears an appropriate relation to “vehicles” for this canon to apply. Since neither a tricycle nor a bicycle has a motor, likely no one would question the use of either in the park.

d. Canon IV: Eiusdem generis

The *eiusdem generis* canon elaborates on *noscitur a sociis* and states that when catchall terms, such as “other,” follow a list of specific items, interpreters should assume that such terms refer only to words that share characteristics with other items in the list.¹⁵⁴ Thus, one could potentially assume that in the phrase “X, Y, Z, and other letters,” the terms “other letters” refers only to those letters that constitute the Latin alphabet.¹⁵⁵ *Eiusdem generis* essentially “implies the addition of *similar* after the word *other*.”¹⁵⁶ In the same vein, the phrase “B, Φ, 3, and other characters” would not include characters like Snoopy or Mickey Mouse. Such a construction corresponds with the idea that context is essential to interpretation, but it also ensures that the enumeration is not superfluous, as it would be if “characters” were construed in the broadest terms possible.¹⁵⁷ One downfall of this canon is its failure to identify the proper level of generality to use when interpreting a statute, which leaves judges with significant leeway.¹⁵⁸ However, both this canon and the preceding two illustrate legislators’ understanding that people use lists to connect similar terms and concepts and to imbue them with additional meaning.¹⁵⁹

154. SCALIA & GARNER, *supra* note 118, at 199 (“Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned.”).

155. While such a statement could also support inclusion of letters from other alphabets, the whole act rule would clarify this; if the entirety of the text uses the Latin alphabet exclusively, there would be no cause to presume that “other letters” included letters of the Greek alphabet or the International Phonetic Alphabet, for example. If the text were a linguistics article, however, such an assumption would potentially be unfounded, and a technical definition of “letter” might apply, excluding Japanese and Hindi syllabaries, as well as Chinese characters, from classification as letters. See Simon Ager, *Types of Writing System*, OMNIGLOT, <http://www.omniglot.com/writing/types.htm> (last visited Aug. 2, 2014).

156. SCALIA & GARNER, *supra* note 118, at 199.

157. *Id.* at 199–200.

158. *Id.* at 207–08 (questioning whether an ordinance applying to owners of “horses, cattle, sheep, pigs, goats, and other farm animals” applies to *any* domestic animal one might find on a farm or whether the animal must be a mammal or a quadruped too).

159. ESKRIDGE, *supra* note 118, at 262.

*e. Canon V: "Presumption of Nonexclusive 'Include'"*¹⁶⁰

Typically, use of the verb "include" or the gerund "including" suggests examples, rather than "an exhaustive list."¹⁶¹ This runs counter to another common canon that presumes that the inclusion of one term implies the exclusion of terms not mentioned.¹⁶² However, the presumption of the nonexclusivity of "include" stands as a common exception to the negative implication canon.¹⁶³ This exception also corresponds with common usage; if a person goes grocery shopping and comes back with five full grocery bags, a child or spouse might ask what he bought at the store. He might reply, "I bought a number of things, including chicken for dinner tonight, some mixed vegetables, and milk for your tea." In all likelihood, this is merely an illustrative list because the listed items would not fill five grocery bags. Instead, the list provides the inquirer with useful information about items he requested or the content of future meals. For a full accounting, the shopper might as well just furnish the inquirer with the receipt for the inquirer to read himself.

f. Canon VI: Presumption against ineffectiveness

Insofar as it is possible to discern the legislature's intent, the presumption against ineffectiveness insists that judges favor a textually sound interpretation that furthers the statute's purpose over a textually sound interpretation that hinders its purpose.¹⁶⁴ Thus, this canon assumes that judges can and should look to the purpose of a statute.¹⁶⁵ However, textualists would argue that one should discern such intent exclusively from the four corners of the document, not from outside research into legislative history.¹⁶⁶ In contrast, intentionalists and those who take a hybrid approach would nonetheless look to sources outside the text to determine or confirm the text's purpose.¹⁶⁷

The Emily & The Caroline,¹⁶⁸ an 1824 Supreme Court case, offers one example of this canon in action.¹⁶⁹ The statute prohibited the

160. SCALIA & GARNER, *supra* note 118, at 132.

161. *Id.*

162. This canon is known as *inclusio unius est exclusio alterius*. ESKRIDGE, *supra* note 118, at 263–64.

163. SCALIA & GARNER, *supra* note 118, at 132–33.

164. *Id.* at 63.

165. *See also id.* at 63 (articulating that this canon stems from the fact that "(1) interpretation always depends on context, (2) context always includes evident purpose, and (3) evident purpose always includes effectiveness").

166. *Id.* at 33.

167. *See* ESKRIDGE, *supra* note 118, at 219.

168. 22 U.S. (9 Wheat.) 381 (1824).

preparation of “any ship or vessel, within any port or place of the United States . . . for the purpose of carrying on any trade or traffic in slaves.”¹⁷⁰ The Supreme Court determined that the statute did not require *completion* of the preparations for the penalty of forfeiture to attach; such a requirement would defeat the purpose of the statute because completely prepared ships could immediately set sail, evading legal consequences.¹⁷¹ Thus, the Court excluded this ineffective interpretation of the law and determined that the statute must apply as soon as preparations manifest an intent to use the ships for the slave trade.¹⁷²

g. Canon VII: Absurd results canon

This canon allows judges to disregard or revise laws if failing to do so would result in an absurd, inconsistent, or thoroughly unreasonable result.¹⁷³ However, Eskridge rightly asks, “What, then, is the difference between an *absurd* result (i.e., one the legislature certainly did not contemplate) and merely an *unreasonable* one (i.e., one the judge disagrees with and truly believes right-thinking people would find unreasonable)?”¹⁷⁴ Because this distinction is difficult to maintain, textualists tend to conclude that this canon only applies to correct scrivener’s errors and other obvious mistakes, otherwise viewing the canon as a “slippery slope” toward judicial lawmaking.¹⁷⁵ Others, however, give the canon broader application, as in *Church of the Holy Trinity v. United States*.¹⁷⁶ There, the Supreme Court applied the absurdity doctrine,¹⁷⁷ stating

It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers This is not the

169. *Id.* at 388 (instructing legal professionals that in construing any statute, the focus must remain on the object in view, and the interpretation must never conflict with the statute’s purpose); see also SCALIA & GARNER, *supra* note 118, at 63–64 (citing *The Emily & The Caroline*, along with a few other examples of this canon).

170. *The Emily & The Caroline*, 22 U.S. (9 Wheat.) at 385.

171. *Id.* at 388; SCALIA & GARNER, *supra* note 118, at 63–64.

172. *The Emily & The Caroline*, 22 U.S. (9 Wheat.) at 389.

173. ESKRIDGE, *supra* note 118, at 267; SCALIA & GARNER, *supra* note 118, at 234.

174. ESKRIDGE, *supra* note 118, at 268.

175. See SCALIA & GARNER, *supra* note 118, at 235–38 (elaborating that the correction must be simple—involving the addition or replacement of a word or phrase that the legislature obviously intended).

176. 143 U.S. 457, 459 (1892). In that case, a law prevented people or companies from “assist[ing] or encourag[ing] the importation or migration of any alien . . . under contract or agreement . . . to perform labor or service of any kind” *Id.* at 458. The Supreme Court largely felt that Congress could not possibly have intended this provision to apply to an English minister and overruled the lower court based on the absurdity doctrine. *Id.* at 557–58.

177. See *infra* Part II.A.7.

substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.¹⁷⁸

While such a statement is clearly open to abuse, even the majority in *Church of the Holy Trinity* aimed to give a statute only the meaning that the legislature intended.¹⁷⁹ How to determine the legislature's intent is an ongoing point of contention, but most people would agree that the absurdity doctrine still applies, even as they disagree over its scope of application.¹⁸⁰

h. Canon VIII: Remedial statutes

The “oft-expressed maxim” that remedial statutes should be liberally construed argues for a broader approach to statutory interpretation, lending primacy to the purpose or intent behind the law.¹⁸¹ Scalia, for one, attacks this notion as false and points to the difficulty in discerning which laws are remedial; in some sense, he reasons, all laws are remedial, as they all attempt to address a perceived problem in the nation's legal framework.¹⁸² Yet courts have invoked this rule time and again, from *Chisholm v. Georgia*¹⁸³ in 1793 to the present day.¹⁸⁴ Harvard professor David L. Shapiro suggests that this canon has had the greatest impact in areas where the legislature was taking restorative action to cure a problem with currently existing legislation or correcting prior blunders or where

178. *Church of the Holy Trinity*, 143 U.S. at 459.

179. *See id.* (reasoning that the act in question may have been within the scope of the statute, but Congress could not have envisioned application to this type of transaction).

180. *See supra* Part I.C.1 (detailing the intentionalist and textualist points of view on statutory interpretation).

181. David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 935 (1992).

182. *See* SCALIA & GARNER, *supra* note 118, at 364–65 & n.6 (providing examples such as California's Credit Card Act, Alabama's Small Loan Act, and Washington, D.C.'s liquor control law).

183. 2 U.S. (2 Dall.) 419, 429 (1793).

184. *See, e.g.,* *Irizarry v. Catsimatidis*, 722 F.3d 99, 104, 110 (2d Cir. 2013) (advocating an “expansive” interpretation of the Fair Labor Standards Act in light of its “remedial purposes”); *see also Chisholm*, 2 U.S. (2 Dall.) at 476 (declaring that because the extension of federal judicial power over the states serves a remedial purpose, it should be liberally construed). *But see* *Holland v. Williams Mountain Coal Co.*, 256 F.3d 819, 823 (D.C. Cir. 2001) (dismissing this canon as useless because it “does nothing to identify which statutes should be ‘liberally construed’”).

the change hoped to increase access to certain benefits without stripping them from current beneficiaries.¹⁸⁵

II. ANALYSIS

This section applies the conventional interpretive devices to the LHWCA and its corresponding case law to understand why a broader approach to coverage for injured marine employees better corresponds with both the statutory text and Congress's intent. Before doing so, however, it is worth noting that circuit courts review Benefits Review Board decisions *de novo*—without reference to *Chevron* deference¹⁸⁶—because the language of § 903(a) does not involve a special agency interpretation and therefore does not fall under the *Chevron* rubric.¹⁸⁷ Despite this, courts tend to look first to the statute's "plain meaning," as in *Sidwell* and *New Orleans Depot Services*, paralleling the Court's directive in *Chevron* to determine whether Congress's language speaks clearly to the issue at hand.¹⁸⁸

185. See Shapiro, *supra* note 181, at 938.

186. Special considerations apply when courts review the interpretations of administrative agencies because administrative agencies often formulate their own rules, either upon Congress's directive or out of necessity to supplement the rules that Congress provides. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). *Chevron*, the seminal case in this area, established a two-part test to apply when a court reviews a statute. *Id.* at 842. First, the court must determine whether Congress has spoken directly on the issue. *Id.* If congressional intent is evident, the analysis ends, and both the court and the agency must respect Congress's intent. *Id.* at 842–43. However, if the statutory language is unclear, the court must determine whether the agency's interpretation of the statute is reasonable. *Id.* at 843. Under *Chevron* deference, courts *must* look to Congress's intent, and the canons of construction often guide that inquiry. See *id.* at 843 & n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." (citations omitted)). However, if after applying the canons and perhaps looking into legislative history and other such sources, Congress's intent remains ambiguous, courts must defer to the administrative agency's interpretation unless the interpretation is patently unreasonable. See ESKRIDGE, *supra* note 118, at 328–29 (indicating that the Supreme Court has only twice overturned an agency decision based on *Chevron's* reasonableness prong).

187. See *New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs*, 718 F.3d 384, 387 (5th Cir. 2013) (en banc) (determining that because the facts were not in dispute, the case presented an issue of statutory construction and legislative intent and should be reviewed *de novo*); see also *Chevron*, 467 U.S. at 842–43 (listing the two inquiries in judicial review of an agency interpretation—unambiguity of Congress's language and reasonableness of the interpretation); *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1141–42 (4th Cir. 1995) (claiming that the one-page internal memorandum presented by the Director of the Office of Workers' Compensation Programs likely did not qualify as an "actual agency interpretation" and therefore would be worthy of less deference anyway, especially given the lack of legal analysis; rather, the memorandum simply affirmed the Fifth's Circuit's decision in *Winchester*).

188. See *Chevron*, 467 U.S. at 842–43 (requiring courts to discern and apply Congress's clearly-stated intent when possible); *New Orleans Depot Servs.*, 718 F.3d at 391–93 (scrutinizing the approaches in other circuits with particular emphasis on the

However, lately courts have mistakenly determined that Congress's language speaks unambiguously in favor of a restrictive statutory construction that limits benefits for injured workers.¹⁸⁹

A. *Applying the Canons of Construction*

Whether courts favor a broad or a narrow interpretation, they typically begin with the most textually-based canons and sources to interpret a statute; from there, some stop after reviewing the four corners of the text, while others quickly expand their inquiry to external sources.¹⁹⁰ There is a certain logical coherence to looking at the statutory text before investigating other sources because determining and applying a statute's purpose without first looking at the statutory language could result in egregious judicial overreaching.¹⁹¹ This Comment will therefore proceed to apply the canons discussed in Part I.C.2 *supra* to the LHWCA's contested language, starting with the most text-oriented canons.

1. *Canon I: Plain meaning canon*

Because intentionalists and textualists alike begin with the statutory text, few would debate the wisdom of assessing the ordinary meaning of the words in a statute.¹⁹² The *New Orleans Depot Services* en banc decision turned on the definition of "adjoining" and its ambiguities.¹⁹³ However, the entire statutory provision lacks clarity; it revolves around the definition of "navigable waters," a facially unclear and ambiguous concept in the statute.¹⁹⁴ Under any ordinary

Fourth Circuit's plain meaning approach); *Sidwell*, 71 F.3d at 1138 (analyzing the plain language as a means to discern Congress's stated intent).

189. *New Orleans Depot Servs.*, 718 F.3d at 393–94; *Sidwell*, 71 F.3d at 1141.

190. See ESKRIDGE, *supra* note 118, at 250 (diagramming the statutory inquiry process, from the most concrete inquiry, involving the statutory text, to more abstract inquiries, involving legislative purpose and current values); see also *id.* at 317 (depicting the authoritativeness of legislative history sources). For a case that follows this approach, see *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

191. See SCALIA & GARNER, *supra* note 118, at 16 (arguing that beginning with the text does not necessarily mean that the inquiry ends there; instead, non-textual approaches are often subsequently and *inappropriately* applied).

192. SCALIA & GARNER, *supra* note 118 at 69.

193. The statutory text reads:

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

LHWCA, 33 U.S.C. § 903(a) (2012).

194. See *id.* Incidentally, ambiguity around the term "navigable waters" also beleaguers the Clean Water Act, which defines "navigable waters" as "the waters of

definition, a “pier, wharf, dry dock, [etc.]” could not constitute “navigable waters” because they are neither water nor navigable, and yet, the statute nonetheless includes them in its definition of “navigable waters,” rendering the plain meaning of “navigable waters” inapplicable under the statute.¹⁹⁵ This context implies that the “ordinary meaning” does not consistently apply to this statute and raises concern over the pertinence of this canon across all terms in the statute.

Assuming that the ordinary meaning of “adjoining” applied here, that meaning would likely comprise definitions like “attached to,” “next to,” “near,” or something similar.¹⁹⁶ The *Sidwell* court determined that Congress did not assign “adjoining” a technical meaning, so courts must discern its “ordinary meaning.”¹⁹⁷ It further asserted that

dictionaries do include “neighboring” and “in the vicinity of” as possible definitions of “adjoining,” but such is not the ordinary meaning of the word; rather, the ordinary meaning of “adjoin” is “to lie next to,” to “be in contact with,” to “abut upon,” or to be “touching or bounding at some point,”

a view that the *New Orleans Depot Services* court endorsed.¹⁹⁸ Until the *New Orleans Depot Services* decision, however, *Winchester* ruled in the Fifth Circuit and emphasized that “adjoining” could mean “close to,” “near,” or “neighboring.”¹⁹⁹ The *Winchester* court saw no reason to

the United States.” Federal Water Pollution Control Amendments of 1972 (Clean Water Act), 33 U.S.C. § 1362(7) (2012); see *Rapanos v. United States*, 547 U.S. 715, 731, 734, 742 (2006) (plurality opinion) (acknowledging that the term “navigable waters” is far broader under the Clean Water Act than under the traditional definition, where “navigable waters” must be “navigable in fact or susceptible of being rendered so,” and elaborating that some wetlands constitute “navigable waters,” while others do not); see also Marjorie A. Shields, Annotation, *What Are “Navigable Waters” Subject to Federal Water Pollution Control Act (33 U.S.C.A. §§ 1251 et seq.)*, 160 A.L.R. FED. 585 (2000) (outlining the CWA disputes over “navigable waters” and itemizing which way courts have ruled on particular types of waters, from streams and marshes to ditches, drains, and groundwater).

195. LHWCA, 33 U.S.C. § 903(a) (2012).

196. See, e.g., WEBSTER’S DICTIONARY, *supra* note 14, at 27.

197. See *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1138 (4th Cir. 1995) (reasoning that because Congress did not provide a technical definition of “adjoining,” it must be read in its ordinary meaning). The decision not to accord “adjoining” a technical meaning may have been a mistake, given the unusual definition of “navigable waters” discussed *supra*. *Supra* note 194 and accompanying text.

198. *Sidwell*, 71 F.3d at 1138 (footnote omitted); see also *New Orleans Depot Servs., Inc. v. Dir., Office of Worker’s Comp. Program*, 718 F.3d 384, 391–93 (5th Cir. 2013) (en banc) (endorsing the *Sidwell* court’s approach and claiming that it better coincides with the plain language of the statute).

199. *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 514 (5th Cir. 1980) (en banc) (alleging that an expansive definition of “adjoining” was more congruous with congressional purpose), *overruled in part by New Orleans Depot Servs., Inc. v. Dir., Office of Worker’s Comp. Programs*, 718 F.3d 384 (5th Cir. 2013) (en banc).

eliminate these definitions as unusual or inappropriate, particularly given Congress's goal of uniform coverage for harbor workers, whose work frequently takes them alternatively onto, next to, and near navigable waters, depending on their assigned tasks.²⁰⁰ Other circuits have simply noted the lack of precision in the statutory language and failed to address plain meaning entirely, preferring to follow Congress's intent exclusively.²⁰¹

Interestingly, the *Sidwell* court refers readers to the 1993 edition of Webster's Third New International Dictionary for its narrow definition.²⁰² However, a look at the 1981 edition of that dictionary, which expresses the meaning of "adjoining" as it was understood slightly before 1981—and less than a decade after the first set of LHWCA amendments passed—lends support for a different position.²⁰³ The 1981 edition defines "adjoining" as "touching or bounding at some point or on some line: near in space islands . . . formed by owners living on the shores . . ."²⁰⁴ While this definition could support the *Sidwell* court's theory about the ordinary meaning of "adjoining," the particular example cited in the dictionary suggests otherwise. If islands off the coast can "adjoin" the shore, they must necessarily be near, neighboring, or in the vicinity of the shore, not touching or bounding the shore; otherwise, they would cease to be islands.²⁰⁵ Much as an island can adjoin the shore without touching it, the fact that harbor workers no longer *consistently* work on the water or on the immediately adjacent shore does not mean that their work no longer adjoins navigable waters.²⁰⁶

200. *Id.* at 514–15 (holding that ousting these broader but perfectly plausible definitions of adjoining would result in unequal benefits to maritime employees and lead to disproportionate coverage of land activities).

201. See *Nelson v. Am. Dredging Co.*, 143 F.3d 789, 795 (3d Cir. 1998) (lamenting the statute's imprecision); see also *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 140–41 (9th Cir. 1978) (referring to the *Caputo* discussion of congressional intent to determine how to interpret "adjoining"); *Sea-Land Serv., Inc. v. Dir., Office of Workers' Comp. Programs*, 540 F.2d 629, 634, 638 (3d Cir. 1976) (deploring the unsatisfactory draftsmanship of the 1972 amendments and comparing the 1972 statutory language to the 1927 language to deduce congressional intent).

202. *Sidwell*, 71 F.3d at 1138.

203. See *supra* text accompanying note 95 (noting that the *Sidwell* court's definition is by no means the only reasonable one).

204. See WEBSTER'S DICTIONARY, *supra* note 14, at 27.

205. An island is defined as "a tract of land surrounded by water and smaller than a continent." *Island*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/island?show=0&t=1402074017> (last visited Aug. 2, 2014).

206. Harbor workers' tasks—especially repair and maintenance of shipping containers and longshoring equipment—now take place further inland than in prior decades as a result of containerization, but Congress recognized this as a reason to extend coverage. S. REP. NO. 92-1125, at 13 (1972); H.R. REP. NO. 92-1441, at 10 (1972).

A number of concurring and dissenting judges in the *New Orleans Depot Services* en banc decision consequently took issue with the majority's supposedly plain-meaning interpretation of the word, indicating that, even among people of a similarly high level of education, the "ordinary" meaning of "adjoining" is not so obvious.²⁰⁷ While the majority claimed that the *Sidwell* approach "adheres more faithfully to the plain language of the statute," quoting large blocks of text from the opinion, the concurring and dissenting opinions disagreed.²⁰⁸ For example, Judge Higginson noted in his concurring opinion that "Shakespeare spoke of the hills 'adjoining' Alexandria," even though those hills were neither directly next to, nor "touching or abounding" the city in the way the judges used the term in the majority opinion.²⁰⁹ Coupled with the example in Webster's Third New International Dictionary, "adjoining" carries a broader definition—at least in the context of geography—than the majority would like to assign it. Judge Higginson also noted that

[f]rom the standpoint of persons, industry, and legislators, unbroken contiguity to navigable water is impractical for reasons that our court identified in *Winchester* and that are even more pressing today: land abutting water is finite and expensive, yet ship size and cargo capacity, total shipping volume, and loading and offloading equipment are ever-increasing. . . . By contrast, this court in *Winchester* . . . pointed out that a strict abutment rule could exacerbate the very gangplank benefits coverage problem Congress sought to alleviate.²¹⁰

Parker proves a prime example of the constraints imposed by limited shoreside land availability and demonstrates the effect they have in tandem with an unnecessarily strict interpretation of "adjoining areas." Although expansion of Farrell Lines, Inc.

207. See *New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs*, 718 F.3d 384, 398–99 (5th Cir. 2013) (en banc) (Higginson, J., concurring) (acknowledging that there is no certainty regarding the definition of "adjoining"); *id.* at 400 (Stewart, J., dissenting) (stressing that the majority's definition of "adjoining" is too constraining and deepens the circuit split).

208. See *supra* Part I.B.2 (explaining the court's analysis in *Sidwell*); see also *New Orleans Depot Servs.*, 718 F.3d at 390–93 (discussing the merits of other circuits' approaches, with an emphasis on the 4th Circuit). *But see id.* at 399 (Higginson, J., concurring in the judgment) (exclaiming that even after examining the etymology of "adjoin" there is no certainty that it means contiguousness as opposed to adjacency); *id.* at 400 (Stewart, J., dissenting) (advocating that the court follow the *Winchester* majority's approach because it was consistent with the plain meaning of the text and the congressional purpose).

209. *New Orleans Depot Servs.*, 718 F.3d at 399 (Higginson, J., concurring in the judgment) (departing from the majority because the case should have been decided on the word "vessel," thereby preventing any need for an examination of "adjoining").

210. *Id.*

compelled it to relocate five miles inland, the Fourth Circuit refused to afford LHWCA coverage for the company's employees whose work necessarily occurred farther from the marine terminal than before.²¹¹ If such a strict interpretation were the *only* reasonable one, courts would naturally have to enforce it. However, the dissent in *New Orleans Depot Services* asserted that the *Winchester* definition of "adjoining" fit both the plain meaning and the spirit of the law; furthermore, the dissenting judges believed that "the absence of any compelling evidence of *Winchester's* dysfunction or [a] change in the maritime industry" precluded overruling the court's long-standing and workable precedent.²¹²

Further clarifying the statute's plain meaning, the legislative history effectively states that the bill "cover[s] injuries occurring in the *contiguous* dock area related to longshore and ship repair work."²¹³ The *Sidwell* majority latched on to this statement as support for its definition of "adjoining."²¹⁴ However, the House Report, which shares identical language with much of the Senate Report, omits this statement.²¹⁵ The majority disregarded this difference and interpreted the Senate Report's statement as endorsing "contiguous" as the proper definition of "adjoining."²¹⁶ The *Sidwell* majority ignored the fact that a narrow interpretation of "contiguous" as "nearby" would still contradict other portions of the House and Senate Reports, which point to the need for a "uniform compensation system" for employees that would extend coverage to all of a qualifying employee's activities.²¹⁷ Added to the fact that "contiguous," like "adjoining," can simply mean "nearby," the propriety of the court's definition is, at best, ambiguous and requires further examination than the plain meaning canon typically allows.²¹⁸

A plain meaning interpretation is tempting for its simplicity and clear line-drawing capabilities. It would also rein in the over-

211. *Parker v. Dir., Office of Workers' Comp. Programs*, 75 F.3d 929, 931–33 (4th Cir. 1996).

212. *New Orleans Depot Servs.*, 718 F.3d at 400–03 (Stewart, J., dissenting) (also criticizing *Sidwell* as an "outlier among [the] circuits" and observing the compelling need for "uniformity in maritime law"); *see also* *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 514–15 (5th Cir. 1980) (en banc) (carefully scrutinizing the dictionary definitions of "adjoining" and coming to the opposite conclusion as the majority in *New Orleans Depot Services*), *overruled in part by* *New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs*, 718 F.3d 384 (5th Cir. 2013) (en banc).

213. S. REP. NO. 92-1125, at 2 (1972) (emphasis added).

214. *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1138 (4th Cir. 1995).

215. *Compare* H.R. REP. NO. 92-1441, at 1–4 (1972) (omitting any mention of contiguity), *with* S. REP. NO. 92-1125, at 2 (containing language about contiguity).

216. *See Sidwell*, 71 F.3d at 1138–39 (affirming a narrow definition of "adjoining").

217. S. REP. NO. 92-1125, at 13; H.R. REP. NO. 92-1441, at 10–11.

218. *See* WEBSTER'S DICTIONARY, *supra* note 14, at 492 (defining "contiguous").

expansive interpretations of the statute that the Fourth and recent Fifth Circuit decisions have aptly criticized.²¹⁹ The plain meaning of “adjoining” is anything but clear, however, particularly when viewed exclusively through the lens of the plain meaning canon.²²⁰ To leave an injured employee’s livelihood to a court’s dictionary preferences would be arbitrary. Furthermore, it would be antithetical to a “government of laws and not of men,” as panels of men (and women) throughout the country come to contradicting conclusions regarding an employee’s right to benefits.²²¹ Thus, a plain meaning interpretation is—on its own—patently inappropriate here.

2. *Canon II: The whole act rule*

Given the diversity of views on the plain meaning of “adjoining,” one must logically look beyond the plain meaning of the word to other contextual canons that could further enlighten the situation and guide judges in assigning benefits under the LHWCA. With dueling narrow and broad interpretations in the case law and in the *New Orleans Depot Services* opinion, the question becomes just how far Congress intended to extend coverage, and a judge should naturally seek guidance from the rest of the Act, particularly the surrounding words.²²² Unfortunately, however, the rest of § 903(a) only complicates matters for longshoremen. As mentioned in Part II.A.1 *supra*, the term “navigable waters” does not even refer to water under the new definition,²²³ and Parts II.A.3–5 *infra* demonstrate that the terms modifying navigable waters, particularly “including” and “other adjoining areas,” contribute scant help.²²⁴ Nothing in the definition

219. See, e.g., *New Orleans Depot Servs., Inc. v. Dir., Office of Worker’s Comp. Programs*, 718 F.3d 384, 392–93 (5th Cir. 2013) (en banc) (citing *Sidwell’s* criticism of *Sea-Land* for its elimination of the situs requirement before electing a narrow scope of situs coverage).

220. See *supra* text accompanying notes 196–200 (outlining the different definitions of “adjoining” used by courts).

221. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (explaining that this phrase originates from the Massachusetts Constitution of 1780 and quoting the text, which implies that only by separation of powers could the colonists create a “government of laws and not of men”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (asserting that this phrase will only retain its truth as long as the laws grant a remedy for the violation of every legal right).

222. See *supra* text accompanying notes 196–200 (describing the numerous ways in which the circuit courts have defined “adjoin”); see also *supra* notes 207–09 and accompanying text (detailing the disputing definitions of “adjoin” among the majority, concurring, and dissenting opinions in the *New Orleans Depot Services* opinion).

223. See *supra* note 194 and accompanying text.

224. See *infra* Part II.A.3–5 (employing different canons of interpretation to highlight the various contradictory ways circuit courts have interpreted “including” and “other adjoining areas”).

section of the statute overtly applies to the situs question.²²⁵ However, looking more broadly at the statute, one can discern general guidance for interpreting the Act. For example, Congress's definition of "navigable waters" is expansive, not narrow, involving a long list of structures deemed "navigable waters."²²⁶ Thus, even a textualist could review this document and detect a tendency toward broad coverage for injuries incurred in the course of longshoring work.

An intentionalist would likely compare the 1972 statutory text to its predecessor, which omitted an extensive description of "navigable waters," and conclude with even greater certainty that Congress intended to expand coverage with the 1972 amendments.²²⁷ In fact, most of the LHWCA situs cases discuss the history of the Act for just this reason,²²⁸ and *Sea-Land* specifically highlights the fact that Congress clearly hoped to expand coverage through the 1972 amendments to workers who previously qualified only for state workers' compensation.²²⁹ Rather than subject grievously injured workers and their families to the added burden of financial distress, Congress aimed to standardize, expand, and increase the quantity of federal coverage.²³⁰ The court in *Sea-Land* even compared its broad

225. See LHWCA, 33 U.S.C. § 902 (2012). The statute addresses the status requirement by defining the term "employee" but does not identify the specific geographical location or situs boundary of the Act. *Id.* §§ 902–903.

226. See *id.* § 903(a) (listing the structures deemed to be "navigable waters" under the statute).

227. See LHWCA of 1927, Pub. L. No. 69-803, § 3(a), 44 Stat. 1424, 1426 (1927) (amended 1972) (defining "navigable waters" as "including any dry dock" without further elaboration); see also ESKRIDGE, *supra* note 118, at 273–74 (elaborating on the whole act rule's corollary—that Congress uses terms coherently across statutes—and pointing to Justice Scalia's reference to other parts of the U.S. Code and ratified treaties in his interpretation of the Endangered Species Act, 16 U.S.C. § 1538 (2012)).

228. See, e.g., *Dir., Office of Workers' Comp. Programs v. Perini N. River Assocs.*, 459 U.S. 297, 299, 316–17 (1983) (comparing coverage before and after the 1972 amendments to highlight Congressional expansion of "navigable waters" situs to include adjoining land areas); *Sea-Land Serv., Inc. v. Dir., Office of Workers' Comp. Programs*, 540 F.2d 629, 633–34 (3d Cir. 1976) (pointing to the "coverage" provision and "employer" definition in the 1972 amendments as manifestations of "an unmistakable congressional intention" to extend federal coverage inland).

229. *Sea-Land*, 540 F.2d at 633–34; see, e.g., *Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 256–58, 263–65 (1977) ("The 1972 Amendments thus changed what had been essentially only a 'situs' . . . to one looking to both the 'situs' of the injury and the 'status' of the injured."); *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 508–10 (5th Cir. 1980) (en banc) (contrasting the 1972 amendments' "two-prong test," consisting of a broad-reaching situs and a status component and the 1927 LHWCA statute that contained only a "water's-edge situs test"), *overruled in part by New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs*, 718 F.3d 384 (5th Cir. 2013) (en banc).

230. See S. REP. NO. 92-1125, at 12–13 (1972) (concluding that the differing compensation received for the same type of injury depending upon where the injury occurred was an impetus for Congress to create a "uniform compensation system"); H.R. REP. NO. 92-1441, at 10 (1972) ("The Committee believes that the

interpretation with other maritime provisions in the United States Code—the Harter Act²³¹ and the Carriage of Goods by Sea Act²³²—to ensure consistency across maritime statutory interpretations.²³³

Despite the importance of the statute’s situs description in the 1927 LHWCA, the amended Act downplays this requirement in favor of an increased focus on the status of the employee.²³⁴ While the LHWCA’s amended definition section does not explicitly address the location of injury, it makes a special effort to define “employee” as “*any* person engaged in maritime employment.”²³⁵ The only exceptions to this provision are eight subsequently enumerated categories of employment.²³⁶ This likewise demonstrates an interest in expansive coverage and a concern for the people involved in maritime employment more so than the technicalities of the situs requirement.²³⁷

If courts take seriously their role of applying the will of the people as expressed by statute, they would favor a generous interpretation of the LHWCA because such an interpretation conforms to Congress’s intent to accord broad coverage and does not contradict the plain meaning of the statute.²³⁸ Limiting coverage could unnecessarily harm the very workers Congress was seeking to protect through the 1972 amendments, based solely on judges’ preference for narrower statutory construction. Further statutory analysis only reinforces the need for a broad interpretation of the LHWCA.

compensation . . . should not depend on the fortuitous circumstance of whether the injury occurred on land or over water.”).

231. Pub. L. No. 52-105, 27 Stat. 445 (1893) (codified at 46 U.S.C. §§ 30702–30703, 30705–30707 (2006)) (regulating the transportation of merchandise or property between U.S. and foreign ports).

232. Pub. L. No. 74-229, 49 Stat. 1207 (1936) (current version at 46 U.S.C. § 30701 (2006)) (regulating the transportation of merchandise or property between U.S. and foreign ports).

233. *Sea-Land*, 540 F.2d at 639.

234. *See* LHWCA, 33 U.S.C. § 902(3) (2012) (delineating the type of employees covered under the statute).

235. *Id.* (emphasis added).

236. *Id.* § 902(3)(A)–(H) (including a variety of exceptions, among them, employees in purely administrative tasks, employees in recreational or tourist-related endeavors, vendors, and temporary contractors).

237. Even before adopting the status requirement, courts hesitated to impose the technicalities of the statute where doing so seemed manifestly unfair. *Luckenbach S.S. Co. v. Norton*, 106 F.2d 137, 138 (3d Cir. 1939) (refusing to follow the employee’s interpretation of a 1934 amendment to the LHWCA because it would give the statute a “narrowly technical and impractical construction”); *see also* *Voris v. Eikel*, 346 U.S. 328, 333 (1953) (concluding that the LHWCA applies even where the employee does not notify his employer in writing about an accident as long as the employer in fact had knowledge of the injury or the employee could not have given such notice under the circumstances).

238. *See supra* note 236 and accompanying text. Congress created only eight exceptions to the group of employees covered by the amended Act, thus suggesting that the Act broadly applied to all other individuals. *Id.*

3. *Canon III: Noscitur a sociis*

Because associated words in a statutory text modify and clarify each other, one should pay attention to the entire text of § 903(a), particularly the descriptive terms “including” and “other adjoining areas,” which receive consideration in Parts II.A.4–5 *infra*.²³⁹ However, courts like the Fourth Circuit neglect the full range of analysis available under *noscitur a sociis*, applying only its narrower corollary, *eiusdem generis*, to the phrase “other adjoining areas” to determine that “other adjoining areas” must be structures or buildings like those explicitly enumerated in the statute.²⁴⁰ While the Fourth Circuit claimed that it would come to the same conclusion under *noscitur a sociis*,²⁴¹ the Third Circuit explicitly rejected this approach just three years later in its *Nelson* opinion.²⁴² It criticized *Sidwell* for looking only at the word “other,” rather than to the word “areas,” which denotes an open space, rather than a building or structure.²⁴³ Because this broader construction conformed with a dictionary definition and congressional intent, the Third Circuit dismissed the *Sidwell* approach, ruling instead that the claimant should have received coverage for the injuries that occurred when he slipped and fell from a bulldozer as he attempted to adjust a pipeline valve.²⁴⁴ However, most of the circuit courts went no further than this cursory analysis of “other adjoining areas,” despite the fact that a couple of other phrases in the LHWCA deserve consideration and potentially support a broader construction of the statute than *New Orleans Depot Services* adopted.²⁴⁵

For example, the clause “[e]xcept as otherwise provided in this section,”²⁴⁶ indicates a narrow set of circumstances under which no compensation should issue. The word “except” modifies the text with an exception, providing a counterpoint that highlights the unclear

239. See *infra* Parts II.A.4–5 (using the canons *eiusdem generis* and “presumption of nonexclusive ‘include’” to define “including” and “other adjoining areas”).

240. *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1139 (4th Cir. 1995) (arguing that even applying *noscitur a sociis* to the statute requires the interpreter to look to the other enumerated items in the list to determine which structures would satisfy the situs requirement of “other adjoining areas”). This narrow application of *noscitur a sociis* exclusively to lists neglects the broad usefulness of the canon.

241. *Id.*; see *infra* Part II.A.4 (discussing how the canon of *eiusdem generis* can promote a narrower interpretation of the situs requirement).

242. *Nelson v. Am. Dredging Co.*, 143 F.3d 789, 797 (3rd Cir. 1998).

243. *Id.*

244. *Id.* at 792, 797–98.

245. See, e.g., *id.* at 797–98 (focusing on the definition of “other adjoining areas” to conclude that the employee should have received coverage under the Act); *Sidwell*, 71 F.3d at 1136–39 (limiting the analysis to interpretation of “other adjoining areas” in determining whether the injured employee was covered under the LHWCA).

246. LHWCA, 33 U.S.C. § 903(a) (2012).

language in the rest of the statute.²⁴⁷ This implies that courts can take a more flexible approach to circumstances not excepted from coverage. Those in favor of narrower interpretations might contradict this, rightly claiming that the injury must both fit into the definition of “navigable waters” and not fall into an exception to compensation.²⁴⁸ However, while the language regarding exceptions is rigid, the language defining “navigable waters” is not, suggesting different treatment of the two clauses.²⁴⁹ Because of this differentiating treatment, courts can justify more flexibility and interpret the “navigable waters” provision to aid disabled harbor workers while still strictly applying the exceptions provision.

Additionally, maritime attorney F. Nash Bilisoly notes that the complete phrase “other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel” is particularly vague, which has caused courts to assign it several different meanings.²⁵⁰ The phrase “customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel”²⁵¹ closes a series of multilayered modifiers. In the LHWCA, the customary use phrase modifies “other adjoining areas,” which modifies the preceding list of terms, a list that describes examples of “navigable waters.”²⁵² In fact, the Fourth Circuit, whose interpretation the *New Orleans Depot Services* court largely adopted, applies *ejusdem generis* to “other adjoining areas” without considering in detail the customary use clause, or “functional requirement,” attached to the situs component of the statute.²⁵³ However, it is in part from this clause that the Third and Ninth Circuits developed their theory that “[t]he line delimiting the outer reaches of the Act’s extended coverage is . . . functional and not spatial.”²⁵⁴ Such a

247. *Id.*

248. *Id.*

249. See *supra* note 194 and accompanying text (emphasizing the fluidity in the definition of “navigable waters”).

250. Bilisoly, *supra* note 11, at 518; see also LHWCA, 33 U.S.C. § 903(a). Bilisoly has argued a number of LHWCA cases, including *Sidwell*. See, e.g., *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 222–23 (4th Cir. 1998) (denying coverage for an employee who was injured at a steel fabrication plant because the plant’s *raison d’être* was not sufficiently connected to the nearby navigable waters); *Sidwell*, 71 F.3d at 1141 (holding that, under the court’s interpretation, the definition of “other adjoining area” did not extend to the site where the injury occurred).

251. LHWCA, 33 U.S.C. § 903(a).

252. *Id.*

253. *Sidwell*, 71 F.3d at 1139. See generally LHWCA, 33 U.S.C. § 903(a) (“an injury occurring upon . . . [an] other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel”).

254. *Sea-Land Serv., Inc. v. Dir., Office of Workers’ Comp. Programs*, 540 F.2d 629, 636, 638 (3d Cir. 1976) (indicating that a “nexus” to maritime activity is the only essential factor); see also *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 140–41

presumption risks confusing the status and situs inquiries, but it also allows courts more flexibility to favor coverage for injured longshoremen and harbor workers in close cases. While the Fifth Circuit now believes that the statute contains separate spatial and functional requirements within the situs requirement, the Ninth Circuit presumes that the functional requirement subsumes the spatial—that the spatial is just one element useful to analysis of the situs’s functional requirement.²⁵⁵

Linguistically, the Fifth Circuit has the better argument on this point because the customary use clause appears to be an additional descriptor, not a replacement for the list of adjoining areas.²⁵⁶ Otherwise, the list of “adjoining areas” would become mere surplusage. However, the customary use clause may instead indicate that coverage under the Act’s situs requirement is *partially* functional and *partially* spatial, which would comport with use of the *Herron* multi-factor test for reasons different than those the court set out.²⁵⁷ Reviewing accidents on a case-by-case basis, courts should find the situs requirement satisfied where there is a particularly compelling functional nexus, even where the geographical nexus is in doubt, and vice versa. Under this theory, the customary use clause merely dilutes the “adjoining areas” factor with an additional element to *consider* (but not require), rather than adding another discrete requirement to coverage. Thus, neither the broad nor the narrow statutory interpretations are completely correct.²⁵⁸ The Fifth Circuit’s reasoning surpasses that of the more liberal readings from a textual standpoint, but the result of the Ninth Circuit’s reasoning exceeds that of the Fifth Circuit and better favors compensation for injured workers.

The Court’s analysis in *Director, Office of Workers’ Compensation Programs v. Perini North River Associates*²⁵⁹ also supports a broad

(9th Cir. 1978) (gleaning this concept of the “functional” from investigation into Congress’s intent).

255. See *New Orleans Depot Servs., Inc. v. Dir., Office of Worker’s Comp. Programs*, 718 F.3d 384, 389 (5th Cir. 2013) (en banc) (claiming that the list of “other adjoining areas” dictates a spatial requirement, while the customary use clause mandates a functional requirement); *Herron*, 568 F.2d at 141 (delineating a multifactor test for determining employment’s “functional relationship” to situs).

256. See LHWCA, 33 U.S.C. § 903(a).

257. See *Herron*, 568 F.2d at 141 (creating a multifactor test which considers both the functional—such as the suitability of the site for maritime uses—and the spatial relationship—such as looking at the “proximity of the site to the waterway”—to determine federal coverage under the Act).

258. Compare *New Orleans Depot Servs.*, 718 F.3d at 389 (viewing the geographic and functional components as separate requirements, each of which must be proven to obtain coverage), with *Herron*, 568 F.2d at 140–41 (proposing a factors test, including the site’s proximity to the water and suitability for the maritime uses contemplated by the statute).

259. 459 U.S. 297 (1983).

interpretation of the statute. The *Perini* court essentially argued that, “a plain reading of the Act reveals only that the 1972 amendments expanded coverage ashore and indicates nothing with respect to curtailment of coverage.”²⁶⁰ At most, Congress *expected* that the situs inquiry could become overbroad, and it corrected for this by including a status inquiry, which requires an employee to qualify as such under the definition section of 33 U.S.C. § 902(3).²⁶¹ This suggests that any “curtailment” of benefits would be vested not in the situs requirement but in the status requirement, further supporting a liberal—but not unfaithful—interpretation of the situs language that better indemnifies accident victims.²⁶² While some injured workers unfortunately will not satisfy the status requirement, this is part of the statutory framework.²⁶³ However, it is unreasonable to limit benefits based exclusively on two circuits’ preferred readings of the situs requirement, especially given the weight of the evidence in favor of affording liberal benefits to longshoremen, harbor workers, and, by extension, to their dependent family members.²⁶⁴ Such limitations merely create uneven benefits regimes based on where a person’s injury occurs, rather than providing uniform coverage across the United States for all those whom Congress intended to cover.²⁶⁵

4. *Canon IV: Ejusdem generis*

Despite the many reasons to favor an expansive interpretation of the situs requirement, an application of *ejusdem generis*—the inference that “other” unenumerated items following a list must share characteristics with the items specifically mentioned in the list—may

260. Dulude & Greenwood, *supra* note 11, at 67 (summarizing the *Perini* Court’s conclusion); see *Perini*, 459 U.S. at 315–19 (concluding that Congress did not intend the status requirement to limit coverage for those who would previously have received coverage under the Act after an injury actually occurring on the water).

261. See, e.g., *Perini*, 459 U.S. at 317–18 (noting that the status requirement reined in the scope of the 1972 amendments by defining the employees covered); *Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 264 (1977) (concluding that the expansion of the geographical scope of the Act’s coverage under the 1972 amendments made it necessary for Congress to add the status requirement to “describe affirmatively the . . . workers Congress desired to compensate”).

262. See *Caputo*, 432 U.S. at 264 (arguing that Congress’s inclusion of the status requirement under the 1972 amendments was implemented to curtail the broadened scope of the situs test); Dulude & Greenwood, *supra* note 11, at 67.

263. See S. REP. NO. 92-1125, at 13 (1972) (“The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.”); H.R. REP. NO. 92-1441, at 11 (1972) (explaining that an employee responsible for picking up stored cargo for further trans-shipment would not receive coverage).

264. See *Perini*, 459 U.S. at 317–18; *Caputo*, 432 U.S. at 264.

265. See S. REP. NO. 92-1125, at 13; H.R. REP. NO. 92-1441, at 10–11. Both reports indicate that Congress was concerned with creating “a uniform compensation system.”

be the one canon discussed here whose application could potentially promote a narrower interpretation of the situs requirement. Unsurprisingly, the Fourth Circuit flags this canon in its *Sidwell* analysis, noting that the phrase “other adjoining areas” following Congress’s list of qualifying locations invokes *ejusdem generis* and potentially provides interpretive insight into the statute.²⁶⁶

Citing *Sidwell*, the Fifth Circuit applied this canon to conclude that an “other adjoining area” as to which coverage extends must be like a “pier,” “wharf,” “dry dock,” “terminal,” “building way,” or “marine railway.” Each of these enumerated “areas” is a discrete structure or facility, the very *raison d’être* of which is its use in connection with navigable waters. Therefore, in order for an area to constitute an “other area” under the statute, it must be a discrete shoreside structure or facility.²⁶⁷

However, the dissent notes that such a construction would harm maritime employees because it would provide employers an easy opportunity to evade LHWCA coverage by purchasing property near the shore with a small strip of land separating it from the water’s edge.²⁶⁸ Such a construction by itself should therefore not hold up to scrutiny, given the presumption against ineffectiveness, when another legitimate interpretation exists.²⁶⁹ When added to concerns over availability and cost of seaside property, such an interpretation, though reasonable, raises significant practical concerns.²⁷⁰ For example, it could unintentionally constrict LHWCA coverage when otherwise qualifying maritime employment necessarily takes place a little farther from shore than a strict statutory construction will allow. Furthermore, such an outcome seems to conflict with Congress’s intent for broad coverage, as manifested in both the language of the Act and in its legislative history, and would unduly harm injured longshoremen and harbor workers.²⁷¹

266. LHWCA, 33 U.S.C. § 903(a) (2012); *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1139 (4th Cir. 1995); *see also supra* text accompanying notes 154–59 for a description of *ejusdem generis*.

267. *New Orleans Depot Servs., Inc. v. Dir., Office of Workers’ Comp. Programs*, 718 F.3d 384, 392 (5th Cir. 2013) (en banc) (citing *Sidwell*, 71 F.3d at 1139).

268. *Id.* at 402 (Stewart, J., dissenting).

269. *See supra* Part I.C.2.f. (articulating the presumption against ineffectiveness, which favors interpretations that promote rather than hinder the statute’s purpose).

270. *New Orleans Depot Servs.*, 718 F.3d at 399 (Higginson, J., concurring).

271. *See, e.g., supra* Part II.A.2 (comparing the 1972 statutory text to its predecessor to conclude that Congress intended for the coverage under the 1972 amendments to be broad); *see also infra* Part II.A.5 (applying the canon “presumption of nonexclusive ‘include’” to argue that use of the word “including” supports the position that Congress intended for the statute to be applied broadly).

5. *Canon V: "Presumption of Nonexclusive Include"*²⁷²

In contrast to the potentially narrower coverage workers would receive under *ejusdem generis*, the use of the word "including" militates in support of expansive coverage for maritime workers. In the statutory text, a list of areas that qualify as "navigable waters" follows the word "including."²⁷³ Because the word "including" generally precedes an illustrative example, not an exclusive list,²⁷⁴ the listed items are likely not the only landward objects that constitute "navigable waters" under Congress's new definition. Although other circuits have not intentionally or regularly applied this canon, the Third Circuit, at least, construed the statute's list of enumerated areas to be non-exclusive, especially in light of Congress's desire to broaden coverage for injured workers.²⁷⁵

However, the overlapping application of this canon with *ejusdem generis* creates confusion because "including" theoretically expands the possible types of "navigable waters" landward, while "other adjoining area[s]" limits its overexpansion. Because the two canons counteract each other, the scope of "navigable waters" is both indefinite and ambiguous. The Fourth Circuit argues under *ejusdem generis* that because all the listed items are "discrete structure[s] or facilit[ies], the very raison d'ê[tre] of which is its use in connection with navigable waters," all other qualifying situses must share that quality.²⁷⁶ However, under the presumption of the non-exclusive "include," this logic is akin to saying that a grocery list that includes human food and drink, for example, chicken, vegetables, and tea, *must* exclude items like toilet paper, Swiffer wipes, and cat food. In other words, the two canons propose contradicting levels of specificity and offer little guidance to resolve the conflict. Consequently, circuit courts have elected which canons to apply—apparently based on nothing more than their own preferences—rather than trying to reconcile the two.²⁷⁷ Perhaps because of this

272. SCALIA & GARNER, *supra* note 118, at 132.

273. LHWCA, 33 U.S.C. § 903(a) (2012) (citing certain areas that qualify as "navigable waters" among which are piers, wharves, and dry docks).

274. *See supra* text accompanying notes 160–63 (describing the applicable canon, which argues that the verb "include" suggests examples and not an exhaustive list).

275. *Sea-Land Serv., Inc. v. Dir., Office of Workers' Comp. Programs*, 540 F.2d 629, 638 (3d Cir. 1976); *see also* *Stockman v. John T. Clark & Son of Bos., Inc.*, 539 F.2d 264, 272 (1st Cir. 1976) (explaining—without naming any particular canon—that the court did not believe Congress intended to restrict "adjoining" solely to the areas associated with the vessel).

276. *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1139 (4th Cir. 1995).

277. *See, e.g.,* *New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs*, 718 F.3d 384, 392 (5th Cir. 2013) (en banc) (favorably citing and adopting *Sidwell's* use of *ejusdem generis*); *Nelson v. Am. Dredging Co.*, 143 F.3d 789,

conflict, judges have preferred to turn directly to Congress's intent and the presumption against ineffectiveness, both of which illuminate an overall desire for expansive coverage that would alleviate the physical and financial hardship that disabled maritime workers and their families suffer under a narrow interpretation of the situs requirement.²⁷⁸

6. *Canon VI: Presumption against ineffectiveness*

As noted in Part II.A.4, strictly applying *ejusdem generis* to the LHWCA would render the statute ineffective if a clever employer ensured that a strip of someone else's land lay between his property and the shore.²⁷⁹ For example, a situation could occur where one small property (say fifty yards from the shore) intervened between the shoreline and the site of a maritime employer (whose property was one hundred yards from shore). Under the Fifth Circuit interpretation, injuries to maritime workers that occurred on this employer's property would not be covered.²⁸⁰ Yet a large maritime employer with a property extending five hundred yards from shore could send his employee to a back warehouse four hundred yards from shore, and that employee could receive compensation under the LHWCA.²⁸¹ This potential circumvention of the statute further justifies application of the canon presuming that "including" is a non-exclusive term, because that canon permits a broader interpretation than *ejusdem generis* and thus would more likely give effect to the statute.²⁸² In fact, the overwhelming weight of LHWCA situs case law implicitly follows the presumption against ineffectiveness, discussing at length Congress's intent in enacting the 1972 amendments before choosing interpretations based on what will best give effect to that intent.²⁸³ Although this choice sometimes occurs at the expense of

797 (3rd Cir. 1998) (applying *noscitur a sociis*, but not *ejusdem generis*, to reject a narrow construction of the statute); *Sidwell*, 71 F.3d at 1139 (neglecting to apply the canon that presumes the non-exclusive use of include and noting that under both *ejusdem generis* and *noscitur a sociis*, "adjoining" would take a narrow definition); *Sea-Land*, 540 F.2d at 638 (assuming that the list of adjoining areas is not exhaustive).

278. See *infra* Parts II.A.2–3 (applying the canons of interpretation to explain Congress's intention for a broad construction of the statute).

279. *Supra* text accompanying notes 268–70.

280. See *New Orleans Depot Servs.*, 718 F.3d at 392 (quoting *Sidwell* 71 F.3d at 1139) (defining "other area" under the statute as "a discrete shoreside structure or facility").

281. See *id.* at 402 (Stewart, J., dissenting) (extrapolating from the dissent's concerns that an overly literal interpretation would allow employers to "circumvent LHWCA coverage").

282. See *supra* Part II.A.3–5 (discussing the conflicting interpretations between *noscitur a sociis*, *ejusdem generis*, and the presumption of the non-exclusive include).

283. See, e.g., *Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268–71, 273 (1977) (probing the legislative history for evidence of Congress's intent and applying their discoveries to favor broad coverage in the case at hand); *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 141 (9th Cir. 1978) (choosing its multi-factor

traditional textual statutory interpretation, it certainly corresponds with the concept of preventing ineffectiveness and fulfills the Act's goal of providing injury compensation coverage for harbor workers.²⁸⁴

To ensure the statute's effectiveness, courts that do not assume the non-exclusivity of the word "include" could alternatively apply a liberal construction of *eiusdem generis* that deemed find "other adjoining areas" to be areas near the shore used for loading and unloading shipping cargo (or for other maritime employment purposes). While the term "other adjoining areas" should add something to the statute, if doing so would contradict other principles of interpretation and Congress's intent for broad application, it would be safer to assume that this is simply a situation where the messiness of lawmaking and the need for compromise cause duplications in the statute and result in provisions that undermine each other.²⁸⁵ In such a case, the presumption against ineffectiveness supports the idea that the Fourth and Fifth Circuits' use of *eiusdem generis* unfairly restricts benefits where every other canon thus far would cover a worker's broad but otherwise reasonable claim.²⁸⁶ The presumption against ineffectiveness attacks the propriety of such a narrow interpretation, rejecting it as inconsistent with Congress's intent, and instead favors coverage for disabled maritime employees.

7. Canon VII: Absurdity doctrine

Given that Congress's very purpose in passing this Act was to prevent workers from walking in and, more importantly, out of coverage, it would be unreasonable to think that the Fifth Circuit's interpretation of the LHWCA is correct; such an interpretation merely perpetuates the problem that Congress hoped to cure.²⁸⁷ The *New Orleans Depot Services* decision may even cross the line into absurdity, although a textualist would likely take issue with such a

situs test to prevent deserving maritime workers from falling too easily outside of coverage); *Stockman v. John T. Clark & Son of Bos., Inc.*, 539 F.2d 264, 273-77 (quoting H.R. REP. NO. 92-1441 (1972)) (setting forth three principle messages from the House Report and rejecting a narrow interpretation of the Act).

284. See, e.g., *Herron*, 568 F.2d at 141 (eschewing any discussion of statutory construction but choosing a workable situs test that would effectuate Congress's goals).

285. *ESKRIDGE*, *supra* note 118, at 271-72 (highlighting the disconnect between the presumptions that interpretive theories develop about lawmaking and the reality of the process).

286. See generally *New Orleans Depot Servs.*, 718 F.3d at 384; *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134 (4th Cir. 1995).

287. See *Caputo*, 432 U.S. at 273-74 (reasoning that Congress's 1972 amendments to the LHWCA aimed to provide full federal coverage for those "amphibious" workers who had previously only been able to receive federal benefits for part of their employment).

statement.²⁸⁸ Critics of *Church of the Holy Trinity* and similar absurdity-doctrine cases alternatively claim either that the Court ignored most of the legislative deliberations, which showed that Congress was trying to prevent the very things that the Act appeared to prevent, or that any attempt to avoid enforcing the law is undemocratic and a dereliction of judicial duty.²⁸⁹

The first of these arguments does not apply here, given textual evidence of Congress's intent.²⁹⁰ Furthermore, both the House and the Senate Reports on the LHWCA amendments use largely the same language, write at length about the "purpose and background" of the amendments, and make clear statements about intent.²⁹¹ Nothing here implies that a liberal interpretation somehow ignores Congress's intent. Congress was unquestionably addressing the coverage problems that a strict situs requirement caused for maritime employees and demonstrated its intent to broaden the definition, which courts can see from the additions to the definition of "navigable waters."²⁹² To ignore legislative intent at least as a component in interpreting the statute would be to put blinders on and discard all context, when the very purpose of the law was to address specific coverage problems in the pre-1972 legislation.²⁹³ In a sense, *not* looking to intent would be undemocratic and a dereliction of judicial duty because it would ignore the will of the people as expressed by a democratically-elected Congress. Ignoring intent and selecting a narrow interpretation would effectively render the statute useless in its application and "not within the statute, because not within its spirit nor within the intention of its makers."²⁹⁴ Thus,

288. See SCALIA & GARNER, *supra* note 118, at 237–38 (noting textualists' concern that recourse to the spirit of the law may invite abuse and judicial lawmaking).

289. See ESKRIDGE, *supra* note 118, at 223 (arguing that *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892), provoked a new generation of textualists whose goal of interpretation was to discern the text's plain meaning instead of referring to legislative history).

290. See *supra* text accompanying notes 185–88.

291. S. REP. NO. 92-1125, at 13 (1972); H.R. REP. NO. 92-1441, at 10–11 (1972) (stating "The intent of the Committee is . . . The Committee does not intend . . . [T]he Committee has no intention of . . .").

292. Compare LHWCA, 33 U.S.C. § 903(a) (2012) (expanding "navigable waters" to include a list of many more shoreside structures than the 1927 statute had permitted), with LHWCA of 1927, Pub. L. No. 69-803, § 3(a), 44 Stat. 1424, 1426 (1927) (1927 enactment of the statute) (referring only to "navigable waters of the United States (including any dry dock)" without further elaboration).

293. See Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 2(a), 98 Stat. 1639, 1639 (codified as amended at 33 U.S.C. § 902(3)(A)–(H)).

294. *Church of the Holy Trinity*, 143 U.S. at 459. In other words, a narrow definition of "adjoining" would "reenact the hard lines that caused longshoremen to move continually in and out of coverage [and] frustrate . . . congressional objectives . . ."

judges of an intentionalist bent might apply the absurd results canon to achieve a result that follows the spirit of the law. While textualists likely would not apply the absurd results canon here, many of the common canons discussed above could allow them to ascertain Congress's intent through the text and apply a more liberal interpretation of the statute than that of the Fourth and Fifth Circuits.²⁹⁵ Thus, application of the absurd results canon, which sometimes seems an extreme measure, is merely possible, not necessary, to achieving expanded coverage for the workers Congress has tried time and again to protect.²⁹⁶

8. *Canon VIII: Remedial statutes*

Given Congress's many efforts to compensate injured longshoremen and harbor workers,²⁹⁷ it seems that the LHWCA was always, in essence, remedial. Initially, it remedied the lack of coverage caused by *Jensen* and the Supreme Court's invalidation of state and federal attempts at statutory compensation.²⁹⁸ Despite the early challenges in erecting a statutory framework for compensation,²⁹⁹ the courts began recommending a liberal construction of the statute to "avoid[] harsh and incongruous results," a goal reflecting its remedial nature.³⁰⁰ Because the LHWCA of 1927 tried to enhance previously nonexistent benefits and cure the *Jensen* misstep, it corresponds well with Shapiro's observations about application of the remedial statutes canon.³⁰¹ The 1972 amendments further support this view of the LHWCA because the changes amended coverage problems in the earlier legislation, thereby

Texports Stevedore Co. v. Winchester, 632 F.2d 504, 514–15 (5th Cir. 1980) (en banc), *overruled in part by* New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs, 718 F.3d 384 (5th Cir. 2013) (en banc).

295. See generally New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs, 718 F.3d 384 (5th Cir. 2013); Sidwell v. Express Container Servs., Inc., 71 F.3d 1134 (4th Cir. 1995); *supra* Parts II.A.2–3, 5.

296. See *supra* notes 15–16 and accompanying text (detailing Congress's earlier attempts to provide coverage for longshoremen and harbor workers).

297. *Id.*

298. See *supra* text accompanying notes 16–19 (describing the effect of the *Jensen* decision).

299. See *supra* text accompanying note 16 (listing the failed attempts to cover maritime workers under state and federal workers' compensation plans, which prompted passage of the LHWCA).

300. *Voris v. Eikel*, 346 U.S. 328, 333–34 (1953); *Balt. & Phila. Steamboat Co. v. Norton*, 284 U.S. 408, 414 (1932); *Jamison v. Encarnacion*, 281 U.S. 635, 640 (1930).

301. See SHAPIRO, *supra* note 181, at 938 (postulating that the canon most often applies to laws correcting a prior legislative or judicial error and to laws enhancing benefits awards).

extending benefits to more people.³⁰² In fact, the Supreme Court specifically refers to the LHWCA as “remedial legislation” in *Caputo*, which the Court decided shortly after the 1972 amendments passed.³⁰³ Even among the circuit courts, there is unanimous agreement about the Act’s remedial nature.³⁰⁴ Although the 1984 amendments narrowed coverage based on status, this move supports the idea that Congress had a specific set of people in mind when it passed the 1972 legislation; it wanted to compensate those workers who sustained disabling or lethal injuries as a result of their work in traditional longshoring operations, not those who happened to be shoreside employees in another industry.³⁰⁵

In addition to inquiry about the objective function of Congress’s legislation, a foray into the controversial territory of legislative intent demonstrates that Congress’s goals in enacting the LHWCA were “remedial.” The House and Senate Reports both use language explicitly informing readers of its intent and purposes in enacting the statute, alleviating some questions over the courts’ ability to discern intent.³⁰⁶ The reports’ language also speaks to the inadequacy of state workers’ compensation programs, changes in longshoring operations, and the problem of shifting coverage, indicating that Congress’s concern was more for the particular type of workers involved and only

302. *Id.*; see also Longshoremen’s and Harbor Workers’ Compensation Act Amendments of 1972, Pub. L. No. 92-576, § 2(b), 86 Stat. 1251, 1251 (1972) (expanding coverage to workers who were injured on certain “adjoining area[s]” as opposed to the pre-1972 situation, where only workers injured on “navigable waters” were compensated).

303. *Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268, 279 (1977).

304. See, e.g., *Nelson v. Am. Dredging Co.*, 143 F.3d 789, 798 (3d Cir. 1998) (finding the *Sidwell* interpretation inconsistent with the LHWCA’s remedial goals); *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1140 (4th Cir. 1995) (claiming that its narrow interpretation still achieves the Act’s remedial goals without “extending coverage to all those who breathe salt air” (internal quotation marks omitted)); *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 519 (5th Cir. 1980) (en banc) (noting the Act’s “humanitarian purposes”), *overruled in part by New Orleans Depot Servs., Inc. v. Dir., Office of Worker’s Comp. Programs*, 718 F.3d 384 (5th Cir. 2013) (en banc); *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 140 (9th Cir. 1978) (commenting on the Act’s remedial purpose in discussion of the status requirement).

305. See Longshore and Harbor Workers’ Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 2(a), 98 Stat. 1639, 1639 (codified as amended at 33 U.S.C. § 902(3)(A)–(H)) (narrowing the range of qualifying employment to exclude those involved in shore side entertainment and service industries, as well as other employees not engaged in longshoring operations). If the worker’s injuries prove fatal, the LHWCA provides a “death benefit” to surviving family members. LHWCA, 33 U.S.C. § 909 (2012).

306. See *supra* text accompanying note 291 (explaining both Committees’ intent to prohibit coverage under the Act for individuals *not* working for an employer engaged in some form of maritime employment).

secondarily for the actual location of their accident.³⁰⁷ In other words, Congress worried about the fairness of arbitrarily disparate and inadequate benefits because the coincidence of where one is injured hardly seems an appropriate means to determine benefits.³⁰⁸

Detractors' most legitimate argument against application of this canon attacks the canon itself, not its application, because if any statute qualifies as "remedial," this one does.³⁰⁹ Although the idea that every law is "remedial" has some merit,³¹⁰ it seems reasonable to conclude that the canon is reactionary: it applies only in reference to a specific and faulty past statutory enactment or judicial decision, not to laws that merely fill in an omission in the general legal landscape.³¹¹ In other words, remedial statutes cure "a judicial misstep or an earlier legislative error" or increase certain people's ability to receive benefits without *significantly* altering the existing benefits regime.³¹² Under these terms, the canon appears far more workable, not to mention highly applicable to the LHWCA's indemnity scheme for disabled harbor workers.

B. Recommendations

Given the overwhelming evidence in favor of a broad interpretation of the LHWCA, both Congress and the courts have sufficient guidance to resolve the current circuit split via legislative or judicial action respectively.³¹³ While congressional action could definitively end the circuit split, longshoremen and harbor workers likely do not top Congress's list of pressing issues.³¹⁴ Courts, however, will likely contemplate LHWCA cases from time to time and should aim for uniformity of approach and broad statutory construction that

307. S. REP. NO. 92-1125, at 12-13 (1972); H.R. REP. NO. 92-1441, at 10-11 (1972) (noting that compensation should not depend on whether the injury happened on land or on water); *see also Caputo*, 432 U.S. at 257 (emphasizing longshoremen's need for uniformity under "one law to cover their whole employment").

308. Even the legislative history preceding the 1927 version of the law noted the issue of shifting coverage. H.R. REP. NO. 67-639, at 1-2 (1922) (remarking on the shift from state coverage to no coverage depending on the location of the injury).

309. SCALIA & GARNER, *supra* note 118, at 364-65 (identifying problems with this canon and viewing it as resistance against the widespread belief that statutes contradicting the common law must be strictly construed).

310. *Id.* (arguing that all laws cure one issue or another, thus making all laws remedial).

311. SHAPIRO, *supra* note 181, at 938.

312. *Id.*

313. *See generally* *Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). *See also* *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 140 (9th Cir. 1978).

314. *See* *Dulude & Greenwood*, *supra* note 11, at 88, 102 ("Congress, with a sharp pencil in hand, has the power to draft legislation amending the Act to reflect its original intent.").

favors coverage when doing so.³¹⁵ Thus, this Comment proceeds to offer both statutory and judicial remedies in the hope of settling the present circuit split.

1. *Congressional remedy*

Congress's elaboration on the situs requirement has resulted in an unwieldy law with unclear limitations. Congress should therefore revisit the statute and eliminate the situs requirement in favor of a status-only inquiry. The statute's descriptive (but unclear) language, remedial purpose, and the addition of a status requirement—mandating that claimants also qualify as an “employee” under the definition section of the statute—indicate that Congress felt uncomfortable drawing bright lines around the qualifying place of injury.³¹⁶ However, the complete lack of clarity on where to draw the line for a qualifying situs leads to questions about the usefulness of the requirement. For example, why not eliminate the situs requirement completely, as the Third Circuit did until the *Caputo* decision,³¹⁷ and focus instead on the type of person Congress wanted to afford coverage—longshoremen, harbor workers, and other types of maritime employees? Alternatively, why not make the situs one component in determining status as a qualifying maritime employee? Instead, the separation of the LHWCA's situs and status requirements has led to incongruous results.³¹⁸ Of course, one could argue that the status and situs requirements complement each other and provide checks on each other: “Each test acts as a control upon the other so as to diminish the potential for undue expansion of coverage.”³¹⁹ However, this works only insofar as a given circuit does not over- or under-interpret the reach of the requirements; a given circuit could broadly interpret both or narrowly interpret both so that standards vary enormously from circuit to circuit. This anomaly, though seemingly minor in theory, has devastating results when viewed from

315. See *supra* note 116 and accompanying text (stating which circuits frequently addressed maritime cases).

316. See LHWCA, 33 U.S.C. §§ 902(3), 903(a) (2012); see also *supra* Parts II.A.1, 8 (discussing remedial statutes and the issues with plain meaning interpretation of the LHWCA).

317. *Sea-Land Serv., Inc. v. Dir., Office of Workers' Comp. Programs*, 540 F.2d 629, 638–39 (3d Cir. 1976).

318. See, e.g., *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1141 (4th Cir. 1995) (ruling against the claimant under a strict interpretation of the statute); *Sea-Land*, 540 F.2d at 638-39 (construing the statute liberally to find in favor of the claimant); see also CLARK, *supra* note 11, at 857–58 (contemplating the benefits of the *Winchester* decision's expansive statutory interpretation and the potential consequences of the alternatives).

319. *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 140 (9th Cir. 1978).

the perspective of a worker—and his family—who does not receive coverage under a narrow interpretation of the Act.

Congress should therefore abandon the situs requirement, which is so nebulous that the only information to glean from it is that courts should be generous in their statutory interpretation. As things stand currently, the situs and status requirements interfere with each other and preclude the courts from achieving Congress's goals.³²⁰ They create two contradictory tests, and the contradiction most often stems from the situs requirement.³²¹ In fact, in their analysis of the situs requirement, courts rarely manage to avoid using language related to status, because the only reason a person typically visits a site is due to his status as a maritime employee.³²²

Thus, Congress should adopt the status requirement as the exclusive test for coverage. Although the *New Orleans Depot Services* court noted that it had no cause to review the ALJ's assessment that the plaintiff met the Act's status requirement, the status requirement, if properly applied, may actually have been a better check on coverage than the situs requirement in this case.³²³ Furthermore, Congress's biggest concern was not over-extension of coverage; it was the Act's failure to cover workers *all* of the time instead of part of the time.³²⁴ It seems logical then that if a worker's job qualifies part of the time, it should qualify all of the time, regardless of where the individual's duties take place.³²⁵ Perhaps the best test would be whether workers could potentially be required to participate in

320. *Sea-Land*, 540 F.2d at 638. Rather than proceeding to wrestle with these contradictions, however, the Third Circuit simply threw out the situs requirement in certain situations, incurring harsh and largely legitimate criticism from other circuits. *See, e.g.*, *Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 277 n.40 (1977) (frowning upon the Third Circuit dismissal of the situs test); *New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs*, 718 F.3d 384, 392–93 (5th Cir. 2013) (en banc) (upholding *Sidwell's* interpretation); *Sidwell*, 71 F.3d at 1139–40.

321. *See supra* note 292 and accompanying text (1927 enactment of the statute) (explaining that the courts' broad interpretations of the situs requirement resulted in ambiguous laws with unclear limitations as precedent).

322. LHWCA, 33 U.S.C. § 902(3) (2012) (emphasizing the importance of the status of the employee by making a special effort to broadly define an employee as "any person engaged in maritime employment").

323. *New Orleans Depot Servs.*, 718 F.3d at 387. In *New Orleans Depot Services*, for example, the company worked on repair and maintenance of shipping containers and chassis, some of which transported ocean cargo. *Id.* at 386–87. Although in this case the lower court determined that the company was a maritime employer, perhaps another court would find otherwise if, for example, ocean cargo containers constituted only 5% of a company's work, and workers never had cause to go near the ships or the shoreline. *Id.* at 387.

324. *See Caputo*, 432 U.S. at 272, 276; *Stockman v. John T. Clark & Son of Bos., Inc.*, 539 F.2d 264, 275 (1st Cir. 1976) ("The evil of the old Act was that it bifurcated coverage for essentially the same employment.").

325. *See Caputo*, 432 U.S. at 273–74.

longshoring operations, including transportation of cargo from a ship, during their workday—a status test based on type of employment. If so, they would be eligible for LHWCA benefits, even if some of the cargo were being transported far inland. Then Congress and the courts could discard the situs requirement outright.³²⁶ Those who do not approach the shoreline at any point for longshoring operations likely have no need for the Act, because they do not encounter the same dangers or general working conditions that longshoremen and harbor workers do, and they would likely receive coverage under state compensation schemes.³²⁷ However, the nature of their jobs (and thus their employee status) would reflect that.

Much of the problem with the Act derives from Congress's approach to the LHWCA amendments. As the Senate Report makes clear, the purpose of the act was to “extend coverage to protect additional workers.”³²⁸ However, the statute formerly applied a strict situs approach, so Congress aimed to achieve its goal by addressing what seemed to be the problem: the overly-restrictive situs requirement. It relaxed and expanded the situs requirement to cover the workers it had in mind. In doing so, it recognized the necessity of “describ[ing] affirmatively the class of workers Congress desired to compensate.”³²⁹ In other words, Congress complicated matters for itself by broadening an otherwise clear statute.³³⁰ By expanding coverage shoreside across the *Jensen* line, Congress destroyed the

326. Even with the help of canons of construction, the situs requirement makes little sense in plain English. For example, it is quite a stretch of the English language to call piers, docks, and the like “navigable waters.”

327. See, e.g., *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1135 (4th Cir. 1995) (indicating that the plaintiff had already received compensation under the state workers' compensation scheme that covered workers injured on adjoining lands, piers, or wharves as opposed to those workers injured on navigable waters who were covered exclusively under LHWCA).

328. S. REP. NO. 92-1125, at 1 (1972). The House Report likewise states a desire “to provide adequate income replacement for disabled workers” H.R. REP. NO. 92-1441, at 1 (1972).

329. *Dir., Office of Workers' Comp. Programs v. Perini N. River Assocs.*, 459 U.S. 297, 317–18 (1983); *Caputo*, 432 U.S. at 264.

330. See *Sidwell*, 71 F.3d at 1138–39 (ruling mere proximity insufficient and announcing that the situs requirement must be literally read to adjoin navigable waters); *Textports Stevedore Co. v. Winchester*, 632 F.2d 504, 513–15 (5th Cir. 1980) (en banc) (enforcing a totality of the circumstances test to determine coverage), *overruled in part by New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs*, 718 F.3d 384 (5th Cir. 2013) (en banc); *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 141 (9th Cir. 1978) (elaborating the Ninth Circuit's liberal approach to compensation coverage but refusing to throw away the situs requirement).

statute's previously clear jurisdictional coverage.³³¹ It therefore added the status inquiry as a check on overbroad extension of the Act.³³²

As part of a status-only test, Congress could incorporate situs as a *factor* by granting benefits to injured “employees who would otherwise be covered by this Act for [the seaward] part of their activity.”³³³ This would comport with the idea that Congress wanted to cover those who encountered maritime dangers, rather than regular dangers, because someone employed in a maritime job would certainly encounter those dangers on a regular, though perhaps not constant, basis.³³⁴ An employee should be able to satisfy the new situs “factor” when a part of his work—no matter how insignificant—takes place on land that is literally next to the ocean; work far from the shoreline might require more evidence to satisfy the new “situs factor” of a revised status test. This could then serve as a more effective check on status.

The *New Orleans Depot Services* court cited *Herb's Welding, Inc. v. Gray*,³³⁵ arguing that “there will always be a boundary to coverage, and there will always be people who cross it during their employment. If that phenomenon was enough to require coverage, the Act would have to reach much further than anyone argues that it does or should.”³³⁶ This is true, as long as there is a situs requirement. However, if the courts were to redefine coverage by employment *status*, they would avoid such a problem. Furthermore, Congress's concern was not “walking in and out of coverage” in the sense of coming to work in the morning or leaving at night. Such an interpretation would be utterly absurd, as every employed person does this on a daily basis. Its concern was tied to the actual employment type and the differing coverage that a person might receive during the course of the same employment.³³⁷

331. Dulude & Greenwood, *supra* note 11, at 53–54.

332. *Id.* at 54.

333. S. REP. NO. 92-1125, at 13; H.R. REP. No. 92-1441, at 10–11. A similar possibility would be for Congress to leave the Act intact, insofar as it pertains to those actually on navigable waters, and add a distinct, exclusively status-based test for those injured on land. Dulude & Greenwood, *supra* note 11, at 89 (recommending a “bipartite eligibility scheme” that would maintain the situs requirement for seaward injuries and replace it with a status requirement for landward injuries).

334. See Dulude & Greenwood, *supra* note 11, at 84 (arguing that for employees engaged in offshore oilfield work, eligibility under the LHWCA, which seeks to remedy maritime perils, should depend upon whether an employer ordered an employee onto navigable waters).

335. 470 U.S. 414, 426–27 (1985) (5–4 decision).

336. *New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs*, 718 F.3d 384, 393 (5th Cir. 2013) (en banc) (quoting *Herb's Welding*, 470 U.S. at 426–27).

337. See *Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 273–74 (1977) (explaining that Congress intended to cover workers who engaged, at least partially, in traditional longshoring activities and reiterating that it intended to eliminate the pre-1972 phenomenon of shifting coverage).

If instead, Congress really wanted to focus on geography and extend a “hard line,” it should clarify where that line is and acknowledge that some workers will inevitably pass in and out of coverage.³³⁸ This might mean developing an exclusive list of “adjoining areas” and eliminating the word “including” from the statute to avoid application of the canon presuming the non-exclusiveness of “include.”³³⁹ It should indicate that situs is the primary focus of the test to avoid any potential contradictions with a status requirement.

2. *Judicial remedy*

In lieu of a congressional remedy, courts should not defer to the Fifth Circuit’s “plain meaning” approach, if only because the statute’s “plain meaning” is ambiguous, while Congress’s purpose in passing the Act is not.³⁴⁰ Application of the Ninth Circuit’s *Herron* factors offers the most moderate judicial path.³⁴¹ This approach recognizes that the purpose of the extension was to grant continuous coverage to “amphibious workers” and that the employee’s particular activity at the time of injury does not matter.³⁴² Just as the employee’s particular activity does not matter, his specific location should not be dispositive: “the phrase ‘adjoining area’ should be read to describe a functional relationship that does not in all cases depend upon physical contiguity.”³⁴³ However, this is arguably the least clear approach because it requires judges to rule on a case-by-case basis, and workers’ circumstances will differ in varying degrees. Furthermore, since the 1917 *Jensen* opinion, Congress has been aiming for uniformity of coverage.³⁴⁴ Weaknesses aside, Fitzhugh notes that the Benefits Review Board typically relies on *Herron* factors where the circuit courts do not have established criteria for

338. *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 514–15 (5th Cir. 1980) (en banc), *overruled in part by* *New Orleans Depot Servs., Inc. v. Dir., Office of Worker’s Comp. Programs*, 718 F.3d 384 (5th Cir. 2013) (en banc).

339. *See supra* Part I.C.2.e (non-exclusive use of “include”).

340. *See supra* Part II.A.1 (demonstrating the lack of clarity in a plain meaning review of the LHWCA); *supra* notes 33–35 and accompanying text (indicating Congress’s intent).

341. *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 141 (9th Cir. 1978) (establishing a test that considers the site’s suitability for maritime uses, whether maritime commerce constitutes the surrounding properties’ principal occupation, the distance between the site and the waterway, and whether the site is as near as possible to the shore).

342. *Id.* at 140.

343. *Id.* at 141.

344. H.R. REP. NO. 67-639, at 1–2 (1922).

determining situs.³⁴⁵ This implies that the Benefits Review Board finds the test to be both workable and reasonable.

The best approach, then, would be for courts to look first to status as the primary element of a benefits claim and second to situs using the *Herron* factors. Given clear congressional intent to expand LHWCA coverage for injured maritime workers, any case involving interpretation of the situs requirement should broadly construe the law, providing coverage where not unreasonable.³⁴⁶ Thus, courts should view someone employed in a job that requires him to work seaward of the *Jensen* line as working on a qualifying situs by nature of his job.³⁴⁷ An examination of the Ninth Circuit factors would complement analysis of an *unclear* situs and ensure that the results of the case are not incongruous.³⁴⁸ Because this approach leads towards a conflation of situs and status, it might prompt the Supreme Court to take up the issue, which it has refused to do on a number of occasions.³⁴⁹

While *Sea-Land's* earlier dismissal of situs is more appealing for its clarity, asking other courts to discard a statutory provision that is clearly present would be akin to asking them not to uphold the law as

345. Fitzhugh, *supra* note 3, at 307–08; *see, e.g.*, *Ramos v. Container Maint. of Fla.*, 44 Ben. Rev. Bd. Serv. (MB) 659 (2011) (applying the *Winchester* and *Herron* “functional relationship” test to a case arising within the jurisdiction of the Eleventh Circuit); *Cunningham v. Bath Iron Works Corp.*, 37 Ben. Rev. Bd. Serv. (MB) 76 (2003) (“[T]he Board applied the standard set forth by the Ninth Circuit in *Herron*, and it has consistently done so in other cases where a circuit court has not established its own criteria.”), *aff'd sub nom* *Cunningham v. Dir., Office of Workers' Comp. Programs*, 377 F.3d 98 (1st Cir. 2004); *Waugh v. Matt's Enters., Inc.*, 33 Ben. Rev. Bd. Serv. (MB) 9 (1999) (adopting the *Herron* standard in this case, which arose under the Sixth Circuit's jurisdiction); *see also* *Dryden v. Dayton Power & Light Co.*, 43 Ben. Rev. Bd. Serv. (MB) 167, 168 (2009) (briefly mentioning the differing interpretations of “adjoining” and noting that the Fourth Circuit interpretation has not received support outside of its own jurisdiction).

346. *See supra* notes 33–39 and accompanying text (expressing Congress's intent to expand LHWCA for maritime workers to give them the most expansive coverage).

347. *See supra* text accompanying note 25 (commenting on the *Jensen* decision's determination that state workers' compensation coverage applied while the worker was on the pier, but no coverage applied after the worker stepped on a gangplank towards the ship).

348. *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 141 (9th Cir. 1978).

349. *See, e.g.*, *Parker v. Dir., Office of Workers' Comp. Programs*, 519 U.S. 812, 812 (1996) (denying cert.); *Sidwell v. Express Container Servs., Inc.*, 518 U.S. 1028, 1028 (1996) (denying cert.); *Texports Stevedore Co. v. Winchester*, 452 U.S. 905 (1981) (denying cert.); *John T. Clark & Son of Bos., Inc. v. Stockman*, 433 U.S. 908, 908 (1977) (denying cert.); *see also* *New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs*, 718 F.3d 384, 391 (5th Cir. 2013) (en banc) (outlining the circuit split and the lack of guidance from the Supreme Court); *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134, 1136 (4th Cir. 1995) (noting that the Supreme Court has not defined the term “adjoining areas”); Fitzhugh, *supra* note 3, at 318 (lamenting the Supreme Court's hesitance to reexamine the LHWCA for more than two decades).

it currently stands.³⁵⁰ Courts would likely reject this as armchair lawmaking and abdication of their duty to interpret the law. Thus, the *Herron* factors provide a more palatable option for judges, allowing them to maintain the situs requirement while favoring broader results for injured workers who might not qualify for benefits under a stricter approach.³⁵¹

CONCLUSION

Congress should legislate to eliminate the situs requirement and to further clarify its intent within the statutory text itself. Alternatively, all circuits should revise their case law to reflect Congress's intent as clearly expressed in 1972 legislative history and in the statutory text. By implementing Congress's desire for broad coverage, courts will mitigate the emotional, physical, and financial hardship that injured maritime workers and their families face, particularly in the case of a worker's death. In the meantime, the Fifth Circuit and, by extension, the Fourth Circuit, should discard their attachment to a "plain meaning" interpretation of the LHWCA and revisit their precedent with an eye toward Congress's intent and the *Herron* factors.³⁵² Doing so will ensure relatively homogenous coverage regardless of location and relieve longshoremen and harbor workers in these jurisdictions of the arbitrariness of a narrow approach to LHWCA coverage under the situs requirement.

350. *Sea-Land Serv., Inc. v. Dir., Office of Workers' Comp. Programs*, 540 F.2d 629, 638 (3d Cir. 1976) (dismissing the situs requirement in cases satisfying the status requirement because doing so weakens Congress's goal of eliminating shifting and uncertain coverage).

351. *See supra* note 341 and accompanying text (listing the *Herron* factors).

352. *See supra* note 8 (discussing courts' adherence to plain meaning interpretation).