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## The Macondo Well Blowout: Taking the Outer Continental Shelf Lands Act Seriously

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# The Macondo Well Blowout: Taking the Outer Continental Shelf Lands Act Seriously

John J. Costonis<sup>1</sup>  
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*It is the foible of all judicatures to value their own justice and pretend that there is none so exquisite as theirs....*<sup>2</sup>

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<sup>2</sup> Roger North, quoted in 1 Holdsworth, *History of English Law* 558 n.2 (3<sup>rd</sup> ed 1927).

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## I. Introduction

The "saltier" a dispute, the greater the confidence with which admiralty judges pronounce it appropriate for their attention. Was the discharge from the Macondo well blowout<sup>3</sup>, only six ten-thousandths of which may have been salty, salty enough to warrant the inclusion within admiralty jurisdiction of the economic losses it generated. Or was it rather a pinch of salt in an oily stew?

The reference, of course, is to the well blowout and fire in April 20, 2010, which discharged an estimated 700 barrels of oil from the Deepwater Horizon as against some 4.9 million barrels from BP's Macondo well<sup>4</sup>, a designated situs under the Outer Continental Shelf Lands Act<sup>5</sup> (OCSLA). To some, a claim of sufficient saltiness given these numbers might call to mind Justice Harlan's plaint in a different context that "whenever a maritime interest is involved, no matter how slight or marginal, it must displace a local interest, no matter how pressing or significant."<sup>6</sup>

Whatever its saltiness quotient, the blowout is first, foremost, and last an environmental/pollution control event. In fact, it is the dreaded focus of at least three federal environmental pollution control measures –OCSLA, the Oil

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<sup>3</sup> For a detailed account of the Macondo blowout, see National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deepwater: The Gulf Oil Disaster and the Future of Offshore Drilling* (2011) [hereinafter *President's Report*].

<sup>4</sup> See *id.* at 130 (Deepwater Horizon discharge); *id.* at 167 (Macondo oil discharge).

<sup>5</sup> Outer Continental Shelf Lands Act, ch. 345, 67 Stat. 462 (1953), (codified as amended at 43 U.S.C. 1331-1356(a)(2006) & Supp. III 2009)[hereinafter OCSLA].

<sup>6</sup> *Kossick v. United Fruit Co.*, 365 U.S. 731, 739 (1961).

Pollution Act of 1990 (OPA)<sup>7</sup>, and the Federal Water Pollution Control Act.<sup>8</sup> One or more of these statutes has engaged Congress since 1948. All have taxed the scientific, rule-making and regulatory capabilities of scores of federal agencies ever since. OCSLA and the FWPCA have been pervasively reworked<sup>9</sup>, moreover, in Congress's struggle to stay apace of the astonishing technological changes of ever deeper and more remote OCS oil drilling and of the nation's shift from pre-1970's environmental neglect to the often dystopian pessimism of the post-1970 era.

Following the 1969 Santa Barbara OCS blowout, these legislative efforts have proceeded alongside an expanding network of other federal non-admiralty environmental measures that often engage hybrid ocean/land venues or ocean venues alone.<sup>10</sup> But the initial stages of the Macondo Multi-District Litigation<sup>11</sup> signal reluctance to take seriously Senator Edward Muskie's summary of the driving force behind OCSLA's 1978 amendments: “[E]xploration, development and production activities on the Outer Continental Shelf are no different than any other source of pollution.”<sup>12</sup>

### **A. The Macondo Blowout as an Admiralty Tort**

Master complaints and motions supporting and opposing dismissal in the Macondo Multidistrict Litigation suggest that OPA and admiralty law –its substantive rules as well as its procedures—may overwhelm OCSLA in the search for rules and procedures governing the blowout's economic losses.<sup>13</sup> Indicative as well is the decision of presiding Eastern Federal District of Louisiana Judge Barbier

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<sup>7</sup> Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (codified as amended at 33 U.S.C. 2701-2761 (2006 & Supp. III 2009))[hereinafter OPA].

<sup>8</sup> Federal Water Pollution Control Act, ch. 758, 62 Stat 1155 (1948) (codified as amended at 33 U.S.C. secs. 1251-1376 (2006 & Supp. 2009).

<sup>9</sup> OCSLA, which has been significantly amended twice since its adoption in 1953, will be referred to in text as OCSLA '53, OCSLA '78, and OCSLA '90 to correspond to whichever of OCSLA's three phases is under discussion in text.

<sup>10</sup> See *infra* Part III A. and Part III.B.2.

<sup>11</sup> *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico on April 20, 2010*, MDL No. 2179 (Aug. 10, 2010).

<sup>12</sup> 124 Cong. Rec. 27265 (1978) (statement of Sen. Edward Muskie), debating report entitled Outer Continental Shelf Lands Act Amendments of 1978, H.R. Rep. No. 95-1474 (1978).

<sup>13</sup> Remedies available under both OPA and OCSLA's former title III, Pub. L. 95-372, 92 Stat. 629, Title III, secs. 301-315 (1978) [hereinafter title III], relate exclusively to economic losses, not to personal injuries or death. In view of OPA's repeal of title III in Pub. L. 101-380, 104 stat. 484, sec. 2004 (1990), OPA, not OCSLA, is now the source of economic loss remedies even if, as argued in Part IV.A., former title III provisions afford valuable guidance in interpreting OPA key definitional terms, the assessment of which is a principal object of this paper.

devote the first MDL trial to the Concursus Petition of Transocean,<sup>14</sup> the Deepwater Horizon's owner, under the Limitation of Shipowners' Liability Act.<sup>15</sup>

Admiralty's role in the controversy's governance process should be addressed early on, of course, and may turn out to merit the influence that almost all MDL's parties (and observers) seem eager to concede it. To them, the status of the blowout's status as an admiralty tort is essentially assumed, positioning Macondo's dominant issue instead as the extent to which admiralty and state law escape displacement or preemption under OPA's partial preclusion clauses, sections 2751(e) and 2718 respectively. Judge Barbier's selection of the Concursus Petition may prove a brilliant stroke that expedites management of the tragedy's actual and potential economic loss claims by opening the action to a larger group of parties and causes of action than might be possible within OPA's narrower confines.

The conventional case for admiralty jurisdiction proceeds largely, if not exclusively, on the premise that the Deepwater Horizon qualifies as an OPA section 2701(37) "vessel," which the section defines as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water...." This definition corresponds, it is argued, to the United States Supreme Court's description of a vessel in *Stewart v. Dutra Construction Company* as "any watercraft practically capable of maritime transportation regardless of its primary purpose or state of transit at a particular moment."<sup>16</sup> A creature of general maritime law, this definition has been codified for the better part of a century and a half.<sup>17</sup> Within the Macondo setting, moreover, the Deepwater Horizon is a "vessel" engaged in exploratory drilling, an activity the Fifth Circuit has christened "maritime commerce."<sup>18</sup> The discharge of oil from a vessel into navigable waters has also been consecrated as a maritime tort.<sup>19</sup> Although the Macondo well is a non-admiralty OCSLA situs, the movement of its oil to the high seas assures its

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<sup>14</sup> In re the Complaint and Petition of Triton Asset Leasing GmbH for Exoneration from and Limitation of Liability, Civil Action No. 4:10-CV-1721, June 23, 2010, 2010 WL 2541825 (S.D. Tex. 2010).

<sup>15</sup> 46 U.S.C. secs.181-189 (2000) (repealed and subsequently reenacted and codified as the Limitation of Vessel Owner's Liability Act at 46 U.S.C. sec. 30505 (2007)).

<sup>16</sup> 543 US. 481, 497 (2005) (defining the term "vessel" for purposes of the Longshoremen's and Harbor Workers' Act, 33 U.S.C. sec. 902(3)(g) (2009)) [hereinafter LHWCA].

<sup>17</sup> Because the LHWCA lacks its own statutory definition, *Dutra* filled the gap by reference to the term's definition in 1 U.S.C. sec. 3 (2006), which claims statutory provenance from the 19<sup>th</sup> Century.

<sup>18</sup> See *Theriot v. Bay Drilling Corp.*, 783 F.2d 538-39 (5<sup>th</sup> Cir, 1986); *Pippen v. Shell Oil Co.*, 661 F. 2d 378, 383-84 (5<sup>th</sup> Cir. 1981).

<sup>19</sup> See *In re New Jersey Barging Co.*, 168 F. Supp. 925 (S.D.N.Y. 1955); *Salaky v. Atlas Tank Processing Corp.*, 120 F. Supp. 225 (E.D.N.Y. 1953), *rev'd on other grounds*, 208 F.2d 174 (2d Cir. 1953).

blowout's status as a maritime tort pursuant to OCSLA sec. 1332(2)<sup>20</sup> under two earlier federal decisions.<sup>21</sup>

From an admiraltycentric perspective, OCSLA plays into the jurisdictional discussion essentially through a single subsection, OCLSA sec. 1333(a)(2)(A).<sup>22</sup> As construed in the Fifth Circuit's dominant jurisprudence and commentary, this section further secures the Deepwater Horizon's maritime status by including among OCSLA situses only drilling rigs that are "fixed structures." In 1978, OCSLA section 1333(a)(1)<sup>23</sup> was amended to extend federal law to "temporarily attached" devices, such as the Deepwater Horizon, but the amendment has not been tested in the context afforded by the Macondo setting. As a movable drilling platform, therefore, the semisubmersible Deepwater Horizon is a "vessel" under *Dutra* and, it is presumed, OPA section 2701(37) as well.

### **B. A Role for OCSLA's Environmental/Public Lands Perspective?**

Peering at these issues through an admiralty spyglass and genuflecting before talismanic and, perhaps, inapt admiralty labels imprisons environmental purposes and interpretations relating to federal lands as strangers in their own home. Doing so ignores that OCSLA's focus is Outer Continental Shelf "*Lands*," not "*Waters*," and pays no heed to the extensive scope of Congress's power under the Property Clause to make "needful Rules and Regulations" respecting not only the public lands themselves,<sup>24</sup> but contiguous areas, resources and appurtenances functionally linked to the nation's proprietary and regulatory interests in its public

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<sup>20</sup> OCSLA 43 U.S.C. sec.1332(2)(2006) requires that the statute be interpreted "in such manner that the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing shall not be affected."

<sup>21</sup> *Oppen v. Aetna Ins. Co.*, 485 F.2d 252 (9<sup>th</sup> Cir. 1973); *Union Oil v. Oppen*, 501 F.2d 558 (9<sup>th</sup> Cir. 1974).

<sup>22</sup> In relevant part, the section provides that "[t]o the extent that they are applicable and not inconsistent with this subchapter and other Federal laws and regulations of the Secretary ..., the civil and criminal laws of each adjacent State ... are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon...."

<sup>23</sup> As amended, 43 U.S.C. sec. 1333(a)(1)(2006) provides in material part that the "Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and the seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom ... to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a state...."

<sup>24</sup> U.S. Const. art. IV, sec. 3, cl. 2. See *Kleppe v. New Mexico*, 426 U.S. 529 (1976), discussed *infra* Part B.2.

lands.<sup>25</sup> Unwittingly perhaps, they champion a perception of OCSLA that freezes it in its original 1953 form. Disregarded, therefore, is Congress's infusion into OCSLA '78 of pervasive environmental, pollution control and liability values,<sup>26</sup> many of which remain vital elements in OCSLA '90, the statute's third and current phase, or may reasonably be employed to offer interpretative guidance for addressing elements of OCSLA title III that were incorporated into OPA upon the latter's repeal of the title.<sup>27</sup>

Admiraltycentric eyes also discount Macondo's striking novelty. The fact is that the courts have not had occasion to construe either OCSLA '78 or OCSLA 90 as sources of liability for the economic losses resulting from Macondo's unique setting. In consequence, issues as fundamental as the blowout's status as an admiralty tort cannot be predicted with the assurance or, at least, guidance that would have been available had the issues been the subject of prior judicial scrutiny.

This paper advances a legal framework for the governance of Macondo's economic losses from a perspective that properly credits OCSLA's status both as a non-admiralty federal public lands and environmental measure, and as the OCS's parent statute. It identifies three independently sourced elements that interact closely to shape the framework described in this paper. The first is the progressive refashioning of OCSLA over three chronological phases. The second is the Macondo scenario's abrupt departure from what will be termed the "Fifth Circuit model" by endowing OCSLA and, in particular, OCSLA section 1333(a)(1) with a prominent role denied it under this model.

The third is the requirement that, to qualify as an admiralty tort, the activity being pursued when the tortious event occurs must bear a "substantial relationship to a traditional maritime activity." Although formally introduced by *Executive Jet Aviation Company v. City of Cleveland*,<sup>28</sup> the "substantial relationship" requirement was both anticipated in and exemplified by the Supreme Court in *Rodrigue v. Aetna Casualty & Surety Company*.<sup>29</sup> *Executive Jet* and its progeny have increasingly been integrated into OCSLA section 1333(a)(2)(A) analysis, a trend this paper argues poses a more severe threat to Macondo's admiralty status than the questionable status of the Deepwater Horizon as a "vessel."<sup>30</sup> The third inquiry, while valuable in itself, also warrants re-examination of seemingly long-settled doctrines whose dormant limitations surface in Macondo's novel setting. This inquiry explores the doctrines' inadequacies as a point of departure for assessing whether or not Macondo's OCS drilling operations are in fact and law "substantially related to a traditional maritime activity."

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<sup>25</sup> See *Minnesota v. Block*, 660 F.2d 1240 (8<sup>th</sup> Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982), discussed *infra* Part B.2.

<sup>26</sup> See *infra* Part III.A.

<sup>27</sup> See *infra* Part IV.A.

<sup>28</sup> 409 U.S. 249 (1972) [hereinafter *Executive Jet*].

<sup>29</sup> 395 U.S. 352 (1969) [hereinafter *Rodrigue*].

<sup>30</sup> See *infra* Part III.D.3. and Part IV.B.2.

## 1. OCSLA's Three Phases

OCSLA three phases require a degree of individual and cumulative assessment lacking because the courts have yet to address a dispute presenting Macondo's factual and legal profile. The closest litigation of record the author has found are two opinions, the *Oppen* cases,<sup>31</sup> dealing with economic damages suffered in consequence of the 1969 OCS well blowout in the Santa Barbara Channel. Decided prior to OCSLA's amendment in 1978 and OPA's adoption in 1990, they have been overtaken by subsequent developments.<sup>32</sup> But they do offer the provocative conclusions, considered presently, that OCS drilling is a non-maritime activity,<sup>33</sup> and that movement of oil from an OCSLA situs to the sea above may qualify the discharge as an admiralty tort.<sup>34</sup>

OCSLA '53 secured the OCS against foreign and state territorial claims by constituting it a component of federal public lands, and authorized the Executive Branch to lease these lands for oil and gas production.<sup>35</sup> Consistent with the pre-1970's era's neglect of environmental values, however, OCSLA '53 ignored management of the oil drilling's environmental consequences and the allocation of liability and remedies for OCS blowouts and spills. The next 15 years witnessed a parade of OCS environmental disasters, the most notorious of which was the Santa Barbara OCS blowout.

Congress introduced OCSLA's second phase in 1978 by thoroughly rewriting the statute to create a "new statutory regime"<sup>36</sup> designed to address OCSLA 53's environmental voids. OCSLA '78 expanded section 1333(a)(1)'s coverage from "fixed structures" to "temporarily attached" installations such as the Deepwater Horizon.<sup>37</sup> Title III, OCSLA's precursor to OPA title I, denied the latter status as "vessels," a term it strictly limited to watercraft transporting oil from "offshore facilities."<sup>38</sup> Semisubmersibles, such as the Deepwater Horizon, and permanently attached drilling platforms alike occupied the "offshore facility" category.<sup>39</sup> Contrary to the view denying the section 1333(a)(1) substantive force,<sup>40</sup> the amendment's

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<sup>31</sup> See *Oppen v. Aetna Ins. Co.*, 485 F.2d 252 (9<sup>th</sup> Cir. 1973); *Union Oil v. Oppen*, 501 F.2d 558 (9<sup>th</sup> Cir. 1974).

<sup>32</sup> See *infra* TAN 182-93 and 217-18.

<sup>33</sup> *Oppen v. Aetna Ins. Co.*, 485 F. 2d 252, 256 (9<sup>th</sup> Cir. 1974); *Union Oil v. Oppen*, 501 F.2d 558, 561 (9<sup>th</sup> Cir. 1974)

<sup>34</sup> *Oppen v. Aetna Ins. Co.*, 485 F2d at 256; *Union Oil Co. v. Oppen*, 401 F.2d at 562.

<sup>35</sup> See *infra* TAN 75-77.

<sup>36</sup> H.R. Rep. No. 95-590, at 8, *reprinted in* 1978 U.S.C.C.A.N. 1450, 1460.

<sup>37</sup> See *infra* note 181.

<sup>38</sup> See *infra* TAN note 179.

<sup>39</sup> See *infra* TAN 177-79.

<sup>40</sup> See *infra* Part II.C.1. and n. 72.

linkage of the section and its “temporarily attached” devices to the new title III confirmed the section as itself a source of federal substantive governance rules.

Congress also expanded OCSLA 53’s narrow focus on worker welfare and events atop or concerning fixed drilling platforms –principally torts injuring platform workers.<sup>41</sup> OCS oil drilling’s environmental consequences would now be addressed through a three-dimensional geographic/spatial model running horizontally from the OCS to state coastlines and inland, and vertically from OCS subsoil to superadjacent waters on up to the airshed above and extending well inland over the affected state or states.<sup>42</sup> Among their diverse purposes, section 1333(a)(1)’s amendment, a bevy of changes to other OCSLA ’53 provisions, and the addition of title III were required to implement this regional ecological model, an

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<sup>41</sup> This paper’s focus on the Macondo *tort* under the OCSLA/OPA combination accounts for its concentration on torts both in the Fifth Circuit model and in Supreme Court precedents such as *Rodrigue* and *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986). The Fifth Circuit model also addresses contract actions, among others, involving such matters as platform construction, furnishings and maintenance, and cross-indemnification agreements relating to employee injuries. The paper occasionally cites Circuit OCSLA contract cases in assessing *Executive Jet’s* substantial relationship principle. But it avoids incorporating into the Macondo *tort* discussion doctrines premised on the OCSLA contract cases. General maritime law is considerably more likely to preempt OCSLA-endorsed state law in OCS contract cases than in OCS tort cases in which the tortious event occurs on an OCSLA situs. This was not always so. Until 1969, the Circuit held that employee injuries resulting from torts atop fixed drilling platforms were governed by maritime law as “maritime” matters. See *Pure Oil Co. v. Snipes*, 293 F.2d 60, 67 (5<sup>th</sup> Cir. 1961)(general maritime law, not OCSLA-endorsed state law applies to tortious personal injury atop fixed platform; “hazards and risks of injury” made regulable under OCSLA by the Coast Guard are “essentially maritime”). *Rodrigue* objected to the “maritime” characterization, and the Fifth Circuit has acknowledged that under both *Rodrigue* and *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986) the applicable law is likely to be determined by the situs of the tort. But the Fifth Circuit has ruled also post-*Rodrigue* that indemnity *contracts* relating to the same matter -- employee injuries resulting from torts atop fixed platforms--may be governed by general maritime law, which preempts the OCSLA alternative. See, e.g., *Lewis v. Glendel Drilling Co.*, 898 F.2d 1083, 1086 (5<sup>th</sup> Cir. 1990); *Lirette v. Popich Bros. Water Transport*, 699 F.2d 725, 729 (5<sup>th</sup> Cir. 1983). In *Grand Isle Shipyard Inc. v. Seacor Marine LLC*, 589 F. 3<sup>rd</sup> 778 (5<sup>th</sup> Cir. 2009), the Circuit held that all indemnity contract cases triggered by platform employee personal injury or deaths should turn on a “focus-of-the-contract” rule, rather than on the tort-based rule stressing the employee’s location at the time of injury.

<sup>42</sup> See *infra* Part III A.

approach that has been increasingly adopted in late-20<sup>th</sup> Century public lands management.<sup>43</sup>

OCLSA's final (and current) phase commenced with Congress's enactment of OPA '90, which itself repealed OCSLA 78's title III, while leaving in place both amended section 1333(a)(1) and the various other changes designed in part to implement OCSLA 78's ecological model. The pertinent question here –again unaddressed in the courts, and incorporated with ambiguous brevity by Congress<sup>44</sup>—is the extent to which OPA itself incorporates these changes or leaves them intact in OCSLA as a basis for joint management of OCS blowouts and spills.

## **2. The Fifth Circuit Model and the Macondo Scenario: A Comparison**

The second concern –the Macondo scenario's novelty for the courts— explains both the absence of judicial attention to the foregoing issues and the lack of fit between jurisprudence premised on the Fifth Circuit model and the demands of the unique Macondo scenario. As addressed in this paper, the former typically features a tort occurring atop or in proximity to an OCS fixed drilling platform. The tort usually results in injury or death to the fixed platform worker. Under section 1333(a)(2)(A) the routine candidates for legal governance are limited either to admiralty law or to the OCSLA-endorsed law of the adjoining state, with federal law, other than admiralty law, rarely entering the picture. OCSLA's preference for the law of "each adjacent state" seeks to protect platform workers injured atop fixed platforms who, as likely residents of the adjacent state, will be better served by their state's legal regimes than by general maritime law.<sup>45</sup>

In its vertical relationship with state law, (federal) admiralty law, under Fifth Circuit jurisprudence addressed presently,<sup>46</sup> will almost certainly prevail over conflicting OCSLA-endorsed state law in a section 1333(a)(2)(A) contest in which admiralty jurisdiction is engaged. Discarding Congressional intent as transparently expressed in OCSLA's legislative history and recited by the Supreme Court in *Rodrigue*,<sup>47</sup> the Circuit reasons that events that, pre-OCSLA, qualified as admiralty

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<sup>43</sup> See generally Christine Klein, Federico Cheever & Bret Birdsong, *Natural Resources Law: A Place-Based Book of Problems and Cases* (2009).

<sup>44</sup> OPA Subchapter I mentions the OCS at only two points, one in 33 U.S.C. sec. 2701(25) (West. Supp. 2010)'s provocative, if laconic, definition of "Outer Continental Shelf offshore facility," and the other in 33 U.S.C. sec. 2703(c)(3) (West. Supp.), denying these facilities a financial cap for response cost liability.

<sup>45</sup> See *infra* notes 95-97 and accompanying text.

<sup>46</sup> See *infra* note 119.

<sup>47</sup> In *Smith v. Penrod Drilling Corp.*, 960 F. 2d 456 (5<sup>th</sup> Cir. 1992) *overruled on other grounds*, *Grand Isle Shipyard, Inc. v. Seacor Marine LLC*, 589 F. 3<sup>rd</sup> 778 (5<sup>th</sup> Cir. 2009), the court conceded that the Fifth Circuit's "case law arguably conflicts with OCSLA. As explained in *Rodrigue*, Congress intended that, after passage of OCSLA, the oil and gas exploration industries would be governed by [OCSLA-endorsed] state

events remain such post-OCSLA, and are deemed to “apply of their own force.”<sup>48</sup> Reinforcing this outcome is the section’s bar against the application of state law that is “inconsistent” with “other Federal laws,” the latter regarded as including these admiralty rules that apply “of their own force.” From this reasoning follows an additional rule securing admiralty law’s dominance: when admiralty and OCSLA jurisdiction overlap, state law must yield to the former.<sup>49</sup> The displacement of OCSLA jurisdiction seals the victory for admiralty<sup>50</sup> since “with admiralty jurisdiction comes the application of substantive admiralty law.”<sup>51</sup>

The Macondo scenario departs sharply from this model. Although it too entails a tort, its consequences issue as an economic loss, not personal injury or death. Macondo’s engagement with two non-admiralty federal statutes produces a variety of further departures. OCSLA section 1333(a)(1) specifically extends the “laws ... of the United States” to OCSLA situs.<sup>52</sup> There can be no doubt that OCSLA

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law [pursuant to OCSLA 43 U.S.C. sec. 1333(a)(2)(A) (2006)].” Id. at 460. A candid portrayal of the manner by which the Circuit has sidestepped Congressional intent appears in *Walsh v. Seagull Energy Corp* 836 F. Supp. 411 (S.D. Tex. 1993), which declares that the “legislative history of [OCSLA] clearly shows that Congress intended to preempt the application of maritime law to activities on platforms on the OCS [citing *Rodrigue*].” Id. at 414. Dissonance within the Fifth Circuit, however, appears in Judge Politz’s ruling that “[a]s the Supreme Court made abundantly clear in *Rodrigue* ..., Congress intended that the law of the adjacent state would become surrogate on fixed platforms on the Shelf to the exclusion of rules of admiralty and common law.” *Matte v. Zapata Offshore Co.*, 784 F.2d 628, 630 (5<sup>th</sup> Cir. 1986).

<sup>48</sup> Circuit opinions premise this reasoning on two elements. The situs Congress brought under the coverage of OCSLA ’53 –principally permanently attached platforms, their appurtenances and the OCS subsoil, seabed and natural resources -- would not engage admiralty jurisdiction under traditional admiralty principles. In one of its dimensions moreover, *Rodrigue* favored OCSLA-endorsed state law on the basis that, admiralty jurisdiction being inapplicable independently of OCSLA, failed to apply “of its own force.” *Rodrigue* at 355, 366. The Circuit also reasons that the reverse of this proposition is equally true: when independently of OCSLA, admiralty law, traditionally considered, would have applied of its own force, it forms a part of 43 U.S.C. section 1333(a)(2)(A) (2006)’s “other Federal laws” with which the OCSLA-endorsed state law is “inconsistent,” and hence disqualified from service as surrogate federal law.

<sup>49</sup> See, e.g., *Recar v. CNG Producing Co.*, 853 F.2d 367, 369 (5<sup>th</sup> Cir. 1988); *Laredo Offshore Constructors Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1229 (5<sup>th</sup> Cir. 1985).

<sup>50</sup> See *Hufnagel v. Omega Services Indus., Inc.* 182 F.3<sup>rd</sup> 340, 350 (5<sup>th</sup> Cir. 1999); *Smith v. Penrod Drilling Corp.*, 960 F.2d 456, 459 (5<sup>th</sup> Cir. 1992), *overruled on other grounds*, *Grand Isle Shipyard, Inc. v. Seacor Marine LLC*, 589 F. 3<sup>rd</sup> 778 (5<sup>th</sup> Cir. 2009); *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d at 1229, 1230-32 (5<sup>th</sup> Cir. 1985).

<sup>51</sup> *East River S.S. Corp. v. Transamerica v. Delaval, Inc.*, 476 U.S. 858, 864 (1986).

<sup>52</sup> OCSLA 43 U.S.C. sec. 1333(a)(1) (2006). See *infra* Part II.C.1.

and OPA, as a successor to title III, are applicable “laws ... of the United States.” Congress tailored them precisely to fix liability for economic loss resulting from discharges on the OCS under OCSLA title III and, subsequently under OPA, both on the OCS and within territorial seas.

The relationship between section 1333(a)(1)’s governing non-admiralty federal statutory law and general maritime law therefore, reverses the relationship between section 1333(a)(2)(A)’s state law and general maritime law. In the event of conflict, maritime law, which preempts state law under the latter section, is displaced by non-admiralty federal law under section 1333(a)(1).<sup>53</sup> Consequently, claims that OCSLA-endorsed law must yield to admiralty law in the event of overlapping jurisdiction, that admiralty law “applying by its own force” overrides its competitor, or that admiralty jurisdiction necessarily requires the application of admiralty substantive state law are inapposite in the Macondo setting.

Among the most conspicuous differences between the two models are those relating to their respective spatial/geographic ranges. The Fifth Circuit’s tort model goes no further than accidents directly atop or in close proximity to fixed drilling structures.<sup>54</sup> Section 1333(a)(2)(A)’s preference for adjoining state law, as noted, aligns with OCSLA ‘53’s solicitude for platform workers and their families, most of whom, Congress assumed, would be residents of adjacent states.<sup>55</sup> OCSLA ‘78 occupies another dimension altogether that reaches from OCS subsoil to airshed and from OCS to coastline and inland to fulfill OCSLA ‘78’s commitment to insure the environmental integrity of an entire region.

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<sup>53</sup> In *East River S.S. Corp v. Transamerica v. Delaval, Inc.*, 476 U.S. 858, 864 (1986), the Supreme Court was careful to state that it is only in the absence of an intervening federal non-admiralty statute that “[w]ith admiralty jurisdiction comes the application of substantive admiralty law.” The force of *Delaval*’s caveat bites hard if the latter is judge-made general maritime law since neither judge-made common law nor general maritime law fare well in contests with competing federal statutes. See, e.g., *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-19 (1981) (federal common law of maritime pollution displaced by FWPCA which “speaks directly” to the issue); *Middlesex County Sewerage Authority v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 11-15(1981) (same); *In re Oswego Barge Corp*, 664 F.2d 327, 337-38 (2<sup>nd</sup> Cir. 1981) ( federal statutes presumptively displace general maritime law, particularly if they “speak directly” to the matter at hand); cf. *Northwest Airlines, Inc. v. Transport Workers Union AFL-CIO*, 451 U.S. 77, 96 (1981)(“[E]ven in admiralty ... where the federal judiciary’s lawmaking power may well be at its strongest, it is the Court’s duty to respect the will of Congress.”).

<sup>54</sup> 75 feet from platform to accident appears to be the furthest the Fifth Circuit has been willing to go in selecting OCSLA-endorsed state tort law. See *Dearborn Marine Service, Inc. v. Chambers & Kennedy*, 499 F.2d 263 (5<sup>th</sup> Circuit 1974) (fireball from platform incinerated a service vessel moored to it by a 75-foot rope).

<sup>55</sup> See *infra* TAN 95-97.

### 3. Rodrigue: Interpreting OCSLA and Anticipating Executive Jet

The United States Supreme Court decided *Rodrigue* in 1969, 16 years after the passage of OCSLA '53 and three years prior to the Court's decision in *Executive Jet*. These cases are woven into the paper's narrative because they pose in sweeping terms the question dealt with more concretely to this point: why worry about qualifying a matter as appropriate for admiralty jurisdiction, substantive rules and procedures at all?

One response is because the Supreme Court worries about the issue and, in at least two key decisions, one being *Rodrigue*, firmly declared Fifth Circuit jurisprudence overly protective of its admiralty jurisdiction within the OCS operations setting.<sup>56</sup> In fact, the Supreme Court's recognition that OCSLA is hostile to admiralty law's claim to govern OCS oil and gas drilling operations runs throughout its OCSLA jurisprudence. The Court stated in *Rodrigue* that "[t]he bill [that became OCSLA] applied the same law to the seabed and subsoil as well as to artificial islands, and admiralty law was obviously unsuited to that task."<sup>57</sup> It reaffirmed in *Offshore Logistics, Inc. v. Tallentire*<sup>58</sup> that "admiralty jurisdiction generally should not be extended to accidents in areas covered by OCSLA." Most pointedly, it rejected the claim that "comprehensive admiralty remedies apply under [OCSLA Sec.] 1333(a)(1)," in *Chevron Oil Co. v. Huson*,<sup>59</sup> declaring instead that OCSLA "ousts admiralty law and specifically directs that state law shall be adopted as federal law."<sup>60</sup>

Another reason is fidelity to Congressional intent. Congress enjoys plenary power over public lands under the property clause, among other non-admiralty constitutional clauses that ground OCSLA. In the maritime pollution field, it has long since overtaken judge-made common law- and general maritime law-making in this complex endeavor.<sup>61</sup> Special deference is owed to Congress's role when the matter

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<sup>56</sup> The other is *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1986), which is discussed *infra* Part II.D.3.

<sup>57</sup> *Rodrigue* at 364.

<sup>58</sup> 477 U.S. 207, 218 (1986).

<sup>59</sup> 404 U.S. 97, 104 (1971).

<sup>60</sup> *Id.* at 105, n. 8 (emphasis added). *Huson* is the most explicitly hostile of the opinions referenced in text. In response to the Circuit's effort to fill a section 1333(a)(2)(A) (2006) gap with a federal common law remedy that duplicated an admiralty rule, the Court reversed the Circuit on the ground that it was seeking "to reintroduce [an admiralty] doctrine through a back door," an approach the Court complained that "subverts the Congressional intent documented in *Rodrigue* ... that admiralty doctrines should not apply under the Lands Act." *Id.* at 104 (emphasis added).

<sup>61</sup> The disinclination and, indeed, inability of the courts to take on these burdens is the overriding message of the cases cited *supra* n. 53. For a detailed account of progressively complex engagement of federal statutory law and federal agencies in the maritime pollution sphere, see President's Report chs. 7-10; Lawrence Kiern,

in question is amenable to governance under various constitutional powers other than<sup>62</sup> or, in the case of the OCS's comprehensive governance, in opposition to the admiralty clause. Congress's choices, first, to frame a statute comprehensively governing OCS matters under its interstate commerce, property and other non-admiralty clause powers, and, second, expressly to eschew the admiralty clause for this role in the proceedings leading to OCSLA '53's adoption are not easily accommodated with choosing admiralty law as the default law for matters that fell within its purview pre-OCSLA.

*Rodrigue* merits attention independently of this larger question, of course, given its iconic interpretation of OCSLA's text. Construing the latter in the context afforded by the Fifth Circuit model, it held that the law applicable under section 1333(2)(a) to the negligently caused deaths of two fixed drilling platform workers was OCSLA-endorsed adjacent state law, not general maritime law. The decision reversed the contrary view of the Fifth Circuit, which erred on the side of generously construing admiralty's reach by viewing the OCS oil production efforts as inherently maritime in character.<sup>63</sup> The Fifth Circuit response, as earlier noted, crippled OCSLA section 1333(a)(2)(A)'s threat to admiralty jurisdiction by concluding that notwithstanding the statute, matters within admiralty's traditional sphere override state law by continuing to apply "of their own force."

The evident tension between the two tribunals finds further expression in the Supreme Court's *Executive Jet* decision, which it further refined during OCSLA's second and third OCSLA phases.<sup>64</sup> *Executive Jet* is nothing if not a bold decision that has proven unsettling to the admiralty pantheon's guardians.<sup>65</sup> It opens an

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Liability, Compensation, Financial Responsibility under the Oil Pollution Act of 1990: A Review of the First Decade, 24 Tul. Mar. L. J. 451, Parts III-VI (2000).

<sup>62</sup> Judge Rubin has observed that OCSLA "depends on national sovereignty and the commerce clause; the cause of action it creates is one arising out of a general federal statute, and federal court jurisdiction depends on the existence of a federal question." *Smith v. Pan Air Corp.*, 684 F.2d 1102, 1107 n. 12 (5<sup>th</sup> Cir. 1982).

<sup>63</sup> *Rodrigue* reversed two Fifth Circuit opinions, *Dore v. The Link Belt Co.*, 391 F.2d 671 (5<sup>th</sup> Cir. 1068) and *Rodrigue v. Aetna Casualty & Surety Co.*, 395 F.2d 216 (5<sup>th</sup> Circuit 1968). The leading Fifth Circuit pre-*Rodrigue* opinion on the matter is *Pure Oil Co. v. Snipes*, 293 F.2d 60 (5<sup>th</sup> Cir. 1961).

<sup>64</sup> *Executive Jet*'s progeny in order of appearance are *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1989); *Sisson v. Ruby*, 497 U.S. 358 (1990); and *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Company*, 512 U.S. 527 (1995) [hereinafter *Grubart*].

<sup>65</sup> See, e.g., Robert Pelz, *The Myth of Uniformity in Maritime Law*, 21 Tul. Mar. L. J. 103, 109 (1996) (substantial relationship test creates "inability to agree on boundaries of maritime jurisdiction --much less to fashion a workable test"); David Robertson & Michael Sturley, *The Admiralty Extension Act Solution*, 34 J. Mar. L. & Com. 209, 212-23 (substantial relationship test replaces a "simple and predictable rule for determining admiralty tort jurisdiction" with "rococo judicial doctrine").

alternative route to implement the vision of OCSLA's legislative history championed in *Rodrigue* that cannot be nullified by the combined "application of its own force" and "inconsistent with other Federal laws" devices.

*Executive Jet's* goal is to align the choice of admiralty jurisdiction with subject matter appropriate for admiralty's procedures and substantive rules. A proper fit, in *Executive Jet's* formulation, requires that the pursuit giving rise to the action bear a "significant relationship to a traditional maritime activity."<sup>66</sup> The linkage is intended to bar the assignment of admiralty jurisdiction to a matter that is "only fortuitously and incidentally connected to navigable waters and ... bears no relationship to traditional maritime activities."<sup>67</sup>

*Executive Jet's* rationale is rooted in Justice Holmes's demystifying recognition a half century earlier that admiralty law is not a "corpus juris," but a "very limited body of customs and ordinances of the sea."<sup>68</sup> Admiralty rules, remedies and procedures are appropriate if the object of the litigation falls within the ambit of these customs and ordinances.<sup>69</sup> But the contrary applies if the object falls outside of that circle, or, again, "is only fortuitously and incidentally connected to ...traditional maritime activities."<sup>70</sup>

The Court rested the admiralty jurisdiction limitation on its general maritime law-making power, rather than on the demands of a non-admiralty or other external statute or requirement. A matter barred by the principle, therefore, cannot be revived by recourse to section 1333(a)(2)(A)'s "of its own force" or inconsistent with "other Federal laws" devices because the matter's admiralty identity, if it ever had one, is simply expunged. *Executive Jet* did not arise under OCSLA. But its progressive integration into section 1333(a)(2)(A) analysis<sup>71</sup> as an antidote to these

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<sup>66</sup> *Executive Jet* at 269.

<sup>67</sup> *Id.*, at 273.

<sup>68</sup> *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 235 (1917) (Holmes J., dissenting).

<sup>69</sup> Hence, *Executive Jet's* observation that

[t]hrough long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, capture and prizes, limitation of liability, cargo damage and claims for salvage.

*Executive Jet* at 270.

<sup>70</sup> *Id.* at 273.

<sup>71</sup> See, e.g., *Texaco Explor'n & Prod'n Inc. v. AmClyde Engineered Prods. Co., Inc.*, 448 F.3rd 760, 770-71 (5th Cir. 2006), *amended on rehearing*, *Texaco Explor'n & Prod'n Inc v. AmClyde Engineered Prods. Co., Inc.*, 453 F.3rd 652 (5th Cir. 2006); *cert. denied*, *AmClyde Engineered Products Co., Inc. v. Texaco Explor'n & Prod'n, Inc.*, 549 U.S. 1053, (2006) [hereinafter *AmClyde*]; ; *Houston Oil & Minerals Corp. v. American International Tool Co.*, 827 F.2d 1049, 1053-54 (5th Cir. 1987), *cert. denied*, AMF

devices accords OCSLA's legislative history a level of influence that the Fifth Circuit has otherwise chosen to deny it.

### **C. A Framework for Assessing OCSLA's Role in the Macondo Blowout Litigation**

The opening paragraphs identify four issues that call into question the Macondo's blowout's status as an admiralty tort. Insistence that Macondo does not merit this status, however, is neither the paper's goal nor its burden. Placing the question within a framework that honors Macondo's essentially environmental and public lands character is. The paper seeks to position the question where it belongs by eschewing a myopic splitting of hairs over the "vessel" issue, conceived in isolation from this framework, in favor of an inquiry in which this and several other issues cede to OCSLA the role it merits as the OCS's parent law.

Linking the four issues in their shared relation to this inquiry frames the manner in which the paper will proceed. The first (the "Rodney Dangerfield issue") is the role and reach of OCSLA section 1333(a)(1). Is this section undeserving of a role beyond merely proclaiming federal "sovereignty"<sup>72</sup> over the OCS, or does it merit the respect due a versatile provision custom-rebuilt in OCSLA '78 to quarterback OCSLA's and, derivatively perhaps, OPA's management of the economic consequences of the Macondo well blowout? Aside from its role within OCSLA as such, does the section weaken the claim that OCS drilling is substantially related to a traditional maritime activity under *Executive Jet*?

The second (the "Talisman Issue") is the Deepwater Horizon's status: "temporarily attached" device, "vessel," "MODU," "offshore facility," "Outer Continental Shelf facility," or some combination of the foregoing?

The third (the "Gusher Issue") is whether Macondo oil, which is "non-admiralty" at the OCS point of discharge, engages admiralty jurisdiction upon its contact with superadjacent waters. The answer was affirmative in the *Oppen Santa Barbara* blowout opinions, which were written prior to OCSLA '78 and OPA '90. This

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*Tuboscope, Inc. v. Houston Oil & Minerals Corp.*, 484 U.S. 1067 (1988). *AmClyde* is discussed *infra* Part IV.B.2.

<sup>72</sup> Professor David Robertson claims that the term "jurisdiction" in section 1333(a)(1) (2006) means "sovereignty," and that the section's purpose is merely "to assert the federal government's exclusive dominion-- exclusive of any claims of other countries and exclusive of any state claims-- over the resources beneath the outer Continental Shelf." *Mistakes* at 456. He also asserts that Congress's purpose in substituting the phrase "temporarily attached" devices for "fixed structures" in OCSLA '78 was merely to broaden sec. 1333(a)(1)(2006) in order to assure exclusive "national dominion over all of the types of apparatus that are used for exploiting the outer Shelf's mineral resources." *Id.* at 498. For a different view of these two matters premised on a detailed evaluation of their legislative history, see *infra* Part II.C.1. and Part III 3.C.1, respectively.

question primes an inquiry into OCSLA '53's provision denying any impact on the "character of the waters above the outer Continental Shelf as high seas."<sup>73</sup> It also engages subsequent shifts, first, in the international community's view of the legitimacy of littoral states' OCS sanitary and pollution regulation and, second, the addition to OCSLA's '53's narrow top-of-the-platform perspective of OCSLA '78's ecological region focus.

The final question (the "Alien Issue") steps outside of OCSLA, while nonetheless actively drawing upon insights afforded by the three prior issues. Following the *Executive Jet* line of decisions, it asks whether or not the OCS drilling activities giving rise to the Macondo well blowout are sufficiently proximate to traditional maritime pursuits to avoid alienage from admiralty jurisdiction.

To facilitate following the course of each inquiry in chronological time, a brief "scorecard" is inserted following each phase.

Each topic is independent of the other. Separately addressing each, however, would require constant repetition of and backtracking among differing statutory texts, time periods, cases and judicial venues. The framework adopted here tracks the influence of chronology, legislative history, and Supreme Court and Fifth Circuit case law on the evolution of each issue as well on the ultimate convergence of *Rodrigue* and *Executive Jet* in ascribing content to the "substantial relationship" construct.<sup>74</sup> The framework also demonstrates the influence of long-standing, seemingly settled doctrines on choices concerning Macondo's governance, and the necessity of assessing each inquiry both in isolation from and in complex interaction with the other three inquiries.

## **II: OCSLA Phase 1: OCSLA '53 to '77**

Through OCSLA, Congress implemented President Truman's 1945 Proclamation<sup>75</sup> bringing the resources of the OCS under the exclusive control and jurisdiction of the United States federal government, and authorized the Department of the Interior to award OCS oil and gas leases to qualified bidders. Commencing with its declaration in *Rodrigue* that OCSLA "define[s] a body of law applicable to the seabed, the subsoil and the ... structures ... on the Outer Continental shelf,"<sup>76</sup> the Supreme Court has repeatedly confirmed that OCSLA is the OCS's parent law.<sup>77</sup>

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<sup>73</sup> OCSLA 43 US.C. sec. 1332(2) (2006).

<sup>74</sup> Judicial decisions rendered subsequent in time to the phase being discussed are occasionally considered when doing so produces clarity or brevity.

<sup>75</sup> Truman Proclamation No. 2667, 10 Fed. Reg. 13,303, Sep. 28, 1945; Exec. Order No. 9633, 10 Fed. Reg. 12,305, 1945 WL 3400 (Sep. 28, 1945).

<sup>76</sup> *Rodrigue* at 356.

<sup>77</sup> See *infra* TAN 57-60.

OCSLA covers an area of approximately 890,000 square miles off the coasts of the 48 lower states and Alaska.<sup>78</sup> OCSLA's roots reach to the interstate and foreign commerce clause<sup>79</sup> and to Congress's authority under the property clause to "dispose of and make all needful Rules and Regulations respecting the Territory or the Property belonging the United States."<sup>80</sup> Congress's insistence that OCS jurisdiction vest solely in the federal government to the exclusion of the states and of foreign nations speaks not only to its proprietary and trusteeship obligations, but to the OCS's significance in federal spheres as varied as national defense, the national economy, federal revenue generation, and the conduct of international relations. Conspicuous for its absence from this list is the admiralty clause. Not only did Congress eschew reliance on the admiralty clause as OCSLA's foundational source,<sup>81</sup> moreover, but the Supreme Court has recurrently mirrored Congress's discomfort with admiralty law's fitness to govern OCS regulatory and proprietary functions.<sup>82</sup>

Among the many issues posed by OCSLA '53's adoption, the following three merit attention in this paper:

1. *Threading the needle*: establishing the federal claim to OCS jurisdiction and control without compromising freedom of navigation and fishing on the seas above the OCS. In pursuing both goals, did Congress exclude OCSLA's application to superadjacent waters, thereby resolving the Gusher Issue in favor of admiralty jurisdiction, at least under the 1953 measure?

2. *Department of the Interior (DOI) Discretion*: defining the purpose and scope of the DOI's authority to conduct the OCS leasing program. In failing to address OCS's oil drilling's environmental dimension, does OCSLA '53 deny itself the support of a property clause predicate for a rationale that includes within the statute's coverage seas impacted by OCS oil drilling discharges?

3. *Choice of law to govern OCS drilling activities; gap-filling in the absence of federal law*: identifying the governance system for qualified OCS situses and activities from among federal admiralty law, federal non-admiralty law and state law; and filling the gap, if any, created by the absence of applicable non-admiralty federal law by selecting either admiralty/general maritime law or OCSLA-endorsed state law serving as surrogate federal law. Congressional treatment of this group of concerns commences the process of addressing various dimensions of all four issues. Congress was still at work on this process during OCSLA's third phase. Macondo will likely tack a fourth phase of unpredictable dimension on the prior three.

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<sup>78</sup> H.R. Rep. No. 83-413, at 2 (1953), *reprinted in* 1953 U.S.C.C.A.N. 2178.

<sup>79</sup> See *supra* note 62.

<sup>80</sup> See U.S. Const. art. 4, sec. 3, cl. 2 discussed *infra* TAN 149 and Part III.B.2.

<sup>81</sup> See *infra* Part II.C.2.

<sup>82</sup> See *supra* cases cited *supra* notes 57-60 and accompanying text.

## A. Threading the Needle: OCSLA section 1332(2)

This issue is less significant in the present context for the underlying problem it presents --preventing other nations from pointing to OCSLA to justify undue claims for their OCS areas-- than for the implications of its solution for the Gusher Issue. The view of the Santa Barbara *Oppen* opinions that migration converts the discharge into an admiralty tort appears to receive support from OCSLA section 1332(2), which provides that OCSLA “shall be construed in such a manner that the character of the waters above the high seas and the right to navigation and fishing therein shall not be affected.” To like effect is State Department testimony offered or referenced throughout the hearings process that

[t]he character as high seas of the waters above the Continental Shelf remain[s] unaffected by the assertion or exercise of jurisdiction and control over its resources. And consequently, rights to free navigation in and fishing on such waters remain also unaffected.”<sup>83</sup>

Despite these passages, Congress did not relinquish its power to *regulate* activities on the high seas as manifested, for example, in its traditional application of admiralty law to them.<sup>84</sup> Three levels of federal engagement were distinguished in the hearings: outright sovereignty, jurisdiction and control, and regulation. OCSLA '53's legislative history makes clear that Congress stopped short of claiming the first, even for OCS situses.<sup>85</sup> It claimed the second over OCSLA-declared OCS situses

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<sup>83</sup> *Outer Continental Shelf: Hearing before the Senate Committee on Interior and Insular Affairs*, 83<sup>rd</sup> Cong. 573(1953) [hereinafter *Insular Hearings*] (statement of Jack B. Tate, Deputy Legal Adviser of the Department of State).

<sup>84</sup> Senate Committee member Watkins stated that the “entire theory of the draft is that maritime law will apply, that is, by special provision in this Act to distinguish [this Act] from the maritime law which will be in effect on the water itself.” *Insular Hearings* at 23. The same view was expressed throughout the hearings. See, e.g., *id.* at 597 (Senator Daniels), *id.* at 642 (Senator Condon), and *id.* at 668-69 (Richard Young, Esq., Member of the New York State Bar).

<sup>85</sup> Senator Price Daniel of Texas, asserted that the bill stopped short of declaring full “sovereignty” over the OCS and the superadjacent column as England had done. “You have to look at [the jurisdiction and control claimed in OCSLA section 1332(1) (2006)] as a certain amount of sovereignty from the seabed down. It is not complete sovereignty because we make no claim from there up into the water or airspace.” *Insular Hearings* at 21. Similar caution in dealing with the sovereignty appears in *United States v. Ray*, 423 F.2d 16 (S.D. Fla. 1970) in which the United States declined to assert “title” to semi-submerged OCS islands from which it sought to eject private parties. OCSLA too stops short of claiming title: Section 1332(1) (2006) provides that the “subsoil and seabed of the outer Continental Shelf *appertain to* the United States and are subject to its *jurisdiction, control and power of disposition....*”

and resources, but to dispel concern over any possible incursion on freedom or navigation, it asserted, through Senator Condon, the bill's presenter of S. Bill 1901 in the Senate, the intent to limit OCSLA's jurisdiction and control to only a "horizontal" regime that encompasses the OCS's subsoil, seabed and natural resources as a single tranche.<sup>86</sup>

Congress adopted section 1332(2), in short, to prevent other nations from impeding freedom of navigation and of fishing on the high seas on the basis that the United States was itself exercising sovereignty over its OCS under OCSLA. Its audience was the international community, not the states. This conclusion, it will appear presently, is less critical for the narrowly ambitied OCSLA '53 than for regionally focused OCSLA '78.

## **B. DOI Discretion in Managing the OCS Leasing Program**

With the hindsight afforded by OCSLA's 1978 amendments, the most shocking aspect to current observers of Congress's 1953 delegation to DOI of authority to manage the OCS leasing program is its failure to attend to the program's environmental consequences. The breadth of DOI's discretionary authority recalls a Cold War era obsessed with national security threats and comfortable in its faith that the Administrative State will act with wisdom and unrestrained vigor in pursuit of the public interest.

The former plays out in Congressional discussion and resulting OCSLA provisions relating to staunch protection of the freedom of the seas for the nation's navy;<sup>87</sup> exclusion of states from "intermingling of national and international rights" associated with OCS management;<sup>88</sup> reservation of the right to terminate leases<sup>89</sup> and to exercise a right of first refusal to OCS mineral wealth in time of war or necessity<sup>90</sup>; to withdraw strategically significant OCS areas from leasing,<sup>91</sup> and to reserve OCS helium<sup>92</sup> and "all other materials determined pursuant to ... the Atomic Energy Act ... to be peculiarly essential to the production of fissionable material..."<sup>93</sup>

The Secretary's freedom to ignore environmental values is mirrored in OCSLA '53's absence of the citizen suit, environmental impact statement,

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(emphasis added). Hence, the division in text among "sovereignty," "jurisdiction and control," and "regulation."

<sup>86</sup> See 99 Cong. Rec. 6961, 6963 (1953).

<sup>87</sup> See supra notes 83-86 and accompanying text.

<sup>88</sup> See 99 Cong. Rec. 6961, 6963 (1953).

<sup>89</sup> OCSLA 43 U.S.C. sec. 1341(c) (2006).

<sup>90</sup> OCSLA 43 U.S.C. sec. 1341(b) (2006).

<sup>91</sup> OCSLA 43 U.S.C. sec. 1341(d) (2006).

<sup>92</sup> OCSLA 43 U.S.C. sec. 1341(f) (2006).

<sup>93</sup> OCSLA 43 U.S.C. sec. 1341(e) (2006).

information disclosure, polluter-based civil liability, and state and local government consultation provisions that were to become staples of the post-1969 environmental era. These voids appear with special clarity in OCSLA '53's grant to the Secretary to conduct the OCS leasing program:

The Secretary shall administer the provisions of this Act relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of natural resources of the outer Continental Shelf and the protection of correlative rights therein.<sup>94</sup>

Like Sir Conan Doyle's dog that didn't bark, the provision's significance for the later environmental age lies in what it does not say. DOI made no effort to claim or implement the environmental rationale ultimately provided by OCSLA '78 that would justify extending OCSLA's maritime pollution regulation well beyond drilling platforms themselves.

### **C. Law Selection and Application under OCSLA Sections 1333(a)(1) and (a)(2)(A)**

Selecting the body of law to govern OCS drilling activities presented OCSLA's draftsmen with two problems of uncertain dimensions. Which OCS activities and events should be targeted? Which body of law should govern these activities?

Senator Condon was clear that governance of the civil and criminal activities of thousands of expected platform workers was a must.<sup>95</sup> But neither he nor his colleagues provided content for the prospective law's coverage beyond his reference to a "housekeeping law for the outer shelf,"<sup>96</sup> which should address "industrial accidents, accidental deaths, [and] peace and order."<sup>97</sup> Congress's appreciation that unanticipated concerns would emerge over time perhaps explains why, beyond activities atop drilling platforms, it chose a matrix consisting of one precise but easily identifiable variable and a second imprecise variable, the content of which would be filled in over time. Hence, OCSLA '53's section 1333(a)(1)'s and (a)(2)(A)'s

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<sup>94</sup> S.B. 1901, sec. 5(a)(1), *as reproduced in* H.Rep. No. 83-413, at 3 (1953).

<sup>95</sup> In presenting S.B. 1901, Senator Condon stressed the need for "so-called social laws" that would be needed to address the full range of civil and criminal law requirements created by the anticipated thousands of OCS platform workers." 99 Cong. Rec. 6962 (1953). For a contemporaneous account of these expectations, see generally Warren Christopher, *The Outer Continental Shelf Lands Act, Key to a New Frontier*, 6 *Stan. L. Rev.* 23 (1953).

<sup>96</sup> 99 Cong. Rec. 6961, 6963 (1953).

<sup>97</sup> *Id.*

fix on *location*, tightly defined to include only the OCS subsoil and seabed, artificial islands, and fixed structures, and section 1333(a)(1)'s lock on *activity*, amply conceived to encompass "exploring for, developing, or producing [OCS] resources ... or transporting such resources."

### **1. Sections 1333(a)(1) and 1333(a)(2)(A): Of Substantive Law, Law Selection and Law Application**

The draftsmen then turned to selecting the body of law that would best accommodate these criteria. OCSLA '53's legislative history reflects that this so-called choice of law process –which, more accurately, is a constitutionally and (federal) statutorily dictated law selection and application process -- features *three* different candidates and a *two-stage* process. At the outset of the hearings, the candidates were Congress's federal *non-admiralty* law, (federal) admiralty/general maritime law, and state law functioning *ex proprio vigore*.

Having presided over the Senate's definitive rejection of admiralty law and superintended a bill largely identical to the eventual OCSLA '53 version, Senator Condon confirmed this format in his statement that

to carry out the primary purposes of the measure, a body of law is extended to the outer Shelf area, consisting of a) the Constitution and the laws and the civil and political jurisdiction of the Federal Government; b) the regulations, rules and operating orders of the Secretary of the Interior; and c) in the absence of such applicable Federal law or adequate Secretarial regulation, the civil and criminal laws of the State adjacent to the outer shelf area."<sup>98</sup>

The two-stage process requires, first, determining whether applicable federal non-admiralty law exists and, if so, selecting and applying it; and, second, *only* after a determination that there is no applicable non-admiralty federal law,<sup>99</sup> employing as surrogate federal law an OCSLA-endorsed state law that is not itself "inconsistent...with other Federal laws." OCSLA section 1333(a)(1) addresses the first stage; section 1333(a)(2)(A), the second.<sup>100</sup>

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<sup>98</sup> Sen. Rep. No. 83-411 at 2 (1953).

<sup>99</sup> See, e.g., *Nations v. Morris*, 483 F.2d 577, 585 (5<sup>th</sup> Cir. 1073) (the term "applicable [in section 1333(a)(2)(A) (2006) must] be read in terms of necessity –necessity to fill a significant void or gap."); *Continental Oil Co; v. London S.S. Owner's Mut. Ins. Ass'n, Ltd.*, 417 F.2d 1030, 1034 (5<sup>th</sup> Cir. 1969), *cert. denied*, 397 U.S. 911 (1970) (same).

<sup>100</sup> The discussion in text addresses the selection of law applicable to a controversy in which OCSLA subject matter jurisdiction has already been established under OCSLA 43 U.S.C. sec. 1349(b)(1) (2006), a requirement that Macondo litigation obviously satisfies as a case or controversy "arising out of, or in connection with ... any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals ... of the outer Continental Shelf." See In

So focused has been the attention of most courts and commentators on the latter section that they have generally overlooked that section 1333(a)(1) also licenses a law *identification* and *application* process that, when applicable federal law to be applied is present, takes priority over section 1333(a)(2)(A). Macondo affords the obvious example: the OCSLA/OPA combination provides the applicable federal law under section 1333(a)(1), and this law will provide the dominant and, possibly, exclusive basis for affixing liability for economic loss.

Nor is there any reason to conclude that the section would be any less capable than section 1333(a)(2)(A) of generating other substantive effects.<sup>101</sup> Let us anticipate for purposes of current argument that the OCSLA '78 amendment bringing "temporarily attached " drilling platforms under section 1333(a)(1) is in effect, and ask why a tort involving these platforms is any less subject to governance under this section as *applicable law* than a tort occurring on a "fixed structure" under section 1333(a)(2)(A).

Denying that section 1333(a)(1) is endowed with law-selecting and -applying authority while affirming this authority in section 1333(a)(2)(A) is indefensible. *Rodrigue* itself opens with the proposition that "[s]ection [1333(a)(1)] extends the 'Constitution and laws ... of the United States'" to OCSLA situses, then immediately complements this declaration with the assertion that "[a]ll law *applicable* to the outer Continental Shelf is federal law...."<sup>102</sup> Both of these sections, moreover, appear under the heading "*Laws and regulations governing land*", not the current sovereignty" section 1332, entitled "Congressional declaration of policy."<sup>103</sup> Nor is there any perceivable linguistic basis for assigning different law-

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re Oil Spill by the Oil Rig "Deepwater Horizon" MDL No. 2179, 2010 WL 3943451 (E.D. La. 2010) (Barbier, J.).

<sup>101</sup> EP Operating Ltd. Ptns'p v. Placid Oil Co. 26 F.3<sup>rd</sup> 563, 570 (5<sup>th</sup> Cir. 1994) states that "[the] body of substantive law identified in Section 1333 was intended 'to govern the full range of potential legal problems that might arise in connection with operations on the Outer Continental Shelf. [citing Laredo Offshore Constructors, Inc. v. Hunt Oil Co., 754 F.2d. 1223, 1228 (5<sup>th</sup> Cir. 1085)] Thus, the OCSLA casts a broad substantive net in section 1333." The court continued that "*we find that the most consistent reading of the statute instructs that the jurisdictional grant of section 1349 should be read co-extensively with the substantive reach of section 1333.*" EP Operating Ltd. Ptns'p at 569 (emphasis added).

<sup>102</sup> *Rodrigue* at 356.

<sup>103</sup> An additional goal of section 1333(2) as amended by OCSLA '78 may have been to bring OCS drilling fixtures of all kinds under OCSLA's coverage, as Professor Robertson suggests. See note supra note 72. But the considerations addressed in text when combined with the role OCSLA '78 assigns section 1333(a)(1) (2006) in conjunction with title III's civil liability regime, among other 1978 amendments, reflect that Congress's primary motivation lay elsewhere than this secondary and, given the wording of OCSLA sec. 1332(1) (2006), largely redundant task.

selection/application outcomes to the two sections. OCSLA's drafters<sup>104</sup>, the Supreme Court<sup>105</sup> and OCSLA itself<sup>106</sup> repeatedly use the terms "apply" or "applicable" (section 1333(a)(2)(A)) interchangeably with the term "extend" (section 1333(a)(1)). Pertinent as well is Senator Condon's bundling together without distinction or qualification *both* sections' sources of law – federal law (section 1333(a)(1)), on the one side, and Secretarial regulations and state law (section 1333(a)(2)(A)) on the other.

## 2. Admiralty Law, Federal Non-Admiralty Law or State Law?

Although amendments or earlier versions of House and Senate legislation provided that OCS operations be governed either by admiralty law or by state law as such, federal non-admiralty law was the hands-down winner in a legislative debate in which admiralty law never made it to the finishing line. The original Senate bill cleared the way for admiralty law's preemptive governance of OCS activities in its declaration that "[a]ll acts occurring on any structure (other than a vessel) located on OCS or waters above shall be adjudicated according to the laws relating to such acts or offenses occurring on vessels of the United States on the high seas."<sup>107</sup> But the Senate unequivocally withdrew its support for admiralty law in the course of vigorous, subsequent debate.

Opposition centered on three principal objections, each of which reflect admiralty law's remoteness from OCS operations. The first and perhaps most influential was admiralty law's inability to furnish what Senator Condon termed "so-called social laws" for the protection of affected workers and their families.<sup>108</sup> The second was that admiralty's choice of the "law of the shipowner's place" might

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<sup>104</sup> Illustrative of passages found throughout the reports and debates of both houses is the Senate Report's statement that the "jurisdiction of the Federal Government is *extended* to [OCSLA situses]....[and] the Constitution and laws of the United States are made *applicable*...." *Insular Hearings* supra note 83, at 17-18.

<sup>105</sup> The Supreme Court's assessment of 43 U.S.C. sec. 1333(a)(1) (2006) in *Rodrigue* similarly treats the latter's term "extend" as interchangeable with "applicable" or "apply" in the Court's observation that the section "makes 'the Constitution and laws of the United States' *apply* to the same extent as if the outer Constitutional Shelf were an area of exclusive Federal jurisdiction located within a state." *Rodrigue* at 357. (emphasis added).

<sup>106</sup> OCSLA 43 U.S.C. sec.1333(f) (2006) reinforces the "applicability" of federal law in 43 sec. 1333(a)(1) by declaring that specification "of certain provisions of law [in 43 U.S.C. sec.1333(a)]... shall not give rise to any inference that the *application* ... of any other provisions of law is not intended." (emphasis added). "Any other provisions of law," of course, includes the "laws ... of the United States" referenced in 43 U.S.C. sec. 1333(a)(1) (2006).

<sup>107</sup> *Insular Hearings*, supra note 83, at 2.

<sup>108</sup> 99 Cong. Rec. 6961, 6963 (1953).

lead to the application of different laws to the same incident in the event of multiple owners or operators of OCS facilities.<sup>109</sup>

A third objection was that “[m]aritime law in the strict sense has never had to deal with the resources in the ground beneath the sea, and its whole tenor is ill adapted for that purpose.”<sup>110</sup> This objection departs from the narrow spatial confines or purposes associated with the employer/worker and worker/worker interactions atop drilling platforms. The subject of comment in *Rodrigue* as well, its scope remained largely undefined until the completion of OCSLA’s second and third phases.

State law<sup>111</sup> also failed to gain unqualified support despite its forceful advantage over admiralty law that it addresses head-on the welfare concerns of adjacent state platform workers. The principal objections focused on the status of the OCS as “uniquely an area of exclusive Federal jurisdiction and control,”<sup>112</sup> and the impropriety for the conduct of the nation’s foreign policy of “intermingling of national and international rights in the area.”<sup>113</sup> Muted in the hearings but clearly influential<sup>114</sup> was also Congress’s desire to reserve OCS oil drilling public revenues to the federal government, having just surrendered to the states title to and revenue associated with submerged lands drilling under their territorial seas.<sup>115</sup>

But Congress nevertheless established state law’s superiority over admiralty law in a compromise the Supreme Court described as having been achieved by “dropping the treatment of [fixed drilling structures] as ‘vessels’ ....”<sup>116</sup> *The compromise was neither about nor designed to accommodate admiralty law, which Congress unceremoniously excised by denying the fixed structures status as “vessels.”* The accommodation was between *state* and non-admiralty federal law, and the compromise took form as canonizing the former as surrogate federal law, *not* as providing for admiralty law’s reentry through a back door as majority Fifth Circuit jurisprudence subsequently decreed.<sup>117</sup>

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<sup>109</sup> See generally *Insular Hearings*, supra. n. 83 at 411-35.

<sup>110</sup> *Insular Hearings*, supra note 83, at 668 (statement of Richard Young, Esq., Member of the New York State Bar).

<sup>111</sup> H.B. 5134, sec. 9(a) authorized the Secretary of the Interior to adopt the laws of the adjacent state *ex proprio vigore* if the state so provides, and to reimburse the state for its administrative costs. See H.R. Rep No. 83-413, at 8-9 (1953).

<sup>112</sup> 99 Cong. Rec. 6961, 6963 (1953).

<sup>113</sup> *Id.*

<sup>114</sup> OCSLA, 43 U.S.C. sec. 1333(a)(2)(A) (2006) provides that “State taxation laws shall not apply to the outer Continental Shelf.”

<sup>115</sup> See Submerged Lands Act of 1953, Pub. L. No. 83-31, 67 Stat. 29 (1953) (codified at 43 U.S.C. secs. 1311(a) (2006)). OCSLA ’53 took form as an amendment to this Act.

<sup>116</sup> *Rodrigue* at 365.

<sup>117</sup> See supra note 60.

#### ***D. Rodrigue, the Supreme Court and the Fifth Circuit***

State law exerts less influence in the Macondo scenario than in the Fifth Circuit model because Macondo pits *federal law* –OCSLA and OPA—against general maritime law, not general maritime law against state law. But it is considered at length here for several reasons. One is that the evident disparity between the Fifth Circuit’s treatment of the issue and OCSLA’s legislative history is hostile to the claim that OCS drilling operations satisfy *Executive Jet*’s substantial relationship test. Macondo may present, in addition, a “mini-gap” problem, which arises when the section 1333(a)(1) applicable federal law filling the “maxi-gap” is itself pockmarked with a void or two that requires the use of section 1333(a)(2)(A) to fill the resulting “mini-gap.” Possibly illustrative is the silence of OPA, as one of the applicable section 1333(a)(1) federal laws, on punitive damages, which some observers believe is a void, rather than a conscious omission, that needs to be filled in this manner. Finally, the discussion provides a convenient portal into *Rodrigue* itself.

Like all truly seminal cases, *Rodrigue* works on multiple levels, some of them apparent only years after decision day. Its significance in the Fifth Circuit has waxed or waned in consequence of such changes external to itself as the successive amendment of OCSLA over a half-century and the four-decade evolution of the *Executive Jet* principle, including its gradual convergence, if not fusion with *Rodrigue* itself.<sup>118</sup> *Rodrigue*’s levels align with minimalist, mid-level and *Executive Jet*-level readings. At the last-named level, *Rodrigue* is experiencing a second life in which, ironically, it is proving even more toxic to inappropriate admiralty claims than had it not been neutralized by the Fifth Circuit in its first life.

#### **1. The Minimalist Level**

The Circuit’s minimalist position essentially involves four steps. The first is that OCSLA section 1333(a)(1)’s and (a)(2)(A)’s references to federal law are *generic*; they do not expressly exclude or otherwise restrict admiralty law despite Congress’s hostility to the latter as the appropriate vehicle for OCS governance. Second, section 1333(a)(2)(A) disqualifies an OCSLA-endorsed state law candidate if it is “inconsistent” with “other Federal law” which, under the first step, includes admiralty law. Third, the locations referenced as OCSLA situs by the statute are not traditional admiralty situs in any event; therefore, events or locations that qualified for admiralty jurisdiction pre-OCSLA continue to do so post-OCSLA on the basis that admiralty law “applies of its own force.” Fourth, if admiralty law is found to apply of its own force, inconsistent state law must yield both because admiralty jurisdiction ousts OCSLA jurisdiction if the two overlap, and because admiralty law

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<sup>118</sup> See *infra* Part IV.B.2.

prevails under OCSLA as the “other Federal law” with which the state law is inconsistent.<sup>119</sup>

## 2. The Mid-Level

*Rodrigue*'s second level takes the Supreme Court's straightforward evaluation of Congress's negative perception of admiralty law at face value, and employs it to balance out the Fifth Circuit's selective interpretation of *Rodrigue*, which is not inaccurate within its tight self-chosen parameters. It is true, as the Circuit reasons, that the Supreme Court agreed that OCSLA situs, as defined by Congress, would not have activated admiralty jurisdiction under traditional principles.<sup>120</sup>

But Congress's designation of these situs *as if* they were non-admiralty destinations in actual fact was as fanciful an exercise as Congress's earlier designation of the Guano Islands as a United States “vessel” in order to administer these actual islands under United States admiralty law.<sup>121</sup> Indeed, the Senate's initial OCSLA draft would have constituted the OCSLA situs *admiralty* sites,<sup>122</sup> which they are for purposes of the Admiralty Extension Act.<sup>123</sup> But for Congress's solicitude for the welfare of adjacent state platform workers, the Senate's designation of sites as “vessels” would not have been expunged, and fixed drilling platforms would be admiralty situs.<sup>124</sup> Ascribing ontological status to an utterly discretionary label—equating a statutorily designated “artificial island” with an actual island, for example—is a useful admiralty jurisdiction-protective device in the same way in which claiming a watercraft is a *really* a “vessel” independent of its classification in the statute pertinent to the inquiry serves the same purpose. Just ask Lewis Carroll.<sup>125</sup>

The Supreme Court would appear to have done so, as evidenced by its statement that

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<sup>119</sup> For a step-by-step summary of the Fifth Circuit's logic as seen from the bench, see *Walsh v. Seagull Energy Corp.*, 836 F. Supp. 411 (S.D. Tex. 1993).

<sup>120</sup> See *Rodrigue* at 355.

<sup>121</sup> See *Jones v. United States*, 137 U.S. 202 (1890).

<sup>122</sup> See *supra* note 107 and accompanying text.

<sup>123</sup> 46 U.S.C. sec. 30101 (2006). See *Continental Oil Co. v. London S.S. Owners' Mut. Ins. Ass'n*, 417 F.2d 1030 (5<sup>th</sup> Cir. 1969) (Admiralty Extension Act applies to collision of vessel with an OCS fixed drilling platform).

<sup>124</sup> See *Rodrigue* at 365.

<sup>125</sup> The reference, of course, is to Humpty Dumpty who, like Congress, can have its language mean “just what I choose it to mean—neither more nor less.” Lewis Carroll, *Through the Looking Glass and What Alice Found There* 213 (Martin Gardner ed., W.W. Norton & Co. 2000)(1897).

*[e]ven if admiralty law would have applied to the deaths occurring under traditional principles, the legislative history shows that Congress did not intend that result. First, Congress assumed that admiralty law would not apply [to the OCS situs] unless Congress made it apply, and then Congress decided not to make it apply.*<sup>126</sup>

The statement effectively paraphrases Humpty Dumpty's response to a perplexed Alice: "The question is .... which is to be master –that's all." In placing Congress in the role of "master," the Court acknowledges that Congress intends OCSLA, not admiralty law, to serve as the OCS's parent law, and that unless Congress chooses otherwise --presumably by a statute to the contrary-- such OCSLA shall be.

Why would the Court impose the burden on Congress to negate the use of the OCSLA alternative in a particular case rather than placing the burden to show that admiralty law does *not* apply on the party invoking OCSLA, as the Fifth Circuit does? The answer is spread throughout *Rodrigue's* pages. *OCSLA's oil and admiralty's water simply don't mix*. Addressing the inapplicability of admiralty law not only to fixed platforms, but to the OCS seabed and subsoil, the Court counseled that the Senate Committee "was acutely aware of the inaptness of admiralty law. The bill applied the same law to the seabed and subsoil as well as to the artificial islands, and *admiralty law was obviously unsuited to that task.*"<sup>127</sup>

Even more telling is the Court's assessment of an admiralty expert's testimony that "[m]aritime law in the strict sense has never had to deal with the resources in the ground beneath the sea, and its whole tenor is ill adapted for that purpose"<sup>128</sup>:

Since the Act treats seabed, subsoil, and artificial islands the same, dropping any reference to special treatment for presumptive vessels, the most sensible interpretation of Congress' reaction to this testimony is that *admiralty treatment was eschewed altogether....*<sup>129</sup>

### **3. The Executive Jet Level**

A third way of reading *Rodrigue* is to isolate passages that stun in departing from the OCSLA situs issue altogether to ask whether, *in light of the purpose of the activity giving rise to the plaintiffs' deaths*, admiralty jurisdiction applies at all. The

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<sup>126</sup> *Rodrigue* at 361 (emphasis added). For other examples of Congress's assignment of shifting and even conflicting connotations to the same definitional term that place it within or outside of the "vessel" category, see the discussion of OCSLA's and OPA's definitions of the terms "temporarily attached" installation, "MODU," "offshore facility," and "Outer Continental Shelf facility" infra Part IV. A.

<sup>127</sup> *Id.* at 364-65.

<sup>128</sup> *Insular Hearings*, at 669 (Statement of Richard Young, Esq., Member of the New York State Bar).

<sup>129</sup> *Rodrigue* at 365 n.12.

pertinent passages are those relating to the Court's discussion of its 1908 action sustaining, without opinion<sup>130</sup>, a federal district court decision, *Phoenix Construction Company v. The Steamer Poughkeepsie*,<sup>131</sup> holding that the collision of a vessel with a platform erected around piles placed in the Hudson River to support construction of an aqueduct did not engage admiralty jurisdiction.<sup>132</sup> The Court expressly approved the lower court's ruling denying admiralty jurisdiction because the project's purpose –supplying water transported by the aqueduct to a metropolitan area-- was, in terms used by the lower court<sup>133</sup> and approved in *Rodrigue*,<sup>134</sup> “not even suggestive of maritime affairs.”

The Court offered further insight into its view of purpose seventeen years later in *Herb's Welding, Inc. v. Gray*,<sup>135</sup> which reversed a Fifth Circuit holding that an injured welder who worked on pipelines and drilling platforms was engaged in “maritime employment” under LHWCA sec. 902(3). Declaring that the Circuit's position that “offshore drilling is maritime commerce” is “untenable”, it singled out *Rodrigue's* use of *Phoenix* to reassert that drilling platforms are “not even suggestive of maritime affairs.”<sup>136</sup> The Court then linked its purpose inquiry back to OCSLA by advertent to *Rodrigue's* assessment of OCSLA's legislative history to conclude that the latter “at the very least forecloses the Court of Appeals holding that offshore drilling is a marine activity....”<sup>137</sup> The plaintiff, the Court stated

built and maintained pipelines and the platforms themselves. There is nothing inherently maritime about those tasks. They are also performed on land, and their nature is not significantly altered by the marine environment, *particularly since exploration and development of the Continental Shelf are not themselves maritime commerce.*”<sup>138</sup>

The purpose analysis is joined at the hip with, if not identical to *Executive Jet's* substantial relationship test,<sup>139</sup> which helps explain why *Executive Jet* singles out

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<sup>130</sup> *Phoenix Construction Co. v. The Steamer Poughkeepsie*, 212 U.S. 558 (1908).

<sup>131</sup> *Phoenix Construction Co. v. The Steamer Poughkeepsie*, 162 F. 494 (1908).

<sup>132</sup> *Rodrigue* at 360.

<sup>133</sup> *Phoenix Construction Co.*, 162 F. at 496.

<sup>134</sup> *Rodrigue* at 360.

<sup>135</sup> 470 U.S. 414 (1986).

<sup>136</sup> *Id.* at 424-25.

<sup>137</sup> *Id.* (emphasis added).

<sup>138</sup> *Id.* at 425 (emphasis added).

<sup>139</sup> Illustrative of the essential interchangeability of the two cases in the OCS drilling context is the Fifth Circuit's use of *Rodrigue* to deny admiralty jurisdiction on grounds functionally indistinguishable from *Executive Jet's* substantial relationship test. See, e.g., *Hufnagel v. Omega Service Indus. Inc.*, 182 F.3<sup>rd</sup> 340, 353 (5<sup>th</sup> Cir. 1999); *Union Texas Petroleum Corp. v. PLT Eng'g. Corp.*, 895 F.2d 1043, 1049 (5<sup>th</sup> Cir.), *cert. denied*, *Union Texas Petroleum v. State Service Co.*, 498 U.S. 848 (1990).

*Rodrigue* as an exemplar of the position it espouses.<sup>140</sup> Both ask essentially the same question: is there a sufficient fit between admiralty and the pertinent activity –the provision of water to a municipality in *Phoenix*, or the airplane flight between two fixed land locations in *Executive Jet*—to warrant subjecting the latter to admiralty’s jurisdiction, rules and procedures?

#### **E. Of Maxi-Gaps, Mini-Gaps, Section 1333(a)(2)(A)’s “other Federal laws,” and Admiralty Law’s “Application of its own Force”**

OCSLA Section 1333(a)(2)(A) will not play the same role in the Macondo setting that it does under the Fifth Circuit model, if indeed it plays any role at all. The former model, as earlier noted, opposes OCSLA and OPA with their admiralty-displacing capabilities against general maritime law, while the latter pits federal general maritime law against state law. The Fifth Circuit model’s concern is with “maxi-gaps,” that is, a complete absence of federal law under section 1333(a)(1), which must be filled through the section 1333(a)(2)(A) vehicle. Macondo avoids maxi-gaps because OCSLA and OPA provide comprehensive and detailed federal law pursuant both to the section 1333(a)(1) and as independent statements of applicable federal law.<sup>141</sup>

But section 1333(a)(2)(A) may not fall out of the picture altogether. It will if a court were to conclude that in an action for economic loss, OPA, as successor to OCSLA’s title III, totally supplants general maritime law because it speaks seamlessly (without gaps) to Macondo’s economic loss issues. But if a void or two is found in the interstices of OPA’s otherwise comprehensive coverage, section 1333(a)(2)(A) will likely be needed to fill these “mini-gaps.”<sup>142</sup>

How will Macondo’s pre-OCSLA status as a maritime tort play out? The minimalist Fifth Circuit approach brings admiralty law in through section 1333(a)(2)(A)’s back door, assuming any of the following do not occur. *Executive Jet/Rodrigue* reasoning rules admiralty jurisdiction out altogether. Macondo loses its status as an admiralty event under OCSLA/OPA because the Gusher and the Talisman issue are resolved against admiralty. Macondo reaches the Supreme Court, which chooses to resolve its tug of war with the Fifth Circuit by confirming the previously quoted view it expressed in *Huson* that OCSLA “ousts admiralty law and specifically directs that state law shall be adopted as federal law.”

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<sup>140</sup> *Executive Jet* at 258-59.

<sup>141</sup> OPA’s legislative history reflects Congress’s intent through OPA to enact a single, comprehensive federal act providing clean-up authority, penalties and liability for oil pollution S. Rep 101-94, at 8-9 (1989), *reprinted in* 1990 U.S.C.C.A.N. 779, 802. See, e.g., *Gabarick v. Laurin Mar. (Am.) Inc.*, 623 F. Supp. 2d 741, 750 (E.D. La. 2009); *Nat’l Shipping Co. of Saudi Arabia v. Moran Mid-Atlantic Corp.*, 924 Fed. Supp. 1436, 1447 (E.D. Va. 1996), *aff’d*, 122 F. 3<sup>rd</sup> 1062 (4<sup>th</sup> Cir. 1997), *cert. denied*, 524 U.S. 1021 (1998).

<sup>142</sup> See *supra* text accompanying notes 98-100 and accompanying text.

A simpler resolution would have the Fifth Circuit follow the direction limned in *Rodrigue* and proposed in its own *Laredo Offshore Constructors, Inc. v. Hunt Oil Company*<sup>143</sup>: refuse to strike the OCSLA-endorsed state law absent a statute preferring admiralty law. A federal statute will likely be required in section 1333(a)(2)(A) contests when the OCSLA-endorsed measure's claimed inconsistency is with a *non-admiralty* federal matter. Why shouldn't admiralty be held to a requirement of at least parity with non-admiralty federal spheres? In OCSLA '53's legislative history, moreover, Congress expressly denied that admiralty law should serve as OCS's default law. Yet the Fifth Circuit's minimalist position re-establishes general maritime law in precisely this role. It is anomalous, finally, to restore admiralty law in the Macondo setting where the norms precluding the maxi-gap are themselves *non-admiralty* and in OCSLA's instance, *anti-admiralty* federal statutes.

## F. Scorecard: OCSLA Phase I

*Rodney Dangerfield Issue:* Lack of respect for sec. 1333(a)(1) is premature (as well as inconsistent with OCSLA's legislative history) because the question is not seriously tested in Phase I. Judicial focus on OCSLA sec. 1333(a)(2)(a) was appropriate during this phase because the Fifth Circuit model largely accommodates the era's litigation paradigm.

*Talisman Issue:* "Fixed structures" are targeted both in sec. 1333(a)(1) and (a)(2)(A) during phase I, rendering classification of non-fixed, i.e., mobile or floating structures, as "vessels" non-controversial. That this interpretation might be erroneous, however, appears retroactively in OCSLA '78's legislative history, in which the Congressional conferees explained that the 1978 substitution in OCSLA section 1333(a)(1) of "temporarily attached" devices for "fixed structures" is intended to be "technical and perfecting and is meant *to restate and clarify and not to change existing law.*"<sup>144</sup>

*Gusher Issue:* Section 1332's protection of freedom of navigation is not an abnegation of Congress's power to regulate the high seas for police and sanitary purposes. But the latter function was vaguely in play, if at all, in OCSLA '53 litigation, which centered on activity atop platforms and the welfare of platform workers and their families, not pollution and public lands control activities throughout the platform's region.

*Alien Issue:* The substantial relationship rationale was afforded great respect, and quickly found itself on a post-1972 course favoring integration as a component of the Fifth Circuit's OCSLA sec. 1333(a)(2)(A) inquiry.<sup>145</sup>

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<sup>143</sup> 754 F.2d 1223, 1230-1232 (5<sup>th</sup> Cir. 1985)

<sup>144</sup> H.R. Rep. No. 95-1474, at 6 (1978)(Conf. Rep.), *reprinted in* 1978 U.S.C.C.A.N. 1674, 16479 (emphasis added).

<sup>145</sup> See, e.g., cases cited *supra* note 139; *infra* Part IV.B.2.

### III. OCSLA Phase II: OCSLA '78 -'90

The quarter century following OCSLA's enactment saw a nation-wide embrace of environmental consciousness, the proliferation of environmental statutes, a loss of public confidence in agency expertise and independence from the regulated sector, the drilling of OCS wells ever deeper and further out through revolutionary advances in technology and drilling platform design and construction, and, ominously, scores of catastrophic oil spills. The 1969 Santa Barbara OCS well blowout, in fact, ushered in the post-60's environmental era. By the mid-70's, successful NEPA suits and drilling moratoria covering much of the nation's east and west coasts severely hampered OCS oil production,<sup>146</sup> which the federal government, then as now, viewed as essential for national defense and economy and for federal revenue.<sup>147</sup> The stage was set for redrafting OCSLA to rein in DOI discretion, and to remedy the 1953 Act's inattention to the federal government's trusteeship obligations over its public lands and to OCS petroleum discharges.

#### A. Overview of the "New Statutory Regime"

The summary of the senate bill addressed in the Senate Ad Hoc Committee's report premised OCSLA '78's transformation on Congress's plenary power under the property clause set forth in *Kleppe v. New Mexico*.<sup>148</sup> Congress, the summary declares

has a special constitutional responsibility to make all needful rules and regulations respecting the territory or other property belonging to the United States under article IV, section 3, clause 2. The existing Outer Continental Shelf Lands Act is essentially a carte blanche delegation of authority to the Secretary of the Interior. The increased consideration of the importance of OCS resources, the increased consideration of the environmental and onshore impacts, and emphasis on comprehensive planning require that Congress detail standards for the Secretary (of DOI) to follow in the exercise of his authority."<sup>149</sup>

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<sup>146</sup> This litigation as well as the policy issues dividing environmentalists from the federal government and the oil industry are detailed in Robert Wiygul, *The Structure of Environmental Regulation on the Outer Continental Shelf*, 12 *J. Energy, Nat. Res. & Environmental Law* 785 (1992).

<sup>147</sup> See *President's Commission Report* at 59-67

<sup>148</sup> 426 U.S. 529 (1976) (the "power over public land thus entrusted to Congress is without limitations") (quoting *United States v. City and County of San Francisco*, 310 U.S. 16, 29 (1940)).

<sup>149</sup> H.R. Rep. No. 95-590, at 10 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1450, 1461.

Senators understood in 1978 that they were not simply tinkering with their earlier work. On the contrary, they described OCSLA '53 as “outmoded,”<sup>150</sup> and undertook “to provide a *new statutory regime* for the management of the oil and natural gas resources of the OCS.”<sup>151</sup>

The “new statutory regime” addressed five perceived defects of OCSLA '53. At the top of the list was Congress’s intention to introduce balance between what Senator Henry Jackson, Senate Committee chair, described as “oil and gas development and [the] potentially adverse economic, social and environmental impacts that accompany it.”<sup>152</sup> The revised statute “goes a long way toward alleviating the public’s fears that were spawned by the disastrous Santa Barbara Channel blowout nine years ago and by other environmentally destructive oil spills from tankers that followed.”<sup>153</sup>

The environmental side of the balance offers a second element: management of the OCS blowout and spill pollution threat through a variety of amended provisions<sup>154</sup> alongside a totally new title III, which largely anticipates OPA’s

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<sup>150</sup> Id. at 9.

<sup>151</sup> Id. at 8.

<sup>152</sup> 124 Cong. Rec. 27262 (1978).

<sup>153</sup> Id. Senator Dewey F. Bartlett added that “the “most serious cause of delays in the Outer Continental program to date have been a series of vexatious environmental law suits which have delayed a number of Outer Continental Shelf lease sales.” Id. at 27263. Of special relevance to this paper is *Commonwealth of Massachusetts v. Andrus*, 94 F.2d 872 (1st Cir. 1979), which, on the basis of Congress’s adoption of OCSLA '78, lifted a preliminary injunction imposed by the lower court under NEPA on the leasing of submerged lands in the fisheries-rich Georges Bank region. The Circuit Court reasoned that OCSLA '78’s battery of environmental safeguards would duplicate the environmental scrutiny demanded by NEPA.

<sup>154</sup> For a detailed account of these provisions, see Robert Wiygul, *supra* note 152 at Parts II-IV. Of special relevance for this paper are the inclusion in OCSLA 43 U.S.C. sec. 1331 (2006) of subsections (f)-(i) defining, respectively, the terms “affected state,” “marine,” “coastal” and “human environment[s];” and subsections (k)-(m) expanding the definitions, respectively of “exploration,” “development,” and “production.” These provisions explicitly merge consideration of OCS oil operations on distant OCS locations with their environmental and pollution control consequences on state territorial seas and state inland areas. They thereby add the other half of the environmental equation omitted by OCSLA '53’s focus on the OCS operations alone. OCSLA 43 USC sec. 1333(6) (2006) singles out the need to address “blowouts, loss of well control, fire, spillages ... or other occurrences which may cause damage to the environment or to property or danger life or health.” Meriting special attention is OCSLA '78’s substitution of the phrase “and all installations and other devices permanently or temporarily attached to the seabed” for the former “fixed structures” in 43 U.S.C. sec. 1333(a)(1) (2006) and ancillary section

Subchapter I liability and compensation elements. OCSLA's "new statutory regime's" contrasts with the Fifth Circuit model are stark. The Circuit's jurisprudence, as noted, is premised on a discrete tort-atop-the-platform model. OCSLA '78's range, instead is as expansive as its environmental/pollution control/ecological goals require.<sup>155</sup> The Fifth Circuit model reflects the imprint of OCSLA '53's concern for the welfare needs of adjoining state platform workers. The 1978 model leaves these values in place, but enlarges OCSLA's scope by encompassing regional ecological values. The Fifth Circuit model follows OCSLA '53's targeting of a "horizontal" slice only of the OCS seabed. But an international consensus emerged over the intervening quarter century favoring national regimes premised on OCSLA '78's three-dimensional model.<sup>156</sup> In consequence, Senator Muskie and his colleagues did not hesitate to include the OCS airshed as well as OCS submerged lands and the waters above OCS and state submerged lands in the model.<sup>157</sup>

These shifts also highlight sec. 1333(a)(1) (2006)'s role both as a law selection vehicle and OCSLA, including the section itself, as an expanded source of *substantive law* for managing blowouts and spills. By confirming OCSLA's status as a non-admiralty public lands and pollution control statute, moreover, they render the Macondo scenario even more remote from the link necessary to satisfy *Executive Jet's* substantial relation test.

A third element is OCSLA '78's addition of an array of environmental concerns beyond controlling the risks and consequences of OCS blowouts and spills alone.<sup>158</sup> Assaults on DOI leasing decisions under these provisions, usually in

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subdivisions. This substitution draws semisubmersibles such as the Deepwater Horizon directly under OCSLA's coverage, a result that, given OCSLA's anti-admiralty cast, detracts from the claim that OCS operations conducted in conjunction with semisubmersibles satisfy *Executive Jet's* "substantial relationship" test. Since this amendment also serves as the flywheel driving the title III liability section, among other functions, it deflates the claim that 43 U.S.C. sec. 1333(a)(1) lacks substantive effect. See *supra* Part II.C.1.

<sup>155</sup> OCSLA's coverage of the horizontal seabed and high seas portion of the three dimensional model derives principally from 43 U.S.C. secs. 1331(a), (e)-(i), 1333(a)(1), and Title III. The vertical air shed cap is specified by 43 U.S.C. sec. 1344(a)(8) (2006), which obligates DOI to comply with the Clean Air Act "to the extent that activities authorized [by OCSLA] affect the air quality of any State."

<sup>156</sup> Art. 24, Convention on the High Seas, April 29, 1958, 13 U.S.T. 2313, T.I.A.S. No. 5200 provides that "every state shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or results from the exploration and exploitation of the sea and its subsoil, taking account of existing treaties on the subject."

<sup>157</sup> See 43 U.S.C. sec. 1344(a)(8) (2006).

<sup>158</sup> In addition to the provisions cited in n. 160, an illustrative selection of these controls or associated provisions includes the gamut of title III provisions addressed in text, see *infra* Part III.B.; citizen suits, 43 U.S.C. sec. 1349(1) (2006); DOI authority

conjunction with one or more of such supporting measures as NEPA,<sup>159</sup> the Coastal Zone Management Act,<sup>160</sup> the Endangered Species Act<sup>161</sup>, or the Administrative Procedure Act,<sup>162</sup> witness the breadth of these concerns.<sup>163</sup>

A fourth element is Congress's insistence on curbing DOI's discretion to override environmental and pollution control values in its leasing decisions. In the '78 hearing process, OCSLA '53 was criticized as an "all too general" piece of legislation containing few mandates for the Secretary of the Interior."<sup>164</sup> OCSLA '78, on the other hand, directs that

the whole outer Continental Shelf process, from preparation of a leasing program, selection of tracts for leasing, promulgation and enforcement of regulations, and review of activities must consider environmental consequences –to the water, to the air, to adjacent coastal areas, and to the living resources."<sup>165</sup>

A final element is Congress's effort to identify and better coordinate the three successive phases of OCSLA's management of the oil cycle: authorization and regulation of public lands' leasing, oversight of the leasing program's environmental

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to suspend or terminate oil and gas leases that threaten harm to coastal, marine and human environments, 43 U.S.C. sec. 1334(a)(1) and (2) (2006); control of the sale and management of these leases according to a tiered model encompassing incremental 5-year leasing programs within which individual leases may require approvals at the exploratory, development, and production stages, 43 U.S.C. secs. 1334, 1340, 1344, and 1351 (2006); coordination of the tiered process with non-OCSLA environmental measures including NEPA environmental assessments, 43 U.S.C. sec. 1351 (2006); Clean Air Act national ambient air standard compliance, 43 U.S.C. sec. 1344(a)(8) (2006); and DOI/coastal state consultations premised on state recommendations concerning leasing approvals, 43 U.S.C. secs. 1345(c) (2006).

<sup>159</sup> National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970), at 42 U.S.C. secs. 4321-57 (2006).

<sup>160</sup> Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280, at 16 U.S.C. secs. 14561-65 (2006).

<sup>161</sup> Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) at 16 U.S.C. secs. 1531-43 (2006 & Supp. III 2009).

<sup>162</sup> Administrative Procedure Act, Pub. L. No. 79-404, secs. 1-12, 60 Stat. 237 (1946), at 5 U.S.C. 551-559 (2006 & Supp. IV 2010).

<sup>163</sup> See, e.g., *Tribal Village of Akutan v. Hodel*, 859 F.2d 651 (9<sup>th</sup> Cir. 1988); *Blanco v. Burton*, 2006 WL 2366046 (E.D. La. 2008).

<sup>164</sup> H.R. Rep. 95-590, at 12 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1450, 1464.

<sup>165</sup> *Id.* at 7. Typical of the many sections that implement this directive, 43 U.S.C. sec. 1344(a)(3) (2006) mandates that the "Secretary shall select the timing and location of leasing to the maximum extent practicable, so as to obtain a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas and the potential for adverse impact on the coastal zone."

dimensions, and establishment of a legal regime defining both law selection and substantive legal principles, including among the latter those employed in Title III and elsewhere to address pollution prevention, civil liability and compensation issues. The House committee report confirmed OCSLA '78's establishment of well-considered links among these formerly disparate or non-existent elements.

No comprehensive national legislation presently exists for responsibility and liability for the effects of oil pollution resulting from activities on the Shelf. The purpose of [the bill], by requiring development of an OCS plan, establishing new management and regulatory requirements, mandating coordination with affected states, and providing compensation for damages to fishermen's gear, for spills and for adverse impacts, is to cure these defects.<sup>166</sup>

## **B. Section 1333(a)(1) and Title III**

### **1. Of "Vessels" and "Offshore Facilities"**

The principal if not exclusive ground for admiralty jurisdiction asserted by parties to the Macondo MDL action is that the Deepwater Horizon exploratory drilling rig is a "vessel." This claim may prevail, assuming that it doesn't founder on the rocks of *Executive Jet's* substantial relationship test. It entirely possible, however, that it will fail. In fact, its prospects for success would have been zero in the period between OCSLA's amendment in 1978 and OPA's adoption in 1990.

OPA repealed title III, however, and in OPA section 2701(37) attached the label "vessel"<sup>167</sup> to semisubmersible drilling rigs (which it also titled as "Mobile Offshore Drilling Units"<sup>168</sup> or MODUs). But it also acknowledged that MODUs are "capable of use as an "offshore facility," a term that explicitly excludes "vessels."<sup>169</sup> OPA includes in this litany the term "Outer Continental Shelf facility,"<sup>170</sup> which, if deemed to have been carried over from or substantially modeled upon OCSLA's definition of "offshore facility,"<sup>171</sup> undermines the equation of the Deepwater Horizon with a "vessel." Where the Deepwater Horizon may end up in this sequence is addressed in the following subsection.

Temporarily attached drilling rigs typically trigger admiralty jurisdiction under the Fifth Circuit's interpretation of OCSLA section 1333(a)(2)(A), which, as the sole predicate for law selection under the Fifth Circuit model, focuses on "fixed

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<sup>166</sup> H.R. Rep. No. 95-590, at 9 (1977).

<sup>167</sup> "[V]essel means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water...."

<sup>168</sup> 33 U.S.C. sec. 2701(18) (2006).

<sup>169</sup> 33 U.S.C. 2701(22) (2006).

<sup>170</sup> 33 U.S.C. sec. 2701(25) (2006).

<sup>171</sup> Title III, sec. 301(8) (1978).

structures,” a category deemed to exclude floating rigs.<sup>172</sup> But under the Macondo scenario, as explicitly addressed by the OCSLA '78's pollution control regime, section 1333(a)(1) is the governing provision for law selection and is itself a source of substantive law in conjunction with other amendments instituting its pollution control and liability regime.

The House viewed OCSLA title III as providing the “procedures to be followed in the event of an oil spill and compensation for clean up costs and damages resulting from such a spill.”<sup>173</sup> Title III covers “spills from any offshore facility in the OCS” and “any oil tanker, barge or other watercraft which is operating in offshore areas, and which is carrying oil directly from an offshore facility.”<sup>174</sup> The geographic coverage defined in OCSLA '78 comports with the statute's shift to a region-wide focus.<sup>175</sup>

OCSLA's “responsible parties” under title III are the owner/operator of either the “vessel” or the “offshore facility” which is the source of oil pollution.<sup>176</sup> “Vessels” are limited to watercraft operating in OCS or territorial sea waters *and* which are “*transporting oil directly from an offshore facility.*”<sup>177</sup> An “offshore facility,” on the other hand, is “any oil refinery, *drilling structure*, oil storage or transfer terminal, or pipeline, or any appurtenance related to any of the foregoing, which is used to *drill for*, produce, store, handle, transfer, process, or transport oil

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<sup>172</sup> See, e.g., *Producers Drilling Co. v. Gray*, 361 F. 2d 432, 437 (5<sup>th</sup> Cir. 1966); *Walsh v. Seagull Energy Corp.*, 836 F. Supp. 411, 414, 416 (S.D. Tex. 1993); *In re Sedco*, 543 F. Supp. 561, 571-72 (D.C. Tex. 1982); cf. *Stewart v. Dutra*, 543 U.S. 481, 489-92 (2005). But see *EEX Corp. v. ABB Vetco Gray, Inc.* 161 F. Supp. 2d 747, 751 (S.D. Tex. 2001) (“[A] vessel ceases to be a vessel the moment it attaches itself to the Shelf”).

<sup>173</sup> H.R. Rep. 95-1474, at 52, 1978 (Conf. Rep.) *reprinted in* 1978 U.S.C.C.A.N. 1674, 1725.

<sup>174</sup> *Id.*

<sup>175</sup> Title III, Sec. 304(a) (1978) declares that “[o]il pollution” comprehends the “unlawful” discharge of oil in the waters above submerged lands seaward from the coastline of a State” or “on the adjacent shoreline of such a State” or “on the waters of the contiguous zone,” or the “presence of oil in or on the waters of the high seas outside the territorial limits of the United States ... when discharged in connection with activities conducted under the Outer Continental Shelf Lands Shelf Lands Act.” This section adds the “slice” of waters above the OCS seabed to the “horizontal” regime of the 1953 OCSLA, which included only the OCS's subsoil, seabed and natural resources. See *supra* Part II.A. The final slice is the airshed above these waters, which DOI is required to regulate for Clean Air Act purposes under OCSLA 43 U.S.C. sec. 1334(a)(8) (2006).

<sup>176</sup> Title III, sec. 304(a) (1978).

<sup>177</sup> Title III, sec. 301(5) (1978) (emphasis added).

produced from the Outer Continental Shelf ..., and is located on the Outer Continental Shelf, except that such term does not include ... a vessel ....<sup>178</sup>

A straightforward reading of these definitions excludes semisubmersibles as “vessels,” by including them under “any drilling structure.” The term “vessel” is restricted to watercraft used exclusively to “[transport] oil directly from an offshore facility.” Hence, the statement of the conferees:

Vessels are separately defined and are separately treated under [title III]. *However, once a drilling ship or other watercraft is attached to the seabed for exploration, development or production, it is to be considered an “offshore facility” rather than a vessel for purposes of applying the differing requirements for a facility as compared with a vessel.*<sup>179</sup>

But the basis for placing “drilling ships” within the “facility” and “offshore facility” categories is of far greater moment for this paper’s purposes. It is one and the same with that supporting Congress’s choice to strike the phrase “fixed structures” from section 1333(a)(1), and insert the phrase “and all installations and other devices permanently or temporarily attached to the seabed.” Red Adair, the oil and gas industry’s premier blowout fireman, confirmed before the Ad Hoc Select Committee that semi-submersibles, which conduct exploration drilling, are more “dangerous” than production platforms, the fixed (production) structures of section 1333(a)(2)(A).<sup>180</sup> Reflecting the variety and frequency of and public outrage over

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<sup>178</sup> Title III, 301(8) (1978) (emphasis added). A “facility” is a “structure, or group of structures (other than a vessel or vessels), used for the purpose of transporting, drilling for, producing, processing, storing, transferring, or otherwise handling oil.” Title III, sec. 301(7) (1978).

<sup>179</sup> H.R. Rep. 95-590, at 117 (1977) (emphasis added), *reprinted in* 1978 U.S.C.C.A.N. 1450, 1585. To like effect is the passage immediately following the quote in text: [“The term ‘vessel’ covers] every description of watercraft or other contrivance, whether or not self-propelled, *which is used to transport oil directly from an offshore facility*. Once a vessel is operating in the navigable waters of the United States [i.e., landward from the OCS], it is not included in the title.” *Id.* at 118. (emphasis added). The special attention accorded vessels engaged in the transport of oil from offshore facilities likely reflects Congress’s agreement with then-Secretary of the Interior Andrus, who testified that these vessels are the “most dangerous things we have in the whole petroleum cycle.” *Outer Continental Shelf Lands Act Amendments of 1977, Part II: Hearings on H.R. 1614 before the Ad Hoc Select Committee on Outer Continental Shelf*, 95<sup>th</sup> Cong. 1587 (1977)(Statement of Cecil D. Andrus, Secretary, Department of the Interior).

<sup>180</sup> *Outer Continental Shelf Lands Act Amendments of 1977, Part II: Hearings on H.R. 1614 Before the Ad hoc Select Committee on Outer Continental Shelf*, 95<sup>th</sup> Cong. 875-915 (1977) (response of Paul “Red” Adair, Red Adair Oil Well Fires and Blowouts Control Co., Houston, TX to sequence of committee questions probing, inter alia, the

the scores of events from the 1969 Santa Barbara blowout to the most recent vessel spill, the Ad Hoc Select Committee explained the amendment's purpose as follows:

Section (a) amends section 4(a)(1) of the OCS Act of 1953 [now section 1333(a)(1)] by changing the term 'fixed structures' to 'and all installations and other devices permanently or temporarily attached to the seabed' and making other technical changes. *It is thus made clear that federal law is to be applicable to all activities on all devices in contact with the seabed for exploration, development, and production. The committee intends that federal law is, therefore, to be applicable to activities on drilling ships, semi-submersible drilling rigs, and other watercraft, when they are connected to the seabed by drill string, pipes, or other appurtenances, on the OCS for exploration, development, or production purposes. Ships and vessels are specifically not covered when they are being used for the purpose of transporting OCS mineral resources.*<sup>181</sup>

## 2. The Gusher Issue and OCSLA '78

The Gusher Issue was dormant under OCSLA '53 in light of the latter's narrow focus on events occurring atop fixed structures. But it comes directly into play under OCSLA '78's amendment adopting a regional orientation to encompass the prevention and policing of blowouts and oil spills. Does OCSLA '78 extend its coverage to the Macondo oil and blowout's effects beyond these sites? In an action seeking to establish liability for a maritime pollution incident's economic losses, does it override the superadjacent water's former status as an admiralty location? The *Oppen* decisions' response to these queries was negative, but OCSLA '78 calls for a different answer.

Congress's authority to control OCSLA public lands and the oil is beyond question. *Kleppe v. New Mexico*<sup>182</sup> ruled both that Congress's property clause powers are "essentially limitless,"<sup>183</sup> and that "Congress exercises the powers both of a proprietor and of a legislator over the public domain."<sup>184</sup> *Kleppe* sustained a federal statute protecting wild horses and burros on public lands against a state challenge asserting, inter alia, that public lands do not include their associated resources—in this case the wild animals.<sup>185</sup> The analogy to OCSLA lands and the oil deriving from

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comparative danger of blowouts from semisubmersible vs. permanent platform drilling structures).

<sup>181</sup> H.R. Rep. No. 95-590, at p. 68 (1977), *reprinted in* 1978 U.S.C.C.A.N.1450, 1534 (capitalization by author).

<sup>182</sup> 426 U.S. 529 (1976).

<sup>182</sup> 426 U.S. 529 (1976).

<sup>183</sup> *Id.* at 539 (quoting *United States v. County and City of San Francisco*, 310 U.S. 16, 29 (1940)).

<sup>184</sup> *Id.* at 540.

<sup>185</sup> *Id.* at 537.

them is plain, although Macondo presents an even stronger case because the OCS, unlike New Mexico, is an exclusive federal enclave in which concurrent state legislation (not functioning as surrogate federal law) is barred.

But what about the claim of OCSLA's continued control of the oil and activities associated with its policing once the oil leaves its original 53 'OCSLA sites? This issue is addressed in the now-classic *Minnesota v. Block* decision,<sup>186</sup> which rejected a state challenge to Congress's powers to control activities on state-owned areas in the context of a federal statute regulating and in some cases barring motorized recreational vehicles on state-owned portions of a national wilderness area. *Block* upheld the federal statute: "Congress' power must extend to the regulation of conduct on or off the public lands that would threaten the designated purpose of federal lands."<sup>187</sup> It also applied a deferential standard to test the reasonableness of the controls adopted by Congress for this purpose.<sup>188</sup>

OCSLA '78's legislative history confirms that its environmental controls, which are largely premised on the regional model, were adopted to minimize state and public objections to OCS drilling. Law suits, drilling moratoria and hostile public response overall to the drilling's environmental consequences severely constrained OCSLA oil production to the detriment of the national economy, national defense and national revenues. Congress sought to overcome this hostility by means of OCSLA's 78 amendments, an illustrative provision of which states that "operations on the outer Continental Shelf should be conducted in a safe manner... to prevent or minimize the likelihood of blowouts, loss of well control, fire ...or other occurrences which may cause damage to the environment or to property, or endanger life or health."<sup>189</sup> The effort to overcome these objections through such environmental assurances and the civil sanctions of OSLA 78's "new statutory regime" fully comport with *Block*'s requirement of regulating conduct "off the public land that would threaten the designated purpose of [these] federal lands."<sup>190</sup>

The Fifth Circuit has acknowledged these values in decisions sustaining OCSLA jurisdiction under section 1349(b)(1) against objections that the activities in the pertinent dispute failed to arise out of "any operation" related to oil production on the OCS. Its leading decision upheld OCSLA jurisdiction to hear a suit concerning the "take-or-pay" and "minimum-take" provisions of a natural gas sales contract.<sup>191</sup> The court upheld jurisdiction, reasoning that

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<sup>186</sup> 660 F.2d 1240 (8<sup>th</sup> Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

<sup>187</sup> *Id.* at 1249.

<sup>188</sup> *Id.* at 1250 ("In reviewing the appropriateness of federal regulations... 'determinations under the Property Clause are entrusted primarily to the judgment of Congress.'") (quoting *Kleppe*, 426 U.S. at 536).

<sup>189</sup> 43 U.S.C. sec. 1332(6) (2006).

<sup>190</sup> *Block*, 660 F.2d at 1249.

<sup>191</sup> *Amoco Prod'n Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202 (5<sup>th</sup> Cir. 1988).

[t]he efficient exploitation of the minerals of the OCS, owned exclusively by the United States, was a primary reason for OCSLA. Just as clearly, any dispute that alters the progress of production activities on the OCS threatens to impair the total recovery of the federally owned minerals from the reservoir ... underlying the OCS.<sup>192</sup>

The court interpreted key OCSLA language in a manner designed to “effectuate the congressional grant of jurisdiction where that would enhance or achieve control of the natural resources by the national government.”<sup>193</sup>

### 3. The Fifth Circuit and Macondo Models under OCSLA '78

This review of the OCSLA '78 program supports this paper's major themes. Congress's exclusion of semisubmersibles from the OCSLA “vessel” category demonstrates that *whether a watercraft is a “vessel” depends entirely upon the context and statute, if any, in issue*. The status of *Dutra's* “Super Scoop” barge in Boston Harbor under the LHWCA or *Grubart's* spud barge on the Chicago River under general maritime law,<sup>194</sup> therefore, in no way controls the status of the Deepwater Horizon atop the Gulf's OCS under OCSLA or OPA. It merely commences what turns out to be a complex and, as the next section will reveal, very uncertain inquiry. Section 1333(a)(1), not section 1333(a)(2)(A), moreover, selects the pertinent law when federal non-admiralty statutes govern OCS operations, as OCSLA and its companion, OPA obviously do in the Macondo setting. Nor is federal law selection 1333(a)(1)'s sole function. The section also provides the flywheel driving OCSLA's '78's environmental and oil discharge liability program, and, as such, is a component of the *substantive* federal law selected. Finally, unlike OCSLA-endorsed *state* law under section 1333(a)(2)(A), OCSLA's *federal* law selections are immune from displacement by general maritime law.

#### C. Scorecard: OCSLA Phase II

*Rodney Dangerfield Issue*: Dangerfield becomes Seinfeld. OCSLA section 1333(a)(1) comes into its own both as a selector of the applicable federal statutes OCSLA and OPA, and as itself a source of substantive law through its inclusion of “temporarily attached” drilling platforms and its links to title III as well as to other OCSLA '78 provisions addressing OCSLA's public lands and environmental advances.

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<sup>192</sup> *Id.* at 1210

<sup>193</sup> *Id.* at 1209, n. 25. In another opinion upholding OCSLA sec. 1349(1)(b) jurisdiction for the partition of co-owned OCS pipeline infrastructure, the Circuit stated that “resolution of these ownership rights would affect the efficient exploitation of resources from the OCS and/or threaten the total recovery of federally-owned resources.” *E.P. Operating Ltd. Partn's'p v. Placid Oil Co.*, 21 F.3<sup>rd</sup> 563, 570 (5<sup>th</sup> Cir. 1994).

<sup>194</sup> See *Grubart* at 555 (1995) (Thomas, J. dissenting).

*Talisman Issue:* OCSLA '78 defines away the Deepwater Horizon's status as a "vessel" for admiralty purposes. It is instead an OCS-located "offshore facility" because it functioned as an exploratory drilling platform when its drill string was attached to the Macondo well below.<sup>195</sup> In the Lewis Carroll world of conventional, rather than ontological meaning, a mobile watercraft can morph into an "offshore facility" for law selection purposes, and indisputably has done so in OCSLA '78.

*Gusher Issue:* Both the international community's 1958 approval of the Convention on the Law of the Sea and Congress's adoption of the regional ecological model negate *Oppen's* conclusion that a blowout or spill commencing on an OCS situs becomes an admiralty tort once the discharge makes contact with superadjacent water. In obligating rather than simply permitting the littoral nation to adopt sanitary and pollution regulations for waters above its OCS region, article 24 eliminated the concern earlier voiced by OCSLA '53's drafters that such measures would serve as a pretext for encroaching upon waters' navigation or fishing freedoms. *Kleppe* and *Block* validate Congress's authority under the Property Clause to regulate public lands and contiguous areas in this manner. The anti-admiralty outcome of the Gusher Issue is fully in accord with the Supreme Court's declaration in *Offshore Logistics, Inc. v. Tallentire* that "admiralty jurisdiction generally should not be extended to accidents *in areas covered by OCSLA.*"<sup>196</sup>

*Alien Issue:* Scoring this issue is reserved for Phase III and the Conclusion.

#### IV. OCSLA PHASE III: Post-OPA '90

##### A. Deepwater Horizon: A "Vessel" for post-OPA '90?

Congress's concurrent adoption of OPA and repeal of OCSLA title III in 1990 while retaining OCSLA's regional focus and its coverage of "temporarily attached" devices fog over a formerly clear picture, leaving pervasive uncertainty cutting both for and against admiralty jurisdiction. Arguably favoring this status for the Deepwater Horizon are three elements. One is OPA's adoption of a definition for "vessel" that codifies the general maritime law concept.<sup>197</sup> While debating OCSLA's

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<sup>195</sup> See *EEX Corp. v. ABB Vetco Gray, Inc.*, 161 F. Supp. 747, 751 (S.D. Tex. 2001), which observed that OCSLA '78's shift to include vessels attached to the sea floor afforded OCSLA jurisdiction for the case at bar. The Court opined that "under the Shelf Act, a vessel ceases to be a vessel the moment it attaches itself to the Shelf; it has become a tiny federal enclave not governed by international admiralty law." *Id.* at 751 (citing *Rodrigue*, among other precedents).

<sup>196</sup> 477 U.S. 207, 218 (1985) (emphasis added). The area "covered by" OCSLA '78 for environmental purposes, of course, is broader than the area "covered by" OCSLA '53 for platform worker injuries, *Tallentire's* issue.

<sup>197</sup> The House and Senate conferees agreed that OPA 33 U.S.C. sec. 2701(37)'s definition of "vessel" is restated verbatim "from [current FWPCA section 1321(a)]"

'78 amendments, moreover, Congress was aware that an-OPA type bill was also underway, and expressly reserved freedom for itself to shape this eventual measure in whatever fashion it wished.<sup>198</sup> Finally, this same narrative bars an interpretation of OCSLA '78 that modifies admiralty jurisdiction, rules or incidents.<sup>199</sup>

But a contrary understanding of Congress's concurrent adoption of OPA '90 and repeal of title III is no less plausible. Having both committed itself so energetically to include "temporarily attached" watercraft as a substantive component of section 1333(a)(1) *and* left this language intact in 1990, it would seem anomalous for Congress abruptly to reverse course without explanation. Not only had Congress been instructed by Red Adair during the OCSLA '78 hearings of the greater dangers posed by exploratory mobile platforms over fixed production platforms,<sup>200</sup> but Senators Chaffee, Lieberman, Durenberger and Graham appended a separate statement to the Senate's 1990 OPA report<sup>201</sup> emphasizing that well blowouts threaten discharges of far greater quantity than vessels. The subsequent Senate provision, which was enacted as OPA section 2703(c)(3), uncapped the liability of what OPA would term "Outer Continental Shelf offshore facilities."<sup>202</sup>

While the 1978 Congress denied an intent to bind its successors in fashioning future oil pollution legislation, neither did it urge that a subsequent Congress disown OCSLA '78's classification of semisubmersible or other mobile off-shore drilling units. On the contrary there is no evidence of Congress's hostility to this classification; its retention of section 1333(a)(1)'s "temporarily attached" devices, of course, points in the contrary direction. What Congress sought, instead, was

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as are the terms "onshore facility" and "offshore facility." H.R. Rep. No.101-653, at 2 (1990) (Conf. Rep.), *reprinted in* 1990 U.S.C.C.A.N. 779.

<sup>198</sup> The conferees agreed that they "'do not in any way intend by the adoption of this title to affect consideration of, or approval of, any language in a comprehensive oil spill act.... The conferees expect that this title would be abrogated by the passage and enactment of such a comprehensive bill." H.R. Rep. No. 95-1474, at 677 (1978) (Conf. Rep.) *reprinted in* 1978 U.S.C.C.A.N. 1674, 1739.

<sup>199</sup> The conferees clarified that it was not their intent "to change the jurisdiction in incidents that are within the admiralty and maritime laws of the United States." H.R. Rep. No. 101-653, at 58 (Conf. Rep.), *reprinted in* 1990 U.S.C.C.A.N. 779, 838.

<sup>200</sup> See *supra* note 180 and accompanying text.

<sup>201</sup> See S. Rep. 101-94, at 26 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 748-49 (separate statement of Senators Chaffee, Lieberman, Durenberger, and Graham). The senators warned that "[v]essels—even extremely large ones such as the Amoco Cadiz and the Exxon Valdez—carry finite supplies of oil and usually only a portion of the cargo is lost because it is compartmentalized.... [But] OCS [blowouts] ... can involve prodigious and seemingly unlimited quantities of crude oil. The size of such spills can be enough to fill hundreds or even thousands of tankers the size of the Exxon Valdez." *Id.*

<sup>202</sup> See 33 U.S.C. sec. 2701(25) (2006)

consolidating within OPA the components of four separate maritime pollution statutes-- OCSLA, FWPCA sec. 311, the Deepwater Port Act<sup>203</sup> and the Trans-Alaska Pipeline Authorization Act.<sup>204</sup> Consolidation was designed to insure standardization of response cost and damages liability, and reduction of the inefficiencies of networking among multiple agencies, each interpreting separate statutes, formulating separate regulations and administering separate oil spill trust funds.<sup>205</sup> The conferees' agreement that OPA does not modify admiralty jurisdiction or incidents is relevant only if the Macondo's status as an admiralty tort post-OCSLA '78 is conceded. But this is the very question being posed in these paragraphs.

Turning to OPA's text for further direction, three OPA terms stand out: "mobile offshore drilling unit" (MODU); "offshore facility," and "Outer Continental Shelf offshore facility." OPA section 2701(18) defines "mobile offshore drilling unit" (MODU), *the only definition that unassailably applies to the Deepwater Horizon because the rig, a semi-submersible, qualifies as a MODU.* But is a MODU a "vessel"? Yes and no: the answer depends upon how the MODU is being used. As defined in section 2701(18), a MODU is categorized either as a "vessel," or as "capable of use" as an "offshore facility." But OPA section 2701(22) defines an "offshore facility," the second definitional term, as "any facility of any kind located in, on or under any of the navigable waters of the United States... *other than a "vessel."* Likewise excluding MODUs (when used as offshore facilities) from classification as vessels is OCSLA sec. 1333(a)(1), which includes them within its "temporarily attached" device group. To like effect are the Coast Guard's navigational aid regulations, which include MODUs as "structures" which are defined to include "fixed structures, temporary or permanent," a category that encompasses "mobile offshore drilling units (MODUs) when attached to the [OCS] bottom."<sup>206</sup>

OPA's third term, section 2701(25)'s "Outer Continental Shelf facility," cannot be overlooked because it is one of only two OPA title I provisions<sup>207</sup> that even mention the OCS. It is defined as "an offshore facility which is located ... on the Outer Continental Shelf and is or was used for any of the following purposes : *exploring*

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<sup>203</sup> Deepwater Port Act of 1974, Pub. L. No. 93-6278, 88 Stat. 2126 (1975), at 33 U.S.C. secs. 1501-24 (2006).

<sup>204</sup> Trans-Alaska Pipeline Authorization Act, Pub. L., No. 93-153, 87 Stat. 584 (1973), at 43 U.S.C. secs. 1651 et. seq. (2006).

<sup>205</sup> The Senate Report observed that the existing oil spill programs "provide varying and uneven liability standards and scope of coverage for clean-up costs and damages associated with activities covered by each individual law. Moreover, the array of ...programs can create administrative problems as well. As a result the goal of compensating those injured may be complicated by questions of the jurisdiction of various federal agencies." Senate Report 101-94, at 3 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 725.

<sup>206</sup> See U.S. Coast Guard, AIDS to Navigation on Artificial Islands and Fixed Structures, 33 C.F.R. sec. 67-01-5 (2004).

<sup>207</sup> 33 U.S.C. sec. 2704(c)(3)(2006) is the other.

*for, drilling for, producing ... or transporting oil produced from the Outer Continental Shelf.*” Striking verbal parallels link this characterization to former OCSLA title III sec. 301(8)’s term “offshore facility,” which is also identified as a “drilling structure ... used to drill for, produce ... or transport oil produced from the Outer Continental Shelf.”<sup>208</sup> But the OCSLA offshore facility encompasses watercraft used as drilling platforms so long as they do not transport oil from OCS offshore facilities. OPA’s “Outer Continental Shelf facility,” in contrast, excludes “vessels” as defined in 33 U.S.C. sec. 2701(18) (2006).

There is, however, a further wrinkle. In supporting the view expressed by the four senators negating a cap on response costs for OCS operations, OPA sec. 2703(c)(3) duplicates the parallelism of OPA “Outer Continental Shelf offshore facilities” with OCSLA “offshore facilities.” It divides into mutually exclusive categories the (OPA) “Outer Continental Shelf facility” from “a vessel carrying oil as cargo from such a facility,” the latter of which, of course, rules the Deepwater Horizon out as a “vessel.” Reinforcing the interpretation that OCS facilities and vessels are mutually exclusive categories are Coast Guard regulations that define the term “Outer Continental Shelf facility” as

[a]ny artificial island, installation or other device permanently or *temporarily attached* to the subsoil or seabed of the Outer Continental Shelf, erected for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting for such resources.. *The term includes mobile offshore drilling units when in contact with the seabed of the OCS for exploration or exploitation of subsea resources.*<sup>209</sup>

Only two confident conclusions can be drawn from this definitional labyrinth, neither of which aids the inquiry. First, Congress has not clarified the extent to which its denial of admiralty jurisdiction for “temporarily attached” drilling platforms in OCSLA ’78 survives or perishes in consequence of title III’s repeal by OPA ’90. Resolving the confusion should be a first order of business in the post-Macondo blowout restructuring of OCSLA and OPA called for by the Presidential Commission.<sup>210</sup> Second, the eventual resolution of the issue for the Macondo dispute will confirm the accuracy of John Chipman Gray’s observation that “statutes do not interpret themselves; their meaning is declared by the courts, and it is with this meaning ... that they are imposed upon the community as Law.”<sup>211</sup>

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<sup>208</sup> Title III, sec. 301(8) (1978) (emphasis added). A “facility” is a “structure, or group of structures (other than a vessel or vessels), used for the purpose of transporting, drilling for, producing, processing, storing, transferring, or otherwise handling oil.” *Id.* at sec. 301(7).

<sup>209</sup> See U.S. Coast Guard OCS Activities, Subpart A, sec. 140.10 (2004) (emphasis added).

<sup>210</sup> *President’s Report*, Part III: Lessons Learned.

<sup>211</sup> *The Nature and Sources of the Law* 170 (Gaunt Reprint 1999) (1909).

## **B . From *Rodrigue* to *Executive Jet* to *Grubart*: The Fusion of OCSLA and Admiralty Analysis**

### **1. From *Executive Jet* to *Grubart***

*Executive Jet* has been followed to date by three further opinions refining the substantial relationship principle. The first, *Foremost Insurance Company v. Richardson*,<sup>212</sup> extended *Executive Jet* to vessels, announcing that only those maritime torts involving vessels in navigable waters that satisfy the *Executive Jet* test under circumstances threatening disruption of maritime commerce qualify as maritime torts.<sup>213</sup> Hence, even if the Deepwater Horizon were a “vessel” and the discharge of its oil into the OCS’s subjacent waters were a tort, admiralty jurisdiction would not apply unless the semisubmersible’s activity, OCS exploratory operations, satisfies the test.

This point is lost on those who conflate the *independent* requirements of location and of the substantial relationship link when they insist that ocean drilling conducted from a vessel engages admiralty jurisdiction.<sup>214</sup> The ocean and vessel elements address location; the fact that drilling is conducted from an ocean vessel does not, by itself, establish compliance with the substantial relation test. The latter is not satisfied unless exploitation of OCS resources through exploration, development or production bears the requisite link to a traditional maritime activity.

The second post-*Executive Jet* decision, *Sisson v. Ruby*,<sup>215</sup> essentially recapitulates the former two opinions to require, in addition to the locational requirements of vessel and waters, that the general features of the incident causing the harm must threaten to disrupt maritime commerce, and that the general character of the activity from which the incident arose must show a substantial relation to a traditional maritime activity. *Grubart*, the last of the *Executive Jet* line to date, confirms the application of these principles, describing the relational test met

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<sup>212</sup> 457 U.S. 668 (1982).

<sup>213</sup> *Id.* at 675.

<sup>214</sup> Hence, *Grubart*’s observation that “[b]ecause the injuries suffered by *Grubart* and the other flood victims were *caused by a vessel on navigable water, the location enquiry would seem to be at an end ...*” *Grubart* at 535 (emphasis added). The opinion then addresses the substantial relationship test as a separate issue. *Id.* at 538-48. Illustrative of the distinction is the Fifth Circuit’s own opinion in *AmClyde*, discussed *infra* Part IV B.2. in which a tortious event occurring on one and, arguably two, vessels on high seas and extending to a partially constructed fixed drilling platform above the OCS was deemed to fall short of admiralty jurisdiction because the OCS “operation” being pursued in the event was found not to be “substantially related to a traditional maritime activity.”

<sup>215</sup> 497 U.S. 358 (1990)

when “the *tortfeasor’s* activity ... on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand.”<sup>216</sup> The Court also observed that if the incident features multiple parties as tortfeasors, admiralty jurisdiction is secured so long as the activity of one party meets the relational test and is the incident’s proximate cause.<sup>217</sup>

Earlier discussion of the *Oppen* decisions following the Santa Barbara OCS blowout observed that they were outdated in two respects that can now be addressed. Their view that the activity to be connected to the traditional maritime activity is that of the damaged party rather than of the tortfeasor<sup>218</sup> is clearly at odds with the Court’s four decisions. Likewise erroneous is their position on the Gusher Issue that movement of the oil from the OCS floor into the waters above transformed the blowout into a general maritime event. This position fails upon OCSLA ’78’s adoption, which enlarged OCSLA’s venue for environmental and civil liability purposes from platforms themselves to the contiguous region.<sup>219</sup>

Turning to *Grubart’s* requirements overall, a forceful claim can be made that The Macondo blowout satisfies only the disruption of maritime commerce element. the blowout, of course, not only threatened to but actually did disrupt maritime commerce. But the impediments to classifying the Deepwater Horizon as a “vessel” are imposing, as evidenced throughout this paper. An even greater struggle is undoubtedly in the offing should the Supreme Court be asked to rule on *Grubart’s* requirement that the “general character of the activity giving rise to the incident”<sup>220</sup> –exploratory drilling for oil and gas on the OCS—is “so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand.”<sup>221</sup>

Two considerations explain why a struggle is likely for an inquiry that is unconstrained by the Fifth Circuit’s OCSLA section 1333(a)(2)(A) jurisprudence. The first is the combination of both Congress’s and the Supreme Court’s dour view of the supposed maritime character of OCS drilling. Macondo may provide the scenario through which, ironically, the OCSLA-based tug of war between the Supreme Court and the Fifth Circuit finds its resolution within *Executive Jet’s* admiralty-limiting venue. The second is that Macondo differs from the Court’s four “substantial relationship” cases in relation to the consideration most likely to

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<sup>216</sup> *Grubart* at 539-40 (emphasis added.)

<sup>217</sup> In Macondo, BP does not satisfy this requirement because its well is an OCSLA situs and because the Gusher Issue resolves against admiralty jurisdiction. Consequently, the focus throughout this paper has been on the Deepwater Horizon.  
<sup>218</sup> See *Union Oil Co. v. Oppen*, 501 F.2d 558, 561 (9<sup>th</sup> Cir. 1974); *Oppen v. Aetna Ins. Co.*, 485 F.2d 252, 257 (9<sup>th</sup> Cir. 1973).

<sup>219</sup> See *infra* Part III.B.2.

<sup>220</sup> *Grubart* at 539

<sup>221</sup> *Id.* at 539-40.

determine the inquiry's outcome: namely, that *Congress itself* has essentially prepackaged the factual and policy grounds upon which a negative decision should rest. The burden of sustaining this endeavor will not fall upon the judiciary alone, therefore, as it has in the Court's four preceding struggles with the inquiry.

Concisely and authoritatively, Congress has framed the *Grubart*-required description of the "general character of the activity giving rise to the incident"<sup>222</sup> by its half-century of deliberations on OCSLA '53 through OCSLA '90, followed by 16 years of similar deliberations leading to OPA. This process has distilled a consistent, logical and fully transparent conception of OCS drilling operations as Macondo's underlying activity. The description is one and the same with OCSLA section 1349(b)(1)'s definition of the basis for OCSLA subject matter jurisdiction: namely, "any operation conducted on the outer Continental Shelf which involves exploration, development or production of the minerals, of the subsoil and seabed of the outer Continental Shelf." This definition mirrors, in turn, OCSLA section 1333(a)(1)'s targeting of activities undertaken "for the purpose of exploring for, developing, or producing resources [from the OCS seabed]," as further delimited by OCSLA section 1331's specification of the terms "exploration," "development," and "production" respectively.<sup>223</sup>

My omission of section 1333(a)(1)'s "temporarily attached" devices and of section 1333(a)(2)(A)'s "fixed structures" is deliberate because the substantial relationship test focuses on the *activity* being conducted by the Deepwater Horizon, not on whether this exploratory oil drilling rig merits classification as temporarily attached or fixed.<sup>224</sup>

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<sup>222</sup> *Id.*

<sup>223</sup> 43 U.S.C. secs. 1331(k) (exploration), (l) (development), and (m) (production), respectively.

<sup>224</sup> Not only has Congress provided this definitive characterization, but the Macondo MDL proceedings have already yielded a determination that the Macondo blowout does indeed fall within these parameters as expressed in OCSLA 43 U.S.C. sec. 1349(b)(1) (2006) and supplemented in Fifth Circuit jurisprudence. See *In re Oil Spill by the Oil Rig "Deepwater Horizon" MDL No. 2179*, 747 F.Supp.2d 704 (E.D. La. 2010) (Barbier, J.).

Declining to remand to state court an action BP had removed to the Eastern District of Louisiana, Judge Barbier ruled that the Macondo incident accorded with the section because it was an "operation conducted on the outer Continental Shelf, which involved the exploration and production of minerals." *Id.* at 709. He added that the Circuit has clarified that "[t]hese terms denote respectively the processes involved in searching for minerals on the OCS; preparing to extract them by, *inter alia*, drilling wells and constructing platforms; and removing the minerals and transferring them to shore." *Id.* (citing *Tennessee Gas Pipeline v. Houston Cas. Ins. Co.*, 87 F.3rd 150, 154 (5<sup>th</sup> Cir. 1996)). All that remains to complete the picture is to conclude that OCSLA not only provides jurisdiction for the dispute, but also specifies the governing law, in accordance not only with the reasoning set forth *supra* Part

## 2. *AmClyde*: From *Executive Jet/Grubart* back to *OCSLA/Rodrigue*

The functional linkage of *Rodrigue* to *Executive Jet* was earlier identified in a passage suggesting that the OCSLA's liberation from the Fifth Circuit's "of its own force" and "other Federal laws" devices might render it even more potent than had the Fifth Circuit accorded the statute the standing that it concedes OCSLA's legislative history warrants.<sup>225</sup> *Texaco Exploration and Production, Inc. v. AmClyde Engineered Products Company*<sup>226</sup> (*AmClyde*) illustrates this scenario. If fused with section 1333(a)(2)(A), the *Executive Jet/Grubart* test renders the OCSLA-endorsed state law candidate a well-armored admiralty opponent .

*Union Texas Petroleum Corp. v. PLT Engineering Corp.*<sup>227</sup> (*UTP*) routinized the section 1333(a)(2)(A) exercise as a three-step process. It favors OCSLA's preference over admiralty jurisdiction and law selection only upon demonstration of an OCSLA situs (Step 1), the non-application of admiralty law of its own force (Step 2), and the consistency of the OCSLA-endorsed state law with "other Federal laws." (Step 3). Independent of OCSLA, on the other hand, admiralty law will not apply absent demonstration of the *Executive Jet/Grubart* relationship linkage.

How might the Fifth Circuit universe change if the *Executive Jet/Grubart* test were substituted for the former Step 2? *AmClyde* instructs that it would change in two significant respects: namely, that the "of its own force" and "other Federal laws" dodges would not overcome OCSLA, and that the presence of a vessel in the situational mix would not, of itself, support admiralty jurisdiction.

*AmClyde* was a combined negligence/products liability action brought by Texaco against a variety of defendants including AmClyde Engineering, the successor to a company that designed the main load line of a crane that failed,

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II.C.1, but as also expressed in *EP Operating Ltd. Ptns'p v. Placid Oil Co.*, 26 F.3<sup>rd</sup> 563, 570 (5<sup>th</sup> Cir. 1994). "*OCSLA casts a broad substantive net in section 1333,*" and "*instructs that 'the jurisdictional grant of section 1349 should be read co-extensively reach of section 1333.'*" *Id.* at 569 (emphasis added). Since it is beyond question that the federal statutes, OCSLA and OPA afford the applicable law for the economic losses occasioned by the Macondo dispute, the complications posed elsewhere by OCSLA section 1333(a)(2)(A) (2006) arise, if at all, only in conjunction with the "mini-gap" issue posed supra Part II.E.

<sup>225</sup> See supra TAN 72.

<sup>226</sup> *Texaco Explor'n & Prod'n Inc . v. AmClyde Engineered Prods. Co., Inc.*, 448 F.3<sup>rd</sup> 760, 770-71 (5<sup>th</sup> Cir. 2006), *amended on rehearing*, *Texaco Explor'n & Prod'n Inc v. AmClyde Engineered Prods. Co., Inc.*, 453 F.3<sup>rd</sup> 652 (5<sup>th</sup> Cir. 2006), *cert. denied*, *AmClyde Engineered Products Co., Inc. v. Texaco Explor'n and Prod'n, Inc.*, 549 U.S. 1053 (2006) [hereinafter *AmClyde*].

<sup>227</sup> 895 F.2d 1043 (5<sup>th</sup> Cir.), *cert. denied*, 498 U.S. 848 (1990).

plunging into the sea a deck module being fitted to the support frame of a partially constructed, fixed oil production platform. Two vessels were featured at least as prominently featured in this tort as the Deepwater Horizon was in the Macondo blowout. One was the materials barge from which the derrick crane lifted the deck module. The other was the DB-50, the barge on which the crane was positioned and from which it had to swing the deck module some 1500 feet to reach the platform site.

The court rebuffed an admiralty-based challenge to OCSLA jurisdiction. It observed that the project's purpose -- constructing a facility that would conduct OCS drilling production activities-- aligned squarely with an OCSLA "operation" under OCSLA section 1349(b)(1). It then held that admiralty jurisdiction was not supported by dispute's facts. "To the extent that maritime activities surround the construction work underlying the complaint," the court stated, "any connection to maritime law is eclipsed by the construction's connection to the development of the Outer Continental Shelf."<sup>228</sup>

The court then turned to the law selection exercise under section 1333(a)(2)(A), utilizing the UTP three-step test for this task. It quickly affirmed the dispute's compliance with Step 1 on the basis that that the permanent platform qualified as an OCSLA situs.

Under conventional 1333(a)(2)(A), analysis, virtual givens in light of the presence of the dispute's two vessels were Step Two's findings of concurrent admiralty jurisdiction followed by overlapping OCSLA and admiralty jurisdiction, and completed by admiralty's rout of OCSLA on grounds of jurisdictional overlap and of the "other Federal laws" and "of its own force" devices. Instead, the court upset these well-settled expectations by opting to substitute for conventional analysis a fusion of *Executive Jet/Grubart* with *Rodrigue* /OCSLA. Negating admiralty law's selection, the court stated that "[t]he DB-50's involvement in the accident and other elements of maritime activity that proceed or surround the [platform's] construction on the Shelf are insufficient to support either admiralty jurisdiction or the application of substantive maritime law."<sup>229</sup> It declared the back door closed to admiralty law: "maritime law cannot apply of its own force because there is an insufficient connection between the underlying tort and traditional maritime activity."<sup>230</sup>

Macondo does not need *AmClyde* to credibly challenge admiralty jurisdiction as inappropriate under *Executive Jet* grounds. But a comparison of the two scenarios is provocative nonetheless because they are united by striking factual similarities. Both present watercraft in prominent roles: *AmClyde* features a materials barge, and the DB-50, a derrick barge. Macondo has the Deepwater Horizon. Both have

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<sup>228</sup> *AmClyde* at 771.

<sup>229</sup> *Id.* at 775.

<sup>230</sup> *Id.* at 774.

undoubted OCSLA situs: *AmClyde*'s fixed platform and Macondo's OCSLA subsoil and seabed oil and gas well. And both are pursuing the same OCS "operation": exploitation of the OCS for oil production. There are, of course, differences between two that distance Macondo even further from admiralty than *AmClyde*. Macondo engages predominantly federal statutes –OCSLA and OPA -- not the OCSLA-endorsed state law on which Texaco relied. Conceding the Deepwater Horizon's not insignificant role in Macondo, the DB-50 was even more prominent in the *AmClyde* tort as the situs upon which the attached derrick crane failed. Conversely, the Macondo well merits top billing over the Deepwater Horizon. The well generated 4.9 million barrels of oil and its blowout caused the Deepwater Horizon's incineration and discharge of a mere six/ten thousandths of the total amount of the event's oil.

### C. Scorecard: OCSLA Phase III (Post-1990)

*Rodney Dangerfield Issue:* OCSLA section 1333(a)(1)'s standing with respect to the selection and application of federal law remains unchanged. Likewise unchanged is its inclusion of "temporarily attached" drilling platforms. But whether this language will have the same or similar force in conjunction with OPA (either directly or as an interpretational aid for the latter) as it enjoyed in conjunction with former title III is unclear. Even if it does not, however, the continued vigor of the section's "temporarily attached" language counts against the conclusion that the Macondo tort satisfies *Executive Jet's* (non-OCSLA) substantial relationship criterion.

*Talisman Issue:* The outcome of this issue will likely depend upon how the judiciary regards the plasticity of terms such as MODU, which may connote a "vessel" pure and simple or which, when "use[d] as an offshore facility" assumes the character of the latter. Also influential will be whether OPA sec. 2703(c)(3)'s dichotomy between an "Outer Continental Shelf facility" and a "vessel carrying oil as cargo from such a facility" is deemed to replicate OCSLA's definition of an "offshore facility" which clearly includes semisubmersibles like the Deepwater Horizon, but excluded oil-transporting vessels. Nor can Section 1333(a)(1)'s "temporarily attached" language be disregarded on the faulty premise that OPA has repealed it by implication in the same measure –OPA--that Congress employed expressly to repeal title III. It remains to be seen whether *AmClyde's* dismissal of the materials and DB-50 barges as background noise will be honored in future Fifth Circuit decisions. *AmClyde* does demonstrate, however, both *Executive Jet's* power to trump the Fifth Circuit's conventional section 1333(a)(2)(A) analysis within the familiar UTP 3-step format, and the distinction between its test's locational (vessel/navigable waters) and purpose (link of the venture underlying the tort with a "traditional maritime activity") components.

*Gusher Issue:* OPA does not supplant OCSLA's non-repealed provisions framing its regional environmental framework. The Gusher Issue's status continues, therefore, as stated in the 1978 Scorecard. The *Oppen* opinions' contrary position should not prevail.

*Alien Issue:* The preceding observations regarding the challenges Macondo faces satisfying the substantial relationship test caution that the latter will prove even more threatening to admiralty jurisdiction than the Deepwater Horizon's status as an "Outer Continental Shelf offshore facility." In combination, the two objections will prove formidable, perhaps even insuperable.

## V. Conclusion

*Executive Jet's* substantial relationship principle has played a prominent role in this paper's inquiry. It is fitting, therefore, to conclude by asking how criticisms of the principle overall<sup>231</sup> measure up against the test's use in the Macondo setting. The conclusion here is that it holds up admirably if *Grubart's* qualification is respected that the "test turns on the comparison of traditional maritime activity to the arguably maritime character of the tortfeasor's activity *in a given case*...."<sup>232</sup> An examination of the criticisms reflects that applying the test in Macondo's tightly framed OCS "operations" setting either avoids the problems that more open-ended settings are claimed to present, or generates benefits that outweigh the costs of abandoning the former brightline location rule.

The criticisms selected are represented by the overlapping concerns voiced by Judge Posner in *Tagliere v. Harrah's Illinois Corporation*,<sup>233</sup> Justice Scalia in *Sisson v. Ruby*<sup>234</sup> and Justice Thomas, joined by Justice Scalia, in *Grubart*.<sup>235</sup> Four in number, the first asserts that the loss is indefensible because the test is likely to be required only for "rare freakish cases."<sup>236</sup> In characteristically colorful phrasemaking, Justice Scalia speaks of torts that fail the test as "exotic actions [that] appear more frequently in the theoretical musings of the 'thoroughbred admiralty men' ... than in the federal reports."<sup>237</sup>

To describe the Macondo blowout as a "rare freakish event," however, would be perverse. The President's Commission reports that from 1996 to 2009 in the United States Gulf of Mexico alone there were 79 reported cases of loss of well control accidents, which occur when hydrocarbons flow uncontrolled either underground or at the surface.<sup>238</sup> It is true that litigated OCS oil well blowouts have

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<sup>231</sup> See authorities cited supra note 65.

<sup>232</sup> *Grubart* at 542.

<sup>233</sup> 445 F.3rd 1013 (7th Cir. 2006).

<sup>234</sup> 497 U.S. 358, 368 (1990) (Scalia, J., concurring).

<sup>235</sup> *Grubart* at 549 (Thomas J., joined by Scalia, J., concurring).

<sup>236</sup> *Sisson v. Ruby*, 497 U.S. at 358 (1990) (Scalia, J.). See also *Grubart* at 555 ("freakish cases, Thomas J.); *Tagliere* at 1014 (7th Cir. 2006) ("freak cases," Posner, J.).

<sup>237</sup> *Sisson*, 497 U.S. at 374.

<sup>238</sup> See *President's Report* at p. 226-29 for a tabular listing of each event. The report recounts the general history of 20th Century American oil spills, well blowouts, and

been rare, but they are hardly “freakish.” On the contrary, the risk of the devastating consequences that have become a reality throughout the Gulf following the Macondo blowout has been the subject of decades of sustained, apprehensive Congressional attention. Uncertainty whether, where and when there will be another Macondo-type blowout must be measured against the frightening magnitude of a multi-million barrel event. Unfortunately it is a risk that will only increase as future wells are drilled even deeper, further out to sea, and in less hospitable environments than the Gulf.<sup>239</sup>

The second objection relates to who will make the call on the test. The matter would not be controversial at all if the task were assigned to Congress. Justice Thomas, for example, would not likely complain as he did in *Grubart* that leaving the matter to judges “may permit judicial power to reach beyond its constitutional and statutory limits, or ... discourage judges from hearing disputes properly before them.”<sup>240</sup> Whether or not this criticism is persuasive in non-OCS contexts, however, it is of little consequence in the Macondo OCSLA setting where the framework for a disciplined evaluation of the call has already engaged Congress at the deepest policy and substantive level. Congress and a score of technically proficient federal agencies have spent decades defining policies and practices for management and governance of OCS oil drilling operations. The courts, therefore, enjoy guidance that is as well-framed for pronouncing on the question in this “given case” as they enjoy in other spheres featuring similar Congressional policy review and draftsmanship and federal agency rulemaking.

This conclusion is not undermined by the turbulence in Fifth Circuit OCS decisions noted both within the Circuit<sup>241</sup> and in commentary.<sup>242</sup> The disorder is more likely a result of the Circuit’s self-acknowledged disinclination<sup>243</sup> to honor the guidance afforded by OCSLA’s legislative history as amplified in the pertinent Supreme Court opinions. The problem, in short, does not lie with the substantial relationship test, which, in the OCS drilling context, functions as a restraint upon, not an enabler of unduly expansive admiralty jurisdiction.

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the disruptive effects of hurricanes and other natural disasters on platform construction and drilling in Chapters 2-6.

<sup>239</sup> See *id.* at 294.

<sup>240</sup> *Grubart* at 549.

<sup>241</sup> Illustrative is the plaint of one Fifth Circuit judge addressing a 43 U.S.C. sec. 1333(a)(2)(A) (2006) problem: “In each new case, a panel of this court must comb through a bewildering array of cases that rely upon inconsistent reasoning in the hope of finding an identical fact situation. Absent en banc reconciliation, cases thus are decided on what seems to be a random factual basis.” *Smith v. Penrod Drilling Corp.*, 960 F. 2d 456, 461 (5<sup>th</sup> Cir. 1992) *overruled on other grounds*, *Grand Isle Shipyard, Inc. v. Seacor Marine LLC*, 589 F. 3<sup>rd</sup> 778 (5<sup>th</sup> Cir. 2009).

<sup>242</sup> For an exhaustive collection of widely divergent Fifth Circuit cases in what Professor Robertson terms this “infamously chaotic” sphere, see *Mistakes* at 480.

<sup>243</sup> See *supra* note 47.

Closely related to the second question is the third: whether judges will be able to fashion rules for the substantial relationship test without increasing “complication and uncertainty,<sup>244</sup> introducing “disruption and confusion,”<sup>245</sup> or rendering the jurisdiction determination “hopelessly uncertain.”<sup>246</sup> Staying focused on the “given case,” the same considerations that overcame the preceding objection apply forcefully to this one as well. Congress has already defined criteria pursuant to which jurisdictional lines should be drawn respecting OCS “operations.”<sup>247</sup> The judiciary’s role, therefore, is closely tethered to and necessarily conducted within a framework precisely delineated by these criteria.

The final objection achieves crisp statement in Judge Posner’s dictate that “the most important requirement of a jurisdictional rule is not that it appeals to common sense but that it be clear.”<sup>248</sup> He proposes as an alternative basis the Extension of Admiralty Jurisdiction Act,<sup>249</sup> which establishes admiralty jurisdiction independent of the “substantial relationship” requirement. He acknowledges, however, his position’s conflict with the Act’s legislative history, the contrary decisions of other circuits, and the Supreme Court’s refusal to rule one way or the other on the question. Nonetheless, he continued

[w]e do not think that the [Act’s] legislative history should override [its] broad statutory language, which provides a clear and simple jurisdictional test for cases like this in contrast to the vague ‘maritime nexus’ (or ‘connection’) test ... that is used to determine jurisdiction under section 1333(1)....”<sup>250</sup>

The persuasiveness of Judge Posner’s reasoning is contingent upon the context in which it, along with the arguments of Justices Scalia and Thomas, is offered: namely, a clash between the competing claims for jurisdiction and law selection in which the candidates are general maritime or admiralty law and *state* law. But Macondo’s context opposes *federal* non-admiralty statutory law to judge-made general maritime law. *Delaval* counsels that the presence of a federal statute resets the question.<sup>251</sup> Consequently, Judge Posner’s cost/benefit analysis – clarity over common sense to avoid replacing simplicity with complexity in determining jurisdiction- must be revised to take into account other variables introduced by OCSLA and OPA, the Macondo context’s federal statutes.

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<sup>244</sup> Sisson, 497 U.S. at 387 (Scalia, J.).

<sup>245</sup> *Grubart* at 1015 (Thomas J.)

<sup>246</sup> Tagliere, 445 F. 3<sup>rd</sup> at 1015 (Posner, J).

<sup>247</sup> OCSLA sec. 1349(b)(1). See TAN 223-24 supra.

<sup>248</sup> Tagliere, 445 F.3<sup>rd</sup> at 1013.

<sup>249</sup> 46 U.S.C. sec. 30101 (2006).

<sup>250</sup> Tagliere, 445 F.3<sup>rd</sup> at 1014.

<sup>251</sup> See TAN 53 supra.

A shift to the Macondo context brings to light a variety of costs avoided by the substantial relationship inquiry that are incurred by choosing “clarity” over “common sense.” Most have already been addressed in this paper, starting with dishonoring the Congressional intent reflected in OCSLA ‘53’s legislative history as further elaborated in pertinent Supreme Court opinions. But others merit attention as well. Unduly broad assertions of admiralty jurisdiction cost the states their opportunity to participate in matters peripheral to admiralty’s central concerns. Since admiralty jurisdiction in the general maritime law vs. state law contests typically begets the application of substantive admiralty law, these claims frustrate Congress’s recognition that OCSLA platform workers’ social welfare needs are best secured by OCSLA-endorsed state law under section 1333(a)(2)(A).

Within Macondo’s context, moreover, Judge Posner’s clarity is achieved not by the application of Occam’s razor –the excision of spurious or redundant claims-- but by expunging vital elements demanded for the inquiry’s rational pursuit. One such element evident throughout this paper is zeroing out OCSLA/OPA’s environmental values as indispensable components of any analysis of Macondo’s jurisdictional basis, while isolating the “vessel” question as though its outcome has nothing to do with these values or their means of implementation. Another is the opportunity to address the fundamental issue of rationality that *Executive Jet* boldly and properly sets forth: what are the components of a proper fit between a dispute’s content and the appropriateness of its resolution under admiralty rules and procedures?

A difficult question to be sure, and one whose response must be acutely sensitive to the dispute’s context. But it needs to be asked if the venture is to claim any pretense of rationality. When pursued in the Macondo context, the following questions present themselves:

Is it rational to assimilate the Deepwater Horizon MODU to a general maritime law “vessel” in light of the astonishing technological transformation of oil drilling technology and infrastructure that has radically increased the risk of these disasters in just the last 30 years?<sup>252</sup>

Is it rational to apply judge-made maritime tort rules to govern the Macondo blowout in view of the conflicting values and constituencies that shaped these rules, on the one side, and OCSLA ‘78 and OPA, on the other?<sup>253</sup>

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<sup>252</sup> See *President’s Commission* at 32-53. As only one example of infrastructure innovation, the Report features a mock-up of Shell Oil’s Auger fixed oilfield platform that, in spatial scope, dwarfs New Orleans entire central business district, the contiguous Mississippi River and the adjoining West Bank. *Id.* at 39.

<sup>253</sup> The differences reflect a shift from the 18<sup>th</sup> and 19<sup>th</sup> century’s dominance of the values of shippers and insurers abetted by the nation’s desire to nurture its maritime commerce to the last-third of the 20<sup>th</sup> century’s embrace of environmental values that forced the radical accommodations found in OCSLA ‘78 and OPA.

Is it rational to assume that judges can or should seek to cope with the complexity and pace of technological, economic and attitudinal changes documented in this paper through general maritime law rule-making, when Congress and scores of federal agencies have had continuously to revise their posture toward the pollution and environmental consequences of OCS drilling operations, and appear poised to do so for the fourth time in a half century?

Is it rational to assume that admiralty law --a “very limited body of customs and ordinances of the sea,” according to Justice Holmes”<sup>254</sup>-- ever possessed or possesses now the jurisprudential genes required to achieve the necessary fit with the complex demands of OCS governance?<sup>255</sup>

Finally, is it rational to assume that if these questions are approached from an admiraltycentric perspective, they will yield to any other than an admiraltycentric response?<sup>256</sup>

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Illustrative are the latter’s broader liability rules, lesser liability limitations, and broader categories of aggrieved parties and damages (e.g., economic loss disassociated from owner property damage, environmental resource damages, streamlined damaged claim procedures, new classes of third-party plaintiffs, and expanded insurer exposure). For a detailed account of these shifts, see Lawrence Kiern, *supra* note 61.

<sup>254</sup> *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 235 (1917) (Holmes J., dissenting).

<sup>255</sup> Pertinent to a response is Justice Marshall’s statement’s that “the demand for tidy rules can go too far, and when that demand entirely divorces the jurisdictional inquiry from the purposes that support the exercise of jurisdiction, it *has* gone too far.” *Sisson v. Ruby*, 497 U.S. at 364, n. 2.

<sup>256</sup> This paper has evaluated its principal issues and themes as an exercise in legal method, constitutional and statutory interpretation and jurisprudence derived from pertinent federal legislation and Fifth Circuit and Supreme Court decisions. An equally cogent approach might evaluate admiralty’s claim for jurisdictional priority over OCS operations as a struggle for institutional primacy that calls to mind England’s brass-knuckle, centuries-long warfare between common law and equity or, indeed, common law and admiralty. For the latter, see David Robertson, *Admiralty and Federalism* 43-64 (1970). It is no denigration of legal process to suggest that extra-legal competitive dynamics may have something to do with the following outcomes, among others, considered in this paper: the Fifth Circuit’s treatment of personal injury torts atop drilling platforms as admiralty torts for 16 years following the enactment of OCSLA ’53 on the basis of a construction of the Act in *Pure Oil Co. v. Snipes*, 293 F. 2d 60 (5<sup>th</sup> Cir. 1961) that utterly ignores its legislative history; the neutering of OCSLA post-*Rodrigue*; the reluctance to concede law selection, law application or substantive force to OCSLA section 1333(a)(1) prior to or following OCSLA ’78; the pre-*Herb’s Welding* inclusion of OCS drilling operations as LHWCA “maritime commerce”; or *Grand Isle Shipyard, Inc. v. Seacor Marine LLC*, 589 F. 3<sup>rd</sup> 778 (5<sup>th</sup> Cir. 2009), which, in overruling decisions that select and apply

## ADDENDUM: B-1 Bundle Rulings

Immediately prior to the submission of this paper for publication, Judge Barbier handed down an “Order and Reasons” concerning the Macondo MDL Plaintiffs’ “B-1” Master Complaint, Defendants’ Motions to Dismiss, and the Plaintiffs’ Oppositions.<sup>257</sup> The B-1 “Bundle” includes various categories of plaintiffs pressing over 100,000 individual claims of diverse forms of economic loss damages under general maritime law, OPA, and various state laws. The rulings hue to the admiraltycentric outcomes driven by the Fifth Circuit model,<sup>258</sup> a result at the trial level that does not surprise given the force of the appellant precedents binding upon the District Court. With the Transocean Concursus action already set as the first of the MDL actions,<sup>259</sup> moreover, a ruling denying the Macondo’s status as an admiralty tort was unlikely, as earlier intimated.<sup>260</sup>

Limitations of space and time preclude attention to reviewing the full battery of the court’s rulings or to detailed consideration of the two that are addressed here. The first declares that the Deepwater Horizon is a “vessel,” “as that term is defined and understood in general maritime law.”<sup>261</sup> The second, that the Macondo OCS operation satisfies the *Executive Jet/Grubart* “substantially related to a traditional maritime activity” requirement.<sup>262</sup> Only summary discussion of these two rulings is called for in any event because both were anticipated and their pros and cons precisely detailed in the paper’s body.

The court’s first ruling proceeds from two deficient premises. One is that the concept of a “vessel” is *generic throughout admiralty law* rather than a creature of the particular governing statute in question, if such there be, that includes or excludes watercraft on the basis of stated criteria. OCSLA, of course, fulfills this role, along with OPA, in the Macondo setting. Despite the OCSLA/OPA combine, the *B1 Bundle* ruling draws randomly from and treats generically the status of specialized

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tort “law of the locus” rather than contract “focus of the contract” principles to indemnity actions arising from tortious personal injuries, increases the likelihood that admiralty law will be preferred over OCSLA-endorsed state law in these contests. If the Supreme Court’s declaration is taken seriously that OCSLA incorporates Congress’s intent that “admiralty treatment [be] eschewed altogether,” *Rodrigue* at 365 n.12, *Executive Jet* does valuable service in requiring that the issues posed in this paper, no less than OCSLA itself, be taken seriously as well.

<sup>257</sup> In re: Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, Case 2:10-md-02179-CJB-SS Doc. 3830 (E.D. La. 2011) [hereinafter *B1 Bundle*].

<sup>258</sup> This model is outlined supra Part I.B.1.

<sup>259</sup> See supra note 14 and accompanying text.

<sup>260</sup> See infra TAN 14.

<sup>261</sup> *B1 Bundle* at 4.

<sup>262</sup> *B1 Bundle* at 8.

watercraft in Jones Act,<sup>263</sup> LHWCA<sup>264</sup> and OCS<sup>265</sup> settings. OCSLA's legislative history, text amendments, and interpretation by federal agencies demand a different approach as amply detailed in Part III B.1 of this paper. Contrary to the ruling, they demonstrate the necessity for the precise attention to context superbly exemplified by Judge Politz's warning in *Houston Oil & Minerals Corporation v. American International Tool Company*, that "[w]e are not convinced that the term "vessel" for Jones Act purposes, which is subject to liberal construction consistent with the purposes of the Act, is necessarily a vessel for other purposes as well...."<sup>266</sup>

The ruling's second ground is that *mobility* lies at the root of the generic "vessel" concept. To hold that a mobile platform is not a "vessel," the court states, runs "counter to longstanding case law which establishes conclusively that the Deepwater Horizon, a **mobile** offshore drilling unit, was a vessel."<sup>267</sup> Combining this premise with the generic concept position, the court's recourse to *Dutra* is inevitable in light of *Dutra*'s description of a "vessel" as "any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment."<sup>268</sup> Ignored are that *Dutra* is a *non-OCS location* case involving a *non-OCS "operation,"* as defined in OCSLA sec. 1333(a)(1). Hence, *Dutra*'s source for application of the "vessel" concept is general maritime law, not OCSLA sec. 1333(a)(1) and the OPA provisions outlined earlier.<sup>269</sup> While the Deepwater Horizon's mobility does indeed constitute it a MODU, moreover, the latter term is but a first step in the complex process described in Part IV.A. of determining whether the rig also qualifies as an *OPA sec. 2701(37) "vessel,"* a process the ruling ignores.

The court's ruling that the Macondo operation is substantially related to a traditional maritime activity disposes of this complex issue in a single conclusory sentence,<sup>270</sup> buttressed by a citation to the Fifth Circuit's *Theriot v. Drilling Bay*

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<sup>263</sup> *Offshore Co. v. Robison*, 266 F.2d 769 (5<sup>th</sup> Cir. 1959).

<sup>264</sup> *Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005).

<sup>265</sup> *Demette v. Falcon Drilling Co., Inc.* 280 F.3<sup>rd</sup> 492 (5<sup>th</sup> Cir. 2002), *overruled in part on other grounds by Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3<sup>rd</sup> 778 (5<sup>th</sup> Cir. 2009) (en banc).

<sup>266</sup> 827 F.2d 1049, 1053 (5<sup>th</sup> Cir. 1987), *cert. denied*, *AMF Tuboscope, Inc. v. Houston Oil & Minerals Corp.*, 484 U.S. 1067 (1988). *Houston Oil* was a negligence and products liability action arising from the malfunction of a mud saver sub aboard an OCS mobile drilling rig. Among other cases cited by the court for its holding that OCSLA-endorsed state law applied are *Executive Jet*, *id.* at 1053; *Foremost Ins. Co. v. Richardson*, 457 U.S. 688 (1982); *Herb's Welding*, 470 U.S. 414 (1986); and *Sohyde Drilling Co. v. Coastal Gas Prod. Co.*, 644 F.2d 1132 (5<sup>th</sup> Cir. 1981).

<sup>267</sup> *B1 Bundle* at 5 (boldface as quoted).

<sup>268</sup> *Stewart v. Dutra Constr. Co., Inc.*, 543 U.S. 481, 497 (2009).

<sup>269</sup> See *supra* Part IV.A.

<sup>270</sup> The sentence, as it appears in in *B1 Bundle* at 8 declares: "Second, the operations of the DEEPWATER HORIZON bore a substantial relationship to traditional

*Drilling Corporation* decision.<sup>271</sup> As a *nisi prius* court the Eastern District of Louisiana is accountable, of course, to and properly must take into account Fifth Circuit precedents. Despite the Fifth Circuit's ample delineation of admiralty jurisdiction's bounds,<sup>272</sup> however, *Theriot's* citation as the authoritative precedent is ill-chosen even within the Circuit's jurisprudence. *Theriot's* oil drilling operation occurred in Galveston Bay, not on the OCS,<sup>273</sup> and addressed a contract, not a tort issue.<sup>274</sup> As a non-OCS event, of course, the operation is not subject to OCSLA's coverage as detailed in Part II. C.-E., nor to the considerations bearing upon its status under *Executive Jet/Grubart* detailed in in Part IV.B. Framing a dispute as a contract rather than a tort action, moreover, biases the outcome in favor of admiralty jurisdiction.<sup>275</sup> Finally, predicating the ruling's result on *Theriot* conflates *Executive Jet/Grubart's* test's location requirement with its separate requirement calling for an independent analysis of the underlying activity giving rise to the alleged admiralty tort.<sup>276</sup>

The question whether the Macondo blowout is an admiralty tort taps deeply into the decades-long tension between the Fifth Circuit and the Supreme Court over OCSLA's scope. The ultimate venue for its definitive resolution properly lies elsewhere than in the District Court, whichever outcome the latter might have preferred. Whether or not the Macondo MDL action will afford the occasion for the issue's denouement remains to be seen.

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maritime activity. See *Theriot v. Bay Drilling Corporation*, 783 F.2d 527, 538-39 (5<sup>th</sup> Cir. 1986) (“oil and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce”).”

<sup>271</sup> 738 F.2d 527 (5<sup>th</sup> Cir. 1986)

<sup>272</sup> See examples cited supra note 256 supra.

<sup>273</sup> Id. at 530.

<sup>274</sup> *Theriot* addressed an indemnity contract for injuries incurred by the employees of their respective contractors. Id. at 538-40.

<sup>275</sup> See supra note 41. *Theriot* demonstrates as much in its declaration that “[w]hether a particular contract can be characterized as maritime depends on the nature and character of the contract, not on the situs of its performance and execution.” Id. at 538.

<sup>276</sup> See supra note 214 and accompanying text.

