

Louisiana Law Review

Volume 73 | Number 1

Coastal Land Loss in the Gulf Coast and Beyond: A

Symposium

Fall 2012

And Not a Drop to Drink: Admiralty Law and the BP Well Blowout

John Costonis

Louisiana State University Law Center

Repository Citation

John Costonis, *And Not a Drop to Drink: Admiralty Law and the BP Well Blowout*, 73 La. L. Rev. (2012)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol73/iss1/2>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

And Not a Drop to Drink: Admiralty Law and the BP Well Blowout

John Costonis*

I. INTRODUCTION

In an earlier Essay, I questioned whether the BP Macondo well blowout qualifies as an admiralty tort.¹ The blowout scenario features BP's exploratory oil and gas well and Transocean's Deepwater Horizon, a Mobile Offshore Drilling Unit (MODU). I appreciated then as now that my approach to the question's resolution diverges from a framework (Fifth Circuit Model) employed by commentators and federal courts within the Federal Fifth Circuit to assess torts occasioned by injuries or deaths of workers atop Outer Continental Shelf (OCS) oil and gas drilling platforms.

Confirmation appeared shortly thereafter in Professor David Robertson's reply essay² and in the Federal Eastern District of Louisiana's opinion in the BP *MDL B-1 Bundle Order and Ruling (B-1 Bundle)*.³

Both look to the Fifth Circuit Model to characterize the blowout as an admiralty event. Paralleling my original and present essays, both focus on what *B-1 Bundle* terms "all claims for private or 'non-governmental economic loss and property damages.'"⁴ These claims, which exclude oil-platform-worker personal injury and death claims, correspond with the inventory of economic-property losses labeled "covered damages" in section 2702(b) of the Oil Pollution Act of 1990 (OPA).⁵

Copyright 2012, by JOHN COSTONIS.

* Chancellor Emeritus and Professor of Law, Paul M. Hebert Law Center, Louisiana State University. Professor Costonis gratefully acknowledges the support of the LSU Law Center Research Support program and the helpful comments of his colleagues, Professors Martin, Devlin, and Richards. Professor Costonis is not a consultant to or otherwise compensated by any party engaged in the legal proceedings discussed in this Essay.

1. See John Costonis, *The Macondo Well Blowout: An Admiralty Tort?*, 59 LA. B. J. 28 (2011).

2. David W. Robertson, *Jurisdiction and Choice of Law Issues in OCS Oil Spill Cases*, 59 LA. B. J. 344 (2012).

3. *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico*, on April 20, 2010, 808 F. Supp. 2d 943 (E.D. La. 2011) [hereinafter *B-1 Bundle*].

4. *Id.* at 947.

5. Pub. L. No. 101-380, 104 Stat. 484 (2006) (codified as amended at 33 U.S.C. §§ 2701-2761 (2006 & Supp. III 2009)). *B-1 Bundle* also addresses claims for punitive damages, which, although allowed under general maritime law, are not included in OPA section 2702(b).

Despite the applicability of the Outer Continental Shelf Lands Act (OCSLA)⁶ to the Macondo blowout, Professor Robertson asserts that “a vessel-related oil spill into the waters over the Outer Continental Shelf (OCS) is [no] less an admiralty matter than a spill into high seas beyond the OCS or into state waters inshore of the OCS.”⁷

B-1 Bundle comes to the same result by employing the Fifth Circuit Model and, largely, the same precedents as Professor Robertson.⁸ The blowout qualifies as an admiralty tort, according to *B-1 Bundle*, because it meets the two standards essential to water-borne status decreed in the United States Supreme Court decision in *Executive Jet Aviation Company v. City of Cleveland*⁹ and its progeny:¹⁰ location and a “substantial relation to a

6. Ch. 345, 67 Stat. 462 (1953) (codified as amended at 43 U.S.C. §§ 1331–1356a (2006 & Supp. III 2009)) [hereinafter OCSLA].

7. Robertson, *supra* note 2, at 345.

8. *B-1 Bundle*, 808 F. Supp. 2d 943, unlike Professor Robertson or my original essay, also addresses the issue of OPA’s displacement of general maritime law. It held that, subject to an exception obligating claimants suing OPA responsible parties to satisfy the procedural requirements of OPA section 2713, OPA and OCSLA do not displace general maritime law. Three consequences attend this stunningly aggressive holding, which affords private claimants a parallel track alongside OCSLA–OPA to press their property- and economic-loss claims. First, claimants may bring general maritime law actions seeking the same damages under that law that are defined as “covered damages” under OPA section 2702(b). Second, OPA’s silence regarding punitive damages does not bar their pursuit under general maritime law. Finally and by implication rather than statement, OPA’s express displacement of the Limited Liability Act of 1851, now codified at 46 U.S.C. §§ 30501–30512 (2006), in OPA section 2718(a) and (c) does not bar consideration of OPA’s “covered damages” under the Act’s procedures so long as the claims are packaged for assertion via the parallel track afforded by general maritime law. Subject to the foregoing exception, these claims may be asserted against *all* of the blowout’s potentially liable parties (e.g., Cameron, Halliburton, and others), despite OPA section 2713, which restricts B-1-type claimants to actions against “responsible parties” alone. The present Essay identifies a variety of problematic outcomes owing to the Fifth Circuit’s self-confessed appetite for the “reflexive invocation of admiralty jurisdiction,” which arise in this Essay’s inquiry into Macondo’s status as an admiralty tort. *Lewis v. Glendel Drilling Co.*, 898 F.2d 1083, 1087 (5th Cir. 1990). Admiralty-aggressive outcomes are no less prominent, however, in *B-1 Bundle*’s grant of the parallel track to general maritime law. In view of the unwieldiness of addressing both the admiralty jurisdiction and admiralty displacement issues in a single study, the author is preparing an independent essay addressing the latter.

9. 409 U.S. 249 (1972).

10. *See, e.g.*, *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1989); *Sisson v. Ruby*, 497 U.S. 358 (1990); *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995). *B-1 Bundle* specifically references the last-named of this triad.

traditional maritime activity” (SRTMA). As a MODU, the Deepwater Horizon satisfies the first because it is a “vessel in navigable waters.”¹¹ Macondo’s Outer Continental Shelf (OCS) drilling operations comply with the SRTMA principle,¹² it is claimed, in line with *Theriot v. Bay Drilling Corporation*’s holding that “oil and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce.”¹³

Robertson and *B-1 Bundle* discern no differences at all between the Macondo blowout and the Exxon Valdez spill, or between Macondo and the personal injury–indemnity contract scenario addressed in *Theriot*. They likewise equate the Deepwater Horizon with the Super Scoop dredging barge, which the United States Supreme Court deemed a “vessel” in *Stewart v. Dutra Construction Company*.¹⁴

The Exxon Valdez spill occurred in state waters, however, and was entirely sourced from a vessel.¹⁵ Macondo, in contrast, featured two discharges, each of which originated from a situs identified in OCSLA.¹⁶ Some 4.9 million barrels issued from the OCS seabed, denominated by OCSLA as an exclusive federal enclave and a component of the nation’s public lands.¹⁷ As a “temporarily attached device” (TAD),¹⁸ the Deepwater Horizon MODU likewise qualifies as an OCSLA situs.¹⁹

11. See *B-1 Bundle*, 808 F. Supp. 2d at 950 (quoting *Jerome B. Grubart, Inc.*, 513 U.S. at 535).

12. *Id.* at 951.

13. 783 F.2d 527, 538–39 (5th Cir. 1986).

14. 543 U.S. 481 (2005).

15. A sobering and decidedly more realistic perspective on the functional nonequivalence of non-OCS vessel-related oil spills and OCS well blowouts appears in a separate statement from congressional testimony on OPA offered by Senators Chaffee, Lieberman, Durenberger, and Graham, who prefigured the Macondo tragedy in their warning 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 sometimes fill hundreds or even thousands of tankers the size of the Exxon Valdez.

See S. REP. NO. 101-94, at 26–27 (1989), reprinted in 1990 U.S.C.C.A.N. 722, 748–49.

16. OCSLA section 1333(a)(2)(A) covers the BP well as a “fixed structure” located on the “subsoil and seabed of the outer Continental Shelf”; OCSLA section 1333(a)(1) addresses the Deepwater Horizon MODU in its reference to “temporarily attached” devices employed in the extraction of the OCS seabed’s resources. 43 U.S.C. § 1333(a)(1), (a)(2)(A) (2006).

17. See discussion *infra* Part IV.

18. The phrase is derived from OCSLA section 1333(a)(1) which states in relevant part:

Stewart predicated the Super Scoop's status as a "vessel" on general maritime law.²⁰ Neither OPA nor OCSLA played any role in *Stewart* because the Super Scoop was dredging a trench in Boston Harbor territorial waters. *Stewart's* plaintiff, a worker aboard the dredging barge, sought compensation for personal injuries incurred during the dredging program.

The Deepwater Horizon MODU, on the other hand, was connected by a drillstring to its OCS seabed source and was completing the exploratory phase of BP's OCS drilling operations when the blowout occurred. Macondo's parties are inland-and-coastal private claimants seeking recompense for economic and property losses incurred 50 miles or more from the MODU in many cases. The vessel or nonvessel status of the Deepwater Horizon MODU, moreover, is governed by statutes—OCSLA section 1333(a)(1) and OPA section 2701—not by general maritime law.²¹

Professor Robertson²² and *B-1 Bundle*²³ agree that *Theriot* sustains their claim that OCS oil and gas drilling meets *Executive Jet's* SRTMA criterion. The *Theriot* action, however, originated neither from a spill nor a blowout, but from an oil barge employee's injury that gave rise, in turn, to an indemnity contract action between his employer and the oil and gas lessee. Sited on Galveston Bay, rather than on OCS waters, and occurring prior to OPA's adoption, the incident was governed neither by OCSLA (given its location) nor by OPA (given its date). At issue in *Theriot* was not a tort, as in Macondo, but a "maritime contract" governed by general maritime law.²⁴

The Constitution and laws . . . of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other *devices* permanently or *temporarily attached* to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom

43 U.S.C. § 1333(a)(1) (2006) (emphasis added).

19. See *Demette v. Falcon Drilling Co.*, 280 F.3d 492 (5th Cir. 2002) (qualifying a MODU as an OCSLA situs for purposes of OCSLA sections 1333(a)(1) and (a)(2)(A)), *overruled on other grounds by* *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F. 3d 778 (5th Cir. 2009).

20. *Stewart v. Dutra Constr. Co.* 543 U.S. 481 (2005). *Stewart's* immediate source for its definition of "vessel" is the codification of the general maritime law concept in 1 U.S.C. § 3 (2006).

21. See *infra* text accompanying notes 117–29.

22. Robertson, *supra* note 2, at 346.

23. *B-1 Bundle*, 808 F. Supp. 2d 943, 951 (E.D. La. 2011).

24. *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538 (5th Cir. 1986).

Ignored by Robertson and *B-1 Bundle*, moreover, is the most telling distinction between the Fifth Circuit's OCSLA-related tort model and the Macondo OCSLA–OPA tort cause of action (Macondo Tort):

The Model is driven by the Circuit's disposition towards securing damages or other compensation for workers atop OCS platforms (whether or not "fixed structures") suffering accidental injury or death. The Macondo Tort, in contrast, encompasses an off-platform regional population of over 100,000 claimants who have suffered economic and property loss in consequence of an OCS oil discharge.

The distinction between the two causes of action has gone unnoticed because the BP blowout is the first Fifth Circuit dispute of record in which an appreciation of these differences is essential to the dispute's resolution. Fifth Circuit reports feature one category of cases evaluating OCSLA platform-worker torts and another addressing OPA economic-loss torts. But the reports lack a single decision addressing the uniquely configured OCSLA–OPA Macondo Tort.²⁵ Only the rarest of OCS blowouts (and, rarer still, of OCS vessel spills) are likely to feature the volume of oil required to inflict private claimant property and economic losses on coastal and inland locations far removed from the pertinent OCS drilling operations.²⁶

Despite Professor Robertson's indifference to the territorial versus over-OCS waters distinction, OCSLA's role as an essential component of the tort cannot be ignored. OCSLA, the Supreme Court has declared, "define[s] a body of law applicable to the seabed, the subsoil and the . . . structures . . . on the Outer

25. The author's review of reported decisions by Fifth Circuit courts (district and appellate) discloses only *one* case discussing both OCSLA and OPA as components of its pertinent cause of action. But the case's key facts—the presence of an OCS *fixed* platform rather than MODU, the status of the platform's owner as the OPA *claimant* rather than as a responsible party (defendant), and an allusion involving contact of the defendant's seismic cable with a leg of the platform—materially distinguish the case from the *B-1 Bundle* fact pattern. *See* Sekco Energy, Inc. v. M/V Margaret Chouest, 820 F. Supp. 1008 (E.D. La. 1993). The OCS rig's owner, who experienced a well "shut-in" in consequence of the discharge of oil from the defendant's seismic cable, sought relief under OPA section 2702(b)(2)(E) for the economic losses associated with the shut-in.

26. Similar considerations likely account for the absence of reported litigation concerning claims under OCSLA title III, which dealt with similar economic losses prior to its repeal in 1990. *See infra* text accompanying notes 119–26.

Continental Shelf.”²⁷ OPA is no less essential to the tort, of course, because, as *B-1 Bundle* itself acknowledges, the statute “governs . . . private claims for property damage and economic loss resulting from a discharge of oil in navigable waters.”²⁸ The Macondo Tort, in short, inextricably engages *both* statutes in this unique configuration.

A. The Fifth Circuit Model and the Macondo Tort: A Comparison

The Macondo and the Fifth Circuit Model torts share only their common occurrence on OCSLA situses. Macondo’s private plaintiffs inhabit entire coastal and inland areas; the Model’s tort claimants are workers atop oil drilling rigs. The former seek recovery for their economic and property losses; the latter for personal injury or death. The former’s “covered damages” under OPA section 2702(b) encompass a range of economic and property loss injuries extrinsic to the Model’s physical injury–death categories, as the latter are processed in admiralty wrongful death, negligence, and statutory compensation schemes.

Macondo defines the status of MODUs through a complex web of OCSLA and OPA statutory terms; the Model, by *Stewart’s* all-inclusive general maritime law definition. The former pits two nonadmiralty federal statutes—OCSLA and OPA—against judge-made general maritime law, insuring displacement by the former of the latter in the event of conflict. The Model’s recurrent competitors in OCSLA section 1333(a)(2)(A) contests are federal general maritime law and state law, either *ex proprio vigore* or as OCSLA-endorsed surrogate federal law.²⁹ This pairing guarantees the former’s victory under the Model, which favors admiralty law when it is deemed to apply “of its own force.”³⁰

27. *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 355 (1969).

28. *B-1 Bundle*, 808 F. Supp. 2d at 953. Public agencies and other nonprivate entities may also pursue damage claims under OPA section 2702(b). The structural distinctions between the Fifth Circuit Model and the Macondo Tort format are detailed at greater length in John Costonis, *The Macondo Well Blowout: Taking the Outer Continental Shelf Lands Act Seriously*, 42 J. MAR. L. & COM. 511, 519–21 (2011) [hereinafter JMARC].

29. OCSLA section 1333(a)(2)(A) provides in relevant part that:
[t]o the extent that they are applicable and not inconsistent with . . . other Federal laws . . . , 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 . . .

43 U.S.C. § 1333(a)(2)(A) (2006).

30. See, e.g., *B-1 Bundle*, 808 F. Supp. 2d at 953; *Demette v. Falcon Drilling Co.*, 280 F.3d 492 (5th Cir. 2002), *overruled on other grounds by Grand*

Finally, the values at stake in Macondo receive expression in OCSLA's 1978 version, which incorporates a "new statutory regime"³¹ to protect the ecological integrity of the OCS and coastal areas through interlocking regulatory and liability strategies designed to prevent or remediate oil discharge damages. The Model, on the other hand, adheres strictly to OCSLA's original 1953 version, which focused narrowly on worker welfare atop drilling rigs and ignored OCS drilling's environmental costs, thereby enabling polluters to shift these costs to the victims of their oil discharges.³²

These differences give rise to five considerations that contest Robertson–*B-1 Bundle*'s classification of the Macondo Tort as an admiralty tort. The first is the imperative that the Model's framework creates for labeling the rigs auxiliary to OCS drilling operations as "vessels."

Critical to supportive worker outcomes is, first, the status of the employees (as seamen, as longshoremen or harborworkers, or as platform workers not engaged in maritime employment) and, second, the status of oil and gas drilling rigs (as "fixed platforms" or as "vessels"). The Fifth Circuit has striven to classify MODUs as "vessels" in order to extend to platform worker "seamen" the benefits of the Jones Act³³ and general maritime tort law. The Circuit has likewise generously construed the concept of "maritime employment" to bring nonseamen platform workers under the coverage of the Longshoremen and Harbor Workers' Compensation Act (LHWCA).³⁴

Isle Shipyard Inc., v. Seacor Marine, LLC, 589 F.3d 778 (5th Cir. 2009); Smith v. Penrod Drilling Co., 960 F.2d 456 (5th Cir. 1992), *overruled on other grounds by Grand Isle Shipyard*, 589 F.3d 778. The "of its own accord" doctrine has been criticized as inconsistent with both the text and legislative history of OCSLA section 1333(a)(2)(A), as well as with the Supreme Court's interpretation of the section in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352. See *Demette*, 280 F.3d at 504–10 (DeMoss, J., dissenting); JMARC, *supra* note 28, at 519–20, 535.

31. H.R. REP. NO. 95-590, at 10 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1450, 1461.

32. See JMARC, *supra* note 28 at 530, 533.

33. 46 U.S.C. § 30104 (2006). A powerful value driving OCSLA upon its adoption in 1953 was the protection of the social welfare of platform workers. Because Congress assumed that most of the latter would be from states adjacent to platforms, it called for OCSLA-endorsed adjacent state law to apply to platform events as surrogate federal law under OCSLA section 1333(a)(2)(A), absent an applicable federal law. See JMARC, *supra* note 28, at 530, 533–34.

34. Ch. 509, 44 Stat. 1424 (1927) (codified as amended at 33 U.S.C. §§ 901–950 (2006)). The term "maritime employment" appears in section 902(3).

Offshore Company v. Robison,³⁵ the judicial icon of the Jones Act–vessel pairing, illustrates the former observation. Writing over a half-century ago, Judge Minor Wisdom observed that “[t]he [Jones] Act has always been construed liberally, but recent decisions have expanded the coverage of the Jones Act to include almost any workman sustaining almost any injury while employed on almost any structure that once floated or is capable of floating on navigable waters.”³⁶ Buttressed today by the Supreme Court’s *Stewart* decision, the 1959 *Robison* decision continues as the centerpiece of Fifth Circuit decisions generally and in *B-1 Bundle* itself as the basis for equating MODUs with “vessels.”³⁷

Related efforts to extend the label of “maritime employment” for purposes of securing LHWCA compensation for platform workers are evident as well. In its *Herb’s Welding v. Gray* decision,³⁸ for example, the Fifth Circuit extended the label to a welder aboard a fixed platform engaged in OCS drilling.³⁹

The second of the five considerations is that the disposition to view all oil drilling rigs as “vessels” obscures the opposition to a “vessel” label reflected both in OCSLA’s 1978 characterization of MODUs as TADs and, less definitively, of OPA’s definition of key terms bearing on the Deepwater Horizon’s status.⁴⁰ Reasoning designed to support workers atop drilling platforms is simply not covariant with the OCSLA–OPA goal of compensating coastal–inland oil-discharge private victims.⁴¹

35. 266 F.2d 769 (5th Cir. 1959). That the *Robison* injury occurred in territorial waters and almost two decades prior to OCSLA ’78’s TAD amendment has gone unremarked in the half-century since its decision, as evidenced by the prominence accorded it, not only by *B-1 Bundle* and Professor Robertson, but also by virtually every other Fifth Circuit opinion on which both rely to support their identification of OCS MODUs as “vessels.” Perhaps a MODU is a “vessel.” If so, the honors go not to *Robison*, but to the OCSLA–OPA statutory definitions (in particular, those of OPA defining a “mobile offshore drilling unit” and a “vessel”), and then only after vanquishing OCSLA’s treatment of MODUs as TADs. See discussion *infra* Part IV.

36. *Robison*, 266 F.2d at 771 (emphasis added).

37. See *B-1 Bundle*, 808 F. Supp. 2d 943, 949 (E.D. La. 2011).

38. 703 F.2d 176 (5th Cir. 1983), *rev’d*, 470 U.S. 414 (1985).

39. The scope of “maritime employment” endorsed in this Fifth Circuit opinion was rejected by the Supreme Court, however, as overly generous in the *Herb’s Welding* appeal. See *Herb’s Welding v. Gray*, 470 U.S. 404 (1985); *infra* text accompanying notes 85–90.

40. See discussion *infra* Part IV.

41. Illustrative is an observation vented in congressional hearings supporting OCSLA’s amendment in 1978 to extend the statute’s coverage to TADs while adding a new OCSLA title III pollution prevention and liability regime. Drilling activities conducted from *exploration* platforms, such as the Deepwater Horizon MODU, present greater dangers of blowouts and spills than

The third is trivializing the hostility to “traditional maritime principles” of OCS drilling operations and of the associated OCSLA–OPA pollution liability regime. This consequence is explored in Part II’s rebuttal of Robertson–*B-1 Bundle*’s insistence that the Macondo blowout is SRTMA-compliant.

The fourth is the contribution of the “all drilling rigs are vessels” mindset to the rebuff that a distressing number of Fifth Circuit OCSLA opinions have experienced before the United States Supreme Court. The latter’s multiple reversals and overrulings seek to restrain, as contrary to Congressional will or the Court’s own jurisprudence, the Circuit’s expansive appetite for admiralty that usually, but not invariably, links up with its determined support for seafaring worker remedies.⁴²

Finally, *B-1 Bundle* views the Macondo Tort from the wrong end of the telescope by commencing with admiralty law and jurisdiction, and, as in *B-1 Bundle* itself, shaping the initial form

activities conducted from the *fixed* platforms employed for OCS development and production operations. In view of congressional testimony affirming these greater risks, excluding TADs from OCSLA’s coverage in the Macondo Tort setting (by deeming them “vessels”) while including the less risky fixed platforms is perverse. See *Outer Continental Shelf Lands Act Amendments of 1977, Part 2: Hearing Before the Ad Hoc Select Committee on the Outer Continental Shelf*, 95th Cong. 875–915 (1977) (response of Paul “Red” Adair, Red Adair Oil Well Fires and Blowouts Control Co., Houston TX, to committee member questions probing the comparative danger of blowouts from semisubmersibles versus permanent platform drilling structures).

42. See, e.g., *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969) (reversing two Fifth Circuit decisions below and undermining the Circuit’s decision in *Snipes v. Pure Oil Co.*, 293 F.2d 60 (5th Cir. 1961), which favored the applicability of admiralty law to accidents occurring on permanent drilling platforms); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 211 (1986) (reversing a Circuit ruling that Louisiana’s wrongful death statute applies *ex proprio vigore* in waters above the OCS); *Herb’s Welding*, 470 U.S. at 421 (overruling *Pippen v. Shell Oil Co.*, 661 F.2d 378 (5th Cir. Unit A Nov. 1981), and reversing as “untenable” the Circuit’s holding that “offshore drilling is maritime commerce”); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 104 (1986) (reversing a Circuit ruling as “subvert[ing] the congressional intent documented in *Rodrigue* . . . that admiralty doctrines should not apply under [OCSLA]”); *Pac. Operators Offshore, LLP v. Valladolid*, 132 S. Ct. 680, 686–87 (2012) (overruling the Fifth Circuit’s holding in *Mills v. Director*, 877 F.2d 356 (5th Cir. 1989) (en banc), that a “situs of injury” rather than “substantial nexus” between an injury and OCS drilling operations test determines LHWCA compensation pursuant to OCSLA section 1333(b)); cf. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 619 (1978) (reversing the Fifth Circuit ruling that survivors of deceased worker are entitled to general maritime law loss-of-society damages despite their disallowance under the Death on the High Seas Act).

and sequence of an entire MDL proceeding on general maritime law principles, holding OCSLA and OPA largely in reserve.⁴³

The Circuit's management of OCS platform-worker tort claims is neither tainted by nor the target of this criticism.⁴⁴ The welfare of workers at sea is a centuries-long commitment, heritage, and emblem of admiralty law and its expertise. However problematic in the Macondo setting, the Circuit's pride in the exercise of admiralty jurisdiction on behalf of seafarers is evident throughout its OCSLA jurisprudence. Rightly, the Circuit takes pride in its status as the nation's preeminent venue for the development of law at the intersection of admiralty and oil and gas operations.⁴⁵ It holds sway over an area of the lower 48 states in which the lion's share of United States' offshore drilling is conducted.⁴⁶

But the Macondo Tort totters on admiralty's far periphery, if indeed it respects this boundary at all. OCS drilling operations and their governance are post-1950 developments that feature environmental, public safety, and liability allocation issues of

43. See *supra* note 8. Appreciating the likely contentiousness of the statement in text, the author has reserved its discussion and defense to an entire essay in progress.

44. Other than the objection in text to uncritically transferring reasoning appropriate to the Fifth Circuit Model to the Macondo OCSLA-OPA tort, the author's uneasiness with Fifth Circuit jurisprudence is limited essentially to the Circuit's application of admiralty law as applying "of its own force" in the absence of evidence in relevant circumstances of congressional intent that admiralty law should override OCSLA. See JMARC, *supra* note 28, at 534-40; *infra* text accompanying note 107.

45. The Fifth Circuit's preeminence appears in a comparison of the number of opinions on the issues immediately relevant to this Essay decided by the Federal Fifth Circuit and its district-level trial courts with those of the nation's other eleven federal circuits and their associated trial courts, using as the comparison's database all non-United States Supreme Court federal cases cited in THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW (5th ed. 2011). The sampling derives from opinions cited by Professor Schoenbaum in Chapter 3, section 3-6 (*Admiralty Jurisdiction: What is a Vessel?*) and section 3-9 (*Admiralty Jurisdiction: Continental Shelf Operations*), and in Chapter 7, section 7-3 (*Longshore and Harbor Worker: Offshore Workers*). Among other topics, these sections exhaustively address vessel versus nonvessel distinctions; OCSLA jurisdiction with respect to OCS operations and activities; and the LHWCA-OCS interface as it relates to the coverage of OCS platform workers under the LHWCA. The combined total of cases cited, respectively, under these headings is as follows:

Opinions from the Federal Fifth Circuit and its District courts: 127

Opinions from the 11 other Federal Circuits and their District Courts: 13.

46. QUEST OFFSHORE RES. INC., THE STATE OF THE OFFSHORE U.S. OIL AND GAS INDUSTRY iii n.1 (2011), available at http://www.api.org/~media/Files/Policy/Exploration/Quest_2011_December_29_Final.ashx.

profound scientific, economic, legal, and policy complexity.⁴⁷ Congress and federal agencies have been addressing these issues through myriad statutes, including OCSLA and OPA, that are grounded in the Property and Interstate and Foreign Commerce clauses, not in the Admiralty Clause.⁴⁸

Macondo most surely is the worst environmental–oil pollution discharge disaster in the nation’s history. Judge-made general maritime law has proven itself no match for assessing or addressing an event of this character and magnitude. Furthermore, it has long espoused procedural and substantive values—shaped in large part by shipping and insurance interests—that have been either indifferent or flatly antithetical to those championed by the current OCSLA–OPA pollution prevention and liability regime.⁴⁹ Were general maritime law up to the task, of course, there would have been no need for the federal government’s lengthy, recurring efforts to detail the contours of a private cause of action, such as that originally defined in OCSLA’s former title III, and since carried over into OPA.⁵⁰

A summary of federal legislative efforts begins with Congress’s adoption in 1953 of OCSLA in its original form. OCSLA, the Supreme Court declared in 1969 in *Rodrigue v. Aetna*

47. For a comprehensive inventory and review of these issues, see NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING (REPORT TO THE PRESIDENT) pts. II & III (2011) [hereinafter PRESIDENT’S REPORT].

48. See *infra* notes 125–26.

49. The transition from judge-made general maritime law’s primitive efforts to formulate both a rationale and a remedial system for the action I have described as the Macondo Tort, as well as the hostility of the resulting law’s procedural and substantive principles to the values incorporated in the OCSLA–OPA private cause of action are detailed in, e.g., PRESIDENT’S REPORT, *supra* note 47, at chs. 7–10; Lawrence Kiern, *Liability, Compensation, Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the First Decade*, 24 TUL. MAR. L.J. 481, 507–89 (2000). Reflective of the clash is Congress’s rejection in OPA of the “Robins Doctrine” as a bar to economic loss claims, see 33 U.S.C. § 2702(b)(2)(E) (2006); of the application of the Limited Liability Act of 1851, 46 U.S.C. §§ 30501–30512 (2006), to the calculation of OPA response costs and damages, see 33 U.S.C. §§ 2718(a), (c); of the procedure pursuant to which *all* private claims for OPA’s “covered damages” against “responsible parties” must mandatorily be pursued, see 33 U.S.C. §§ 2702(b)(2), 2713(a)–(d); and, more comprehensively, of OPA’s *nonobstante* clause barring admiralty law insofar as OPA provisions so dictate, see 33 U.S.C. § 2751(e). If any of the three arguments offered in this Essay countering the admiralty claim for the Macondo Tort is correct, it merits emphasis, section 2751(e) does not “save” admiralty law or jurisdiction because the tort falls outside of the former’s potential “savings” coverage.

50. See *infra* text accompanying notes 51–60.

Casualty & Surety Company, was intended to “define a body of law applicable to the seabed, the subsoil and the . . . structures . . . on the Outer Continental Shelf.”⁵¹ OCSLA ’53’s legislative history, as carefully evaluated by *Rodrigue*, disdains admiralty law as OCS governing law.⁵² Responding to coastal states’ post-Santa Barbara distress over the many intervening oil spills, Congress refashioned OCSLA in 1978 as a “new statutory regime” designed to “prevent or minimize the likelihood of *blowouts, loss of well control, fires . . .* or other occurrences which may cause damage to the environment or to property, or endanger life or health.”⁵³ Congress could not have spoken more directly to Macondo’s core issue and corresponding remedial program, particularly as the latter was subsequently refined and expanded by OPA.

In service to these goals, Congress amended OCSLA section 1333(a)(1) in 1978 to add TADs as OCSLA situses alongside the 1953 version’s “fixed structures.”⁵⁴ A new title III defined the refashioned statute’s allocation of liability for blowouts, fires, and spills.⁵⁵ Congress converted MODUs from “vessels” into “offshore facilities”⁵⁶ to support OCSLA’s new statutory remedies for off-platform private economic and property losses. OCSLA ’78 set forth a self-contained, *nonadmiralty* regime buttressed by the “polluter pays” principle to compensate private claimants for these losses.⁵⁷

Following the Exxon Valdez disaster in 1989, Congress unanimously adopted OPA, which the Senate Public Works and Environmental Committee portrayed as a “single Federal law providing cleanup authority, penalties, and liability from oil pollution.”⁵⁸ Consolidated and harmonized within this single act were major elements of four existing oil pollution statutes, including OCSLA’s title III.⁵⁹ Congress substituted OPA title I for

51. 395 U.S. 352, 356 (1969).

52. See JMARC, *supra* note 28, at 530–37.

53. 43 U.S.C. § 1332(6) (2006) (emphasis added).

54. Pub. L. No. 95-372, § 203(a) (1978).

55. Pub. L. No. 95-372, § 301–315 (1978).

56. See *infra* text accompanying notes 119–26.

57. See JMARC, *supra* note 28, at 540–51.

58. S. REP. NO. 101-94, at 9 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 730. OPA, the Committee added, was designed to replace a “fragmented collection of Federal and State laws providing inadequate cleanup and damage remedies, taxpayer subsidies to cover cleanup costs, third party damages that go uncompensated, and substantial barriers to victim recoveries . . .” *Id.* at 2.

59. The three other statutes are the Deepwater Port Act of 1974, Pub. L. No. 93-627, 88 Stat. 2176 (1978) (codified as amended at 33 U.S.C. §§ 1501–24 (2006)); the Trans-Alaskan Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 576 (1973) (codified as amended at 43 U.S.C. §§ 1651–1656 (2006)); and

OCSLA's title III, leaving untouched the 1978 TAD amendment. OPA, *B-1 Bundle* itself confirms, "governs . . . private claims for property damage and economic loss resulting from a discharge of oil in navigable waters."⁶⁰

B. Summary of the Argument

This Essay advances three fundamental claims. First, the Macondo blowout does not satisfy *Executive Jet*'s SRTMA criterion (Part II). Second, *B-1 Bundle*'s insistence that admiralty law applies "of its own force" to the Macondo blowout fails because it repeats the error of the Fifth Circuit's 1961 opinion in *Snipes v. Pure Oil Company*.⁶¹ The Supreme Court undermined *Snipes* in *Rodrigue* by holding that torts occurring on OCSLA situses are governed by OCSLA, rather than admiralty law, unless Congress expresses a contrary intent (Part III). Third, the Deepwater Horizon MODU is a hybrid capable of assuming identity under OPA as either a "vessel"⁶² or as an "offshore facility"⁶³—"Outer Continental Shelf facility."⁶⁴ With respect to the Macondo Tort, the MODU was functioning as the latter rather than as a vessel when the OCS blowout occurred (Part IV).

Part II's discussion of the SRTMA issue finds Robertson–*B-1 Bundle*'s insistence that Macondo OCS oil and gas drilling is SRTMA-compliant bluntly repudiated in the Supreme Court's contrary characterization of OCS drilling operations. This review carefully disassociates the Court's portrayal of these operations from OCSLA's section 1333(a)(2)(A) choice-of-law issues, for

the Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. §§ 1251–1376 (2006 & Supp. III 2009)). Foreshadowing a cardinal conclusion of the author's pending portrayal of OCSLA–OPA's substantial displacement of general maritime law, the comprehensiveness of the two nonadmiralty statutes' delineation of the Macondo Tort action appears on two fronts. The first is Congress's reformulation of general maritime law's episodic, conflicting, and, at best, embryonic treatment of the tort. The second is Congress's own undertaking in OPA to comprehensively incorporate and reformulate in a single federal statute *its own work in the four prior statutes identified in text and in this footnote*. This extraordinarily extensive undertaking leaves negligible space for the credibility of any claim that these efforts fall short of Congress's effective occupation of a field coextensive with the boundaries delineated in the Macondo Tort action.

60. *B-1 Bundle*, 808 F. Supp. 2d 943, 953 (E.D. La. 2011).

61. 293 F.2d 60 (5th Cir. 1961).

62. 33 U.S.C. § 2701(37) (2006).

63. *Id.* § 2701(22).

64. *Id.* § 2701(25).

which the distinction between “fixed structures” and MODUs as TADs has proven decisive in resolving the choice of law question.

Part III disagrees with *B-1 Bundle*’s application to the Macondo Tort the three-step test set forth in *Union Texas Petroleum Corporation v. PLT Engineering Corporation (PLT)*.⁶⁵ The *PLT* test’s goal is to determine whether OCSLA-endorsed state law or admiralty law prevails in OCSLA’s section 1333(a)(2)(A) choice-of-law contests. Contrary to Professor Robertson’s insistence on barring MODUs from these contests,⁶⁶ the Fifth Circuit has held that TADs qualify for the test.⁶⁷ *B-1 Bundle* dutifully adheres to the Circuit’s position.⁶⁸

Part III’s argument proceeds in two steps. First, MODUs became proper candidates for the section 1333(a)(2)(A) contest no later than the 1978 addition of TADs to OCSLA section 1333(a)(1).⁶⁹ Second, because Macondo is a tort originating from two qualified OCSLA situs, *Rodrigue* precludes the application of admiralty law to them. *Rodrigue* teaches that admiralty law will not displace OCSLA with respect to such torts absent Congress’s expression of its intent favoring displacement.⁷⁰

Part III recognizes the Fifth Circuit’s position, as reflected in *Theriot*, that judges can more easily favor displacement by admiralty law in *contract*-based causes of action, even for events occurring on OCSLA situs. The Circuit’s “focus-of-the-contract” standard affords greater latitude for this outcome than does the OCSLA tort’s rigid physical location standard.⁷¹ Part III views

65. 895 F.2d 1043, 1047–48 (5th Cir. 1990).

66. See David W. Robertson, *The Outer Continental Shelf Lands Act’s Provisions on Jurisdiction, Remedies, and Choice of Law: Correcting the Fifth Circuit’s Mistakes*, 38 J. MAR. L. & COM. 487, 534–35, 541–42 (2007).

67. See *Demette v. Falcon Drilling Co.*, 280 F.3d 492, 498 n.18 (5th Cir. 2002), *overruled on other grounds by* *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778 (5th Cir. 2009); *PLT*, 895 F.2d at 1047–48.

68. *B-1 Bundle*, 808 F. Supp. 2d 943, 953 (E.D. La. 2011).

69. Speaking to OCSLA section 1333(a)(1)’s amendment in 1987, the Conference Committee characterized the initiative as “technical and perfecting and [as] meant to restate and clarify and not change existing law.” H.R. CONF. REP. NO. 95-1474, at 80 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1674, 1679. This language may plausibly be understood as indicating that the term “fixed structures” as used in the 1953 version of OCSLA section 1333(a)(2)(A) should not be read as excluding the eventual inclusion of MODUs within it. MODUs did not come into use until the late 1950s. See PRESIDENT’S REPORT, *supra* note 47, at 22–25. If the intent of the phrase “fixed structures,” as used in 1953, were to include only rigs extant at that time, the Conference Committee’s 1978 statement becomes gibberish.

70. See *infra* text accompanying note 107.

71. See *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 781 (5th Cir. 2009) (en banc); JMARC, *supra* note 28, at 518 n.40.

Theriot as inapt, however, not only because it is a non-OCSLA, territorial waters case, but also because it sounds in contract under facts that persuaded the court that the indemnity contract in question was “maritime.”

Part IV disputes that general maritime law alone resolves the status of the Deepwater Horizon MODU as a “vessel.” Citing the distinctions dividing the Model from the Macondo Tort, it finds the *Robison* line of authority classifying MODUs as vessels unsuitable for the latter, however appropriate it may be for the Model. Agreeing with Fifth Circuit Judge Henry Politz’s endorsement of Judge Brown’s counsel that “the term ‘vessel’ for Jones Act purposes . . . is [not] necessarily a vessel for other purposes as well,”⁷² Part IV advances the concept of MODUs as hybrids, the proper classification of which depends upon the purpose for and setting within which the classification is sought. Part IV also observes that Judge Barbier’s *B-1 Bundle* rejection of TADs as a hybrid concept seems out of step with his apparent willingness to endorse the hybrid analogy in a subsequent MDL opinion.⁷⁵

II. THE MACONDO BLOWOUT: “SUBSTANTIALLY RELATED TO A TRADITIONAL MARITIME ACTIVITY”?

A. OCSLA’s Legislative History, Rodrigue, Herb’s Welding, and Grubart

OCSLA’s legislative history, as further amplified by the United States Supreme Court, is unkind to the Robertson⁷⁴–*B-1 Bundle*⁷⁵ view that the Macondo blowout is “substantially related to a traditional maritime activity.” Failure to satisfy this requirement, of course, dooms the blowout’s status as an admiralty tort, whether or not the Deepwater Horizon is a “vessel.”

Robertson and *B-1 Bundle* invoke *Theriot* and the Supreme Court’s *Foremost Insurance Company v. Richardson*⁷⁶ decisions. But these choices are not up to the task assigned to them. Indeed,

72. *Houston Oil & Minerals Corp. v. Am. Int’l Tool Co.*, 827 F.2d 1049, 1053 (5th Cir. 1987) (emphasis added) (quoting *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1136–37 (5th Cir. May 1981)), *cert. denied*, *AMF Tuboscope v. Houston Oil & Minerals Corp.*, 484 U.S. 1067 (1988).

73. See *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010*, 844 F. Supp. 2d 746, 750 (E.D. La. 2012); *infra* text accompanying notes 130–31.

74. Robertson, *supra* note 2, at 346.

75. *B-1 Bundle*, 808 F. Supp. 2d 943, 951 (E.D. La. 2011).

76. 457 U.S. 668 (1982).

Foremost's facts—the collision of two pleasure boats on a Louisiana river—afford a strikingly awkward choice for an inquiry as fact-sensitive in relation to Macondo's OCS drilling-operations context as the SRTMA principle demands.

The factually appropriate precedents, which Robertson and *B-1 Bundle* exclude in their SRTMA analyses,⁷⁷ appear in the Supreme Court's portrayal in *Rodrigue* and *Herb's Welding* of Congress's and its own conception of OCS oil and gas operations. Likewise pertinent, but overlooked even though closer to home, are decisions within the Fifth Circuit itself that also find particular OCS drilling operations non-SRTMA compliant.⁷⁸

At issue in *Rodrigue* was the familiar choice between OCSLA-endorsed law and admiralty law to govern accidental deaths occurring atop fixed platforms. The Court chose the former because admiralty's Death on the High Seas Act,⁷⁹ which covers events on the "high seas," failed to override OCSLA's more specific targeting of these platforms for the OCSLA alternative.⁸⁰ *Herb's Welding* ruled that because OCS operations are not "maritime commerce," a welder injured atop one of these platforms could not recover under the LHWCA because he was not an employee engaged in "maritime employment" under section 902(3).⁸¹

These cases are not featured for these holdings as such, but for their mapping of a relationship between OCS drilling operations and admiralty law, espoused by Congress and the Supreme Court alike, that cannot be squared with the conclusion that OCS drilling is SRTMA-compliant.

Rodrigue's account of their dissonance is unyielding. Reversing two Fifth Circuit decisions favoring admiralty law over

77. Both sources bring the cases cited in text into play in the OCSLA section 1333(a)(2) choice-of-law context, in which the distinction among different types of OCS platforms may prove outcome determinative. But the character of a drilling rig does not drive the SRTMA outcome; the activity of engaging in OCS drilling operations does. See *infra* text accompanying notes 87–96. While relevant to the Fifth Circuit Model addressing tortious injury or death of on-platform workers, moreover, the distinction is less convincing when applied to the quite different population of coastal and inland plaintiffs who suffer economic and property loss in consequence of an OCSLA situs-based oil discharge. See *supra* text accompanying notes 26–48.

78. See, e.g., *Texaco Exploration & Prod., Inc. v. AmClyde Engineered Prods. Co.*, 448 F.3d 760, 770–71 (5th Cir. 2006), *amended on reh'g*, 453 F.3d 652 (5th Cir. 2006); *Houston Oil & Minerals Corp. v. Am. Int'l Tool Co.*, 827 F.2d 1049, 1053–54 (5th Cir. 1987), *cert. denied*, *AMF Tuboscope v. Houston Oil & Minerals Corp.*, 484 U.S. 1067 (1988).

79. 46 U.S.C. § 30301–30308 (2006).

80. *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 359 (1969).

81. *Herb's Welding v. Gray*, 470 U.S. 414, 421–24 (1985).

OCSLA, the Court stated that the Senate committee deliberating OCSLA '53 “was acutely aware of the *inaptness of admiralty law*. The bill applied the same law as to the seabed and subsoil, as well as to the artificial islands, and *admiralty law was obviously unsuited to that task*.”⁸²

Reinforcing this dour assessment is the Court’s response to an admiralty expert’s testimony at an OCSLA '53 hearing 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.”⁸³ The Court declared that “[s]ince [OCSLA] treats seabed, subsoil, and artificial islands the same, dropping any reference to special treatment for presumptive vessels, the most sensible interpretation of Congress’s reaction to this testimony is that *admiralty treatment was eschewed altogether*”⁸⁴

The SRTMA claim fares no better in *Herb’s Welding*. The Court excoriated as “*untenable*” the Circuit’s view that “*offshore drilling is maritime commerce*.”⁸⁵ *Herb’s Welding*’s explicit confirmation of and reference to the Court’s assessment in *Rodrigue* that OCSLA’s legislative history “*at the very least forecloses the Court of Appeals’ holding that offshore drilling is a maritime activity*”⁸⁶ would seem to leave precious little space for the Robertson–*B-1 Bundle* position.

Professor Robertson seeks to save his argument by distinguishing *Rodrigue* and *Herb’s Welding* from *Macondo* on the ground that the former featured fixed drilling platforms, not Transocean’s temporarily attached MODU.⁸⁷ In line with *Theriot*,⁸⁸ he invokes a *Herb’s Welding* footnote stating that:

82. *Rodrigue*, 395 U.S. at 364–65 (emphasis added).

83. *Outer Continental Shelf: Hearing Before the Senate Committee on Interior and Insular Affairs*, 83rd Cong. 668 (1953) (statement of Richard Young, Esq.) (emphasis added).

84. *Rodrigue*, 395 U.S. at 365, n.12 (emphasis added).

85. *Herb’s Welding*, 470 U.S. at 421 (emphasis added). Professor Robertson criticizes my reliance on *Herb’s Welding* because the platforms in question were fixed. See Robertson, *supra* note 2, at 346. Their status as either fixed or temporarily attached, however, is not dispositive of the issue addressed in text. See *infra* text accompanying notes 89–96.

86. *Herb’s Welding*, 470 U.S. at 421 (emphasis added).

87. See Robertson, *supra* note 2, at 346. *B-1 Bundle* concedes that the argument “has appeal,” *B-1 Bundle*, 808 F. Supp. 2d 943, 951, 952 (E.D. La. 2011), but yields to contrary Fifth Circuit precedent, particularly as set forth in *PLT*, see *Union Tex. Petroleum Corp. v. PLT Eng’g Corp.*, 895 F.2d 1043, 1047–48 (5th Cir. 1990).

88. *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 539 n.11 (5th Cir. 1986).

[o]ffshore oil rigs are of two general sorts: fixed and floating. Floating structures have been treated as vessels by the lower courts. Workers on them, unlike workers on fixed platforms, enjoy the same remedies as workers on ships. If permanently attached to the vessel as crewmembers, they are regarded as seamen; if not, they are covered by the LHWCA because they are employed on navigable waters.⁸⁹

The fixed versus floating structure distinction, Part I confirms, has indeed proven influential in scores of personal injury–death tort actions brought by or on behalf of on-platform workers. But Part I likewise confirms the error of claiming that the same distinction should govern the outcome of a SRTMA inquiry addressing Macondo economic and property loss claimants. The *Theriot* and *Grubart* discussions immediately below establish, moreover, that the vessel–location admiralty tort requirement, which does engage OCSLA section 1333(a)(2)(A), is separate and distinct from the SRTMA compliance requirement. Each must be satisfied independently of the other to ground admiralty jurisdiction under the *Executive Jet* line of cases.⁹⁰

B. *Theriot and Pippen*

Theriot merits meticulous scrutiny, not only because Professor Robertson extols it,⁹¹ but also because it is the sole basis upon which *B-1 Bundle* ruled that Macondo’s OCS exploratory well drilling operations are SRTMA-compliant.⁹² “Oil and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce,” *Theriot* baldly asserts,⁹³ leaving the task of defending its diktat to *Pippen v. Shell Oil Company*.⁹⁴

But neither *Theriot* nor *Pippen* can bear the weight assigned to it. As previously noted, the contrary view of ocean-based drilling operations embraced in *Rodrigue* and *Herb’s Welding* cannot be

89. *Herb’s Welding*, 470 U.S. at 416 n.2 (citations omitted).

90. The OCSLA inquiry does not drive the SRTMA inquiry’s outcome, but there will be instances when the latter will drive the former. *PLT* Step 2 of the OCSLA section 1333(a)(2)(A) choice-of-law analysis accords priority to admiralty law over OCSLA-endorsed law when, *inter alia*, the admiralty law applies “of its own force.” In disputes featuring non-SRTMA compliant activities, admiralty law cannot be said to apply of its own force because the underlying activities fail to trigger admiralty jurisdiction and law in the first instance. See cases cited *supra* note 78; JMARC, *supra* note 28, at 557–60.

91. Robertson, *supra* note 2, at 346.

92. 808 F. Supp. 2d 943, 951 (E.D. La. 2011).

93. *Theriot*, 783 F.2d at 538–39.

94. 661 F.2d 378, 384 (5th Cir. Unit A Nov. 1981).

dismissed on the basis asserted in *Theriot* and by Professor Robertson that scenarios featuring semisubmersibles are *ipso facto* SRTMA-compliant.

Hostile to this claim for essentially the same reason is *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Company*.⁹⁵ The Court's analysis of *Executive Jet's* duo of location-vessel and SRTMA elements rules out meshing the two (as in the expression "drilling for oil from a vessel"). Hence, the instrumentality of OCS drilling (a "vessel on navigable waters") must be examined independently from the activity it enables ("oil and gas drilling") and vice-versa. "Because the injuries suffered by Grubart and the other flood victims were caused by a vessel on navigable waters," the Supreme Court carefully spells out, "the location inquiry would seem to be at an end."⁹⁶ Only after bookending this inquiry does the Court turn to *Grubart's* SRTMA issue.

No less problematic is *Theriot's* or, derivatively, *B-1 Bundle's* reliance on *Pippen* to justify offshore drilling's SRTMA compliance. Not only does *Pippen* fail to provide any support for its ukase that "offshore drilling [sic] the discovery, recovery, and sale of oil and natural gas from the sea bottom is maritime commerce,"⁹⁷ but *Pippen's* identification of oil-drilling operations with "maritime commerce" was expressly rebuffed in the Supreme Court's *Herb's Welding* opinion.⁹⁸

At issue in *Pippen* was whether Mr. Pippen's injury while performing wireline services on a drilling barge was incurred in "maritime employment," which would entitle him to compensation under the LHWCA as a section 902(3) "employee." The "offshore drilling . . . is maritime commerce" statement appears as the unsupported minor premise of a syllogism designed to prove that Pippen's duties have a "realistically significant relationship to traditional maritime activity."⁹⁹ The syllogism's major premise, according to the court, is that a "significant relationship" exists "when the purpose of the employee's activities is to facilitate maritime commerce."¹⁰⁰ With the insertion of the unsupported *vessel-based drilling is maritime commerce* minor premise, the

95. 513 U.S. 527 (1995).

96. *Id.* at 535.

97. *Pippen*, 661 F.2d at 384.

98. *Herb's Welding v. Gray*, 470 U.S. 414, 419 (1985). *Herb's Welding* explains that the Fifth Circuit's opinion below was expressly predicated on *Pippen's* earlier holding that activities integral to OCS drilling operations are "maritime commerce." *Id.*

99. *Pippen*, 661 F.2d at 384 n.10.

100. *Id.* at 383-84.

conclusion links Pippen's activity to the "realistically significant relationship to maritime commerce."

Even absent the contrary portrayal of offshore drilling in *Rodrigue*, *Herb's Welding*, and conforming Fifth Circuit opinions, *Pippen's* premise that the mere statement of a position secures its validation equates to little more than a tautology, a "reflexive" rather than a reasoned response.

III. THE DEEPWATER HORIZON: AN OCSLA SITUS TO WHICH ADMIRALTY LAW DOES NOT APPLY?

Fifth Circuit jurisprudence endorses the view that TADs merit status as OCSLA situs under the first step of the *PLT* analysis superintended under OCSLA section 1333(a)(2)(A).¹⁰¹ *PLT* presents the latter as requiring a three-step inquiry that selects admiralty law absent satisfaction of any of three elements: (1) the event must occur on an OCSLA situs; (2) admiralty law must not apply to the event "of its own force"; and (3) the nonadmiralty alternative (OCSLA-endorsed state law) must be consistent with "other federal law," as required by OCSLA section 1333(a)(2)(A).

Applied to the Macondo Tort, Step 1 favors OCSLA in light of the Circuit's agreement that OCSLA section 1333(a)(1) situs merit inclusion in the *PLT* calculus.

Step 2, Robertson and *B-1 Bundle* insist, defeats OCSLA because they deem admiralty law to apply "of its own force." This is so, they claim, because the Macondo Tort satisfies both poles of *Executive Jet*: OCS drilling is SRTMA-compliant, and the MODU is a "vessel in navigable waters."

Part II's examination of *Theriot-Pippen* and *Rodrigue-Herb's Welding* exposes the implausibility of the first claim.

The general maritime law-based "vessel" claim is unpersuasive on two separate grounds. The first, addressed in Part IV, is that Robertson and *B-1 Bundle* err in seeking to resolve the Deepwater Horizon's status under nonstatutory general maritime law. The proper focus for their gaze is instead OCSLA section 1333(a)(1)'s language and legislative history, OPA's subsequent adoption, and, in this Macondo setting, OCSLA-OPA's targeting of off-platform,

101. See cases cited *supra* note 67. Consistent with this acknowledgement, *B-1 Bundle* likewise treats the Deepwater Horizon, an OCSLA section 1333(a)(1) MODU, as an OCSLA situs under the *PLT* Step 1 analysis. It then appeals to *Theriot* under *PLT* Step 2 to conclude, *inter alia*, that because OCS drilling is SRTMA-qualified, admiralty law applies of its own accord, thereby barring selection of the OCSLA-endorsed state law. See *B-1 Bundle*, 808 F. Supp. 2d 943, 950-52 (E.D. La. 2011).

economic-loss claimants rather than of injured or deceased seamen or platform workers.

The second rationale is set forth directly in *Rodrigue* itself. *Rodrigue* clashed with the Fifth Circuit's *Snipes v. Pure Oil Company* decision,¹⁰² which, in another manifestation of the Circuit's reflexive admiralty-centrism, defined as "maritime" a tortious injury suffered by an OCS stationary platform worker at this OCSLA site. *Rodrigue* countered that admiralty law does not apply to torts originating on OCSLA situses unless Congress affirmatively expresses its "intent" favoring this override.

MODUs qualify as OCSLA situses under *Rodrigue*, now updated to take account of OCSLA '78's addition of "temporarily attached devices" alongside OCSLA '53's "fixed structures."¹⁰³ The Death on the High Seas Act¹⁰⁴ failed as an expression of this intent, the Court ruled in *Rodrigue*, because the Act covered events occurring on the "high seas," not those originating on an OCSLA situs.¹⁰⁵ *Rodrigue*'s accidents occurred on the fixed platforms in question, which Congress analogized to "artificial islands" that would not have been subject to "traditional maritime principles" pre-OCSLA in any event.¹⁰⁶

But the Court stated that it would have made no difference even if the platforms had been subject to these principles. The

102. 293 F.2d 60 (5th Cir. 1961).

103. Although not advanced by Robertson–*B-1 Bundle*, the objection can be anticipated that while the Macondo oil originated from OSLA situses, it satisfied *Executive Jet*'s location requirement when it made its way into the high seas and territorial waters. But Congress enacted OCSLA under the Property Clause and the Interstate and Foreign Commerce Clause, not under the Admiralty Clause. See *infra* notes 125–26. Congress's Property Clause powers were deemed essentially limitless in *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976), and were endorsed as extending to the "regulation of conduct on or off the public land that would threaten the designated purpose of federal lands." *Minnesota v. Block*, 660 F.2d 1240, 1249 (8th Cir. 1982). Congress's OCSLA goals include the generation of federal revenue and the protection of the United States' economic and security interests by insuring unhampered federal control of OCS oil reserves. See JMARC, *supra* note 28, at 526–34. But these goals were frustrated in the 1970s by post-Santa Barbara Channel spill drilling moratoria sought by coastal states fearful of similar environmental, pollution, and economic threats to their coasts and residents. *Id.* at 540–44. OCSLA '78 and, subsequently, OPA, were adopted, as per *Block*, to "regulate conduct . . . off the public land [viz. the high seas and state waters] that would threaten the designated purpose of federal lands [viz. the OCS]." *Block*, 660 F.2d at 1249. Hence, the position expressed in notes 125 and 126 that as a nonadmiralty initiative, the Macondo OCSLA–OPA tort regime neither incorporates nor derives from admiralty law or jurisdiction.

104. 46 U.S.C. §§ 30301–30308 (2006).

105. *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 366 (1969).

106. *Id.* at 360–61.

Court's language favoring this conclusion could not be more forthright:

*Even if the admiralty law would have applied to the deaths occurring in these cases under traditional principles, [OCSLA's] legislative history shows that Congress did not intend that result. First, Congress assumed that the admiralty law would not apply [to an OCSLA situs] unless Congress made it apply, and then Congress decided not to make it apply.*¹⁰⁷

Likewise unavailing is any claim under *PLT* Step 3 that the nonadmiralty alternative is defeated by “inconsistent” federal law, taking the form in this instance of judge-made general maritime law. The argument is an ill-conceived attempt to reject admiralty law's prior repudiation under Step 2. It ignores, moreover, that OCSLA itself is “other federal law” which, by deeming MODUs OCSLA situs, speaks directly to the matter inconsistently resolved by the former. Along with OPA, Professor Robertson agrees that OCSLA “necessarily displace[s] anything in maritime common law deemed inconsistent with the statute's provisions.”¹⁰⁸

A comparison of this conception of the *PLT* test's application to *Macondo* with the majority and dissenting opinions' treatment of the issue in *Demette* affords an instructive bridge to Part IV's discussion of the *Deepwater Horizon*'s status under OCSLA section 1333(a)(1) and OPA section 2701. Like *Theriot*, *Demette* posed the question of a MODU's status in conjunction with an indemnity contract dispute arising out of a platform worker's injury.¹⁰⁹ In *Demette*, however, the platform, owned by the company suing the worker's employer for defense and indemnity, was located on the OCS, not in territorial waters. The court looked to the *PLT* test to address the employer's claim that OCSLA-endorsed Louisiana law governed the indemnity contract's validity.¹¹⁰

The court viewed itself as facing three choices in determining the status of the MODU under *PLT* Step 1 and, derivatively, under

107. *Id.* at 361. Equally explicit is the Court's reassertion of its *Rodrigue* holding in *Herb's Welding*: OCSLA's legislative history, the Court declared, establishes that “Congress was of the view that maritime law would not apply to fixed platforms *unless a statute expressly so provided . . .*” *Herb's Welding v. Gray*, 470 U.S. 414, 422 (1985) (emphasis added).

108. Robertson, *supra* note 2, at 345.

109. The MODU in this instance was a jack-up vessel, which *Demette* categorized as a “special-purpose movable drilling rig[.]” *Demette v. Falcon Drilling Co.*, 280 F.3d 492, 498 n.18 (5th Cir. 2002), *overruled on other grounds by Grand Isle Shipyard Inc., v. Seacor Marine, LLC*, 589 F.3d 778 (5th Cir. 2009).

110. *Id.* at 500–01.

Step 2. The first was that of the injured worker's employer: the MODU is a "vessel" and, as such, fails as an OCSLA section 1333(a)(1) situs that qualifies for review under section 1333(a)(2)(A).¹¹¹ The latter section refers only to "artificial islands and fixed structures," omitting any reference to section 1333(a)(1)'s "temporarily attached devices." The second choice is that approved by the *Demette* majority: the MODU is a "vessel," but it is *also* an OCSLA section 1333(a)(1) situs that merits review under section 1333(a)(2)(A) despite the foregoing omission.¹¹² The third choice is that of Judge DeMoss in dissent: the MODU is not a general maritime law "vessel" because the legislative history of OCSLA's 1978 amendment establishes that TADs and "vessels" are mutually exclusive.¹¹³ Absent a "vessel," the platform injury loses its foundation in admiralty, rendering the section 1333(a)(2)(A) choice of law contest superfluous.¹¹⁴

The *Demette* majority merits qualified praise for going somewhat beyond a simplistic assertion of the general maritime law definition of vessel in its inquiry. But it continued to honor pre-OCSLA '78, territorial-waters *Robison* as establishing "beyond doubt"¹¹⁵ that MODUs retain their identify as vessels even as it concluded that MODUs also double up as section 1333(a)(1) OCSLA situses.¹¹⁶

IV. THE DEEPWATER HORIZON MODU: VESSEL, OFFSHORE FACILITY—OUTER CONTINENTAL SHELF OFFSHORE FACILITY, HERMAPHRODITE, OR HYBRID?

Were affairs in 2010 as they were in 1978, Judge DeMoss's view that MODUs and "vessels" are mutually exclusive would be difficult to challenge. The legislative history of two principal

111. *Id.* at 498.

112. *Id.* at 498–500, 504.

113. *Id.* at 506–11 (DeMoss, J., dissenting).

114. *Id.* at 508 (DeMoss, J., dissenting). Judge DeMoss's position is considerably more hostile to Fifth Circuit Model reasoning than appears in text. He also insisted that *PLT* Step 2, which probes whether admiralty law applies of its own accord, is misconceived because OCSLA rules out admiralty law as a permissible alternative *altogether*. *Id.* at 505 n.2 (DeMoss, J., dissenting).

115. *Id.* at 498, n.18.

116. A skeptic may be pardoned for questioning the latter characterization's significance, however, given *Demette's contract* setting. The plasticity of standards for declaring a contact "maritime" opens an easy route to ruling under *PLT* Step 2 that admiralty law applies of its own accord even for events occurring on OCS platforms, an option the court in fact exercised. This option is not available in the Macondo setting because, again, *B-1 Bundle* claims sound in *tort*, not contract.

OCSLA amendments—those adding TADs to OCSLA section 1333(a)(1) and a new title III—establish that the “new statutory regime” envisioned by Congress demands no less.

But the clarity of this picture diminished in 1990 with Congress’s adoption of OPA in 1990. *Congress left untouched MODUs’ status as TADs*, a reality that Judge DeMoss, alone among his Fifth Circuit colleagues, has taken seriously. But Congress also repealed title III and included an OPA 2701(37) definition for “vessels” duplicating the *Stewart* model. On the other hand, it declared that MODUs are “vessel[s] capable of use as . . . offshore facilit[ies]” and then defined “offshore facilit[ies]” expressly to exclude “vessels.”¹¹⁷ It further reinforced MODUs’ status as offshore facilities by bringing them within its definition of an “Outer Continental Shelf facility,”¹¹⁸ as an offshore facility employed, like the Deepwater Horizon, in OCS resource operations.

Hence, the question: Should the “vessel” label be attached under OPA to the Deepwater Horizon MODU, which is a confirmed OCSLA situs as well as a TAD, when it is *also* functioning as an OPA twin-offshore–Outer Continental Shelf facility? Stated alternatively, Should MODUs be regarded as hermaphrodites, that is, “vessels,” even when functioning in a nonvessel mode, or as hybrids, shifting between the status solely of “vessels” or solely of “offshore facilities” depending upon the context in which the issue is raised and the use assigned to the MODU when the tort occurs? Pertinent to the latter dimension, of course, is the view proposed in Part I that a MODU is a vessel in the context of on-platform accidental deaths or injuries but sheds that status when analyzed in the Macondo Tort setting.

Earlier discussion disclosed Congress’s 1978 institution of its “new [OCSLA] statutory regime.” Combined in a single act were the additions of TADs alongside the “fixed structures” of 1953 and the title III prevention–liability regime, the precursor of the OPA ’90 regime.

The Conference Committee explained that the former clarified 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*

117. 33 U.S.C. §§ 2701(18), (22) (2006).

118. *Id.* § 2701(25).

*drillstring, pipes, or other appurtenances, on the OCS for exploration, development, or production purposes. Ships and vessels are specifically not covered [only] when they are being used for the purpose of transporting OCS mineral resources.*¹¹⁹

The House described title III's function as providing the "procedures to be followed in the event of an oilspill and compensation for cleanup costs and damages resulting from such a spill."¹²⁰ The title limits the definition of "vessels" to watercraft operating in OCS or territorial waters and which transport "oil directly from an offshore facility."¹²¹ An "offshore facility," it stated, is "any oil refinery, [or] *drilling structure*[,] . . . which is used to *drill for*, produce[,], . . . or transport oil produced from the Outer Continental Shelf . . ."¹²²

These definitions exclude semisubmersibles as "vessels" by including them under "any drilling structure." The term "vessel" is restricted to any watercraft used exclusively to "[transport] oil directly from an offshore facility." Hence the statement of the conferees:

*[O]nce 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 to a vessel.*¹²³

Congress's goals for this strengthened regime, the amendment's legislative history, and the unique OCSLA-OPA Macondo Tort action reinforce Judge DeMoss's conclusion, if applied to the Macondo setting, that

there is absolutely no question at all that these . . . changes eliminate the basis for any distinction which our case law may have made in the past between a "jack-up rig" being a vessel and a "fixed platform" not being a vessel, insofar as activities on the Outer Continental Shelf are concerned.¹²⁴

119. H.R. REP. NO. 95-590, at 128 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1450, 1534 (emphasis added).

120. *Id.* at 178, *reprinted in* 1978 U.S.C.C.A.N. 1450, 1584.

121. Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, § 301(5), 92 Stat. 629 (1978).

122. *Id.* at § 301(8).

123. H.R. REP. NO. 95-590, at 179 (1977), *reprinted in* 1978 U.S.C.C.A.N. 1450, 1585 (emphasis added).

124. *Demette v. Falcon Drilling Co.*, 280 F.3d 492, 507 (5th Cir. 2002) (DeMoss, J., dissenting), *overruled on other grounds by* Grand Isle Shipyard

In fact, OCSLA '78's section 1333(a), its title III OCS economic- and property-loss cause of action, and the latter's refinement and expansion in OPA are not creatures of admiralty at all. They are instead independently grounded in the Constitution's Property¹²⁵ and Interstate and Foreign Commerce clauses,¹²⁶ respectively.

B. OPA 1990

Congress's concurrent adoption of OPA and repeal of OCSLA's title III injected definitional uncertainties not present in OCSLA '78. These ambiguities are inventoried in Part IV's lead paragraph, which also stresses that any claim that MODUs are "vessels" must contend with Congress's decision to preserve OCSLA's TAD language.

Judges sharing the Circuit's admiralty reflex, however, will conclude that these changes secure the Deepwater Horizon's status as a "vessel." As in *B-1 Bundle*, they will seize on the inclusion in OPA of a *Stewart*-duplicating definition of "vessel"¹²⁷ and embrace even more tightly the half-century of *Robison*'s line of authority equating MODU-type rigs with "vessels."¹²⁸ Likewise, they will simply ignore the dissonance posed by MODUs' unmodified status as OCSLA section 1333(a)(1) TADs¹²⁹ and the categorical tone of the foregoing congressional explanation that

Inc., v. Seacor Marine, LLC, 589 F.3d 778 (5th Cir. 2009). Professor Robertson and *B-1 Bundle* disagree with Judge DeMoss's assessment. See Robertson, *supra* note 2, at 345; *B-1 Bundle*, 808 F. Supp. 2d 943, 953 & n.4 (E.D. La. 2011). However, like the *Demette* majority, neither undertakes to refute his position's invocation of and reliance on OCSLA section 1333(a)(1)'s TAD language and the uncompromising additional support founded in the legislative history quoted *supra* text accompanying notes 119–24 and *infra* text accompanying notes 125–26. Sometimes, it appears, a statute is simply too inconvenient to merit attention.

125. "Congress," the Senate's Ad Hoc Committee stated in its report on the OCSLA '78 amendments, "has a special constitutional responsibility to make all needful rules and regulations respecting the territory or other property belonging to the United States" under the Property Clause. H.R. REP. NO. 95-590, at 54 (1977), reprinted in 1978 U.S.C.C.A.N. 1450, 1461.

126. OCSLA, Judge Rubin has stated, "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 (5th Cir. 1982).

127. *B-1 Bundle*, 808 F. Supp. 2d at 950.

128. *Id.* at 949.

129. See *supra* text accompanying notes 111–16.

“federal law is to be applicable [both] to *all* activities on *all* devices *in contact with the seabed* . . .” and to MODUs when they “are connected to the seabed by *drillstrings*, pipes or other appurtenances.”

For them, MODUs are hermaphrodites: *both* vessels *and* TADs at all times, hence pillars of admiralty jurisdiction.

Or at least, that is the course that Judge Barbier championed in *B-1 Bundle*. But, in a subsequent MDL decision, he entertained the possibility that MODUs are hybrids.¹³⁰ Recalling OPA’s treatment of MODUs as “vessels capable of use as offshore facilities,” and of offshore facilities as any facility “other than a vessel,” he reasoned that

[a]s the words “other than a vessel” in [the OPA section 2701(22) definition of “offshore facility”] indicate, vessels and offshore facilities typically are mutually exclusive categories. However, OPA provides a hybrid definition for MODUs: “mobile offshore drilling unit” means a vessel . . . **capable of use as an offshore facility.**” In the MODU context, then, the responsible party is determined by how the MODU was used at the time of the incident When the MODU is **not** being used as an offshore facility—such as when it is moving from one drilling location to another—the MODU is treated as a vessel and the responsible party is the owner/operator of the MODU (the responsible party for a vessel). When the MODU is being used as an offshore facility—i.e., when the MODU is “exploring for, drilling for, producing, [etc.] . . . oil” “in , on, or under . . . navigable waters”—then the responsible party is the lessee (the responsible party for an offshore facility).¹³¹

The issue before the court concerned a matter that falls outside of this Essay’s concerns.¹³² But directly relevant is the court’s

130. See *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on April 20, 2010, 844 F. Supp. 2d 746 (E.D. La. 2012).

131. *Id.* at 750 (emphasis by Barbier, J.) (citations omitted).

132. The issue concerned the extent of Transocean’s liability for damages and response costs as a “responsible party” by virtue of its ownership of the Deepwater Horizon MODU. Transocean argued that section 2704(b)(1) limited its liability to that of a “tank vessel” (as set forth in OPA section 2704(a)(1)). In light of the hybrid default position endorsed by the court in language quoted in text, the Deepwater Horizon would not have been a “vessel” because it was being used as an “offshore facility” when the blowout occurred. But the court reasoned that OPA section 2704(b)(1) sets forth an exception in this case based on the section’s language that a MODU “which is being used as an offshore facility is deemed to be a tank vessel with respect to the discharge . . . of oil on or above the surface of the water.” *Id.* at 751.

seeming inclination to regard the hybrid concept for MODUs as the proper default interpretation. Fidelity to the court's attention to "context" and to "how the MODU was used at the time of the incident" favors the hybrid over the hermaphrodite classification in evaluating the purported admiralty status of the Macondo OCSLA-OPA tort. Because the Deepwater Horizon-MODU was being used as an "offshore facility-OCS offshore facility" when the blowout occurred, this second MDL opinion would seem not to favor the MODU's classification as a "vessel."

Additional considerations support this interpretation. Beginning with the statute from which OPA's "vessel" definition actually derives,¹³³ Congress qualified the latter with a caveat calling for its application "unless the context indicates otherwise."¹³⁴ For the Macondo Tort, the context's leading elements are the prior OCSLA '78 "polluter pays" regime that OPA carried forward, section 1333(a)(1) and its intact TAD language, and congressional purposes driving Macondo's tort-economic loss cause of action.

It is difficult to deny that the Macondo context does "indicate otherwise" because none of these elements favors dressing this decidedly nonadmiralty undertaking in admiralty whites. Judge Politz along with Judge Brown surely evidenced a more discerning awareness of context in their caution that "the term 'vessel' for Jones Act purposes . . . is [not] necessarily a vessel for other purposes as well."¹³⁵

Treating MODUs as hybrids, moreover, does no harm to *Robison's* longstanding goal of supporting injured or deceased platform workers. Judges remain free as they have been for a half century to deem the Deepwater Horizon a "vessel" in actions brought on behalf of its deceased or injured platform workers.

But the reverse is not true. Endowing MODUs permanent vessel status even when they are functioning as nonvessels mandates admiralty law's entrance even though its claim is likely to be weak or failing under either or both of *Executive Jet's* tests. More immediate to the Macondo Tort, doing so has provided dubious support for *B-1 Bundle's* related position observed earlier,¹³⁶ that general maritime law has survived OCSLA and OPA largely unscathed.

Considerably more plausible than the MODU-as-hermaphrodite thesis is a two-step understanding of the linkage of

133. 1 U.S.C. § 3 (2006).

134. *Id.* § 1 (emphasis added).

135. *See supra* text accompanying note 72.

136. *See supra* note 8.

the TAD language to OPA's liability regime. The first acknowledges that OCSLA '78 presented the TAD and title III amendments in an integrated OCSLA statutory format. The second recognizes that Congress split them in 1990, leaving the TAD element intact in OCSLA while drawing OCSLA's former title III and similar liability provisions from three other oil pollution statutes within OPA. This understanding would carry forward to the post-1990 OCSLA-OPA, which combined the nonvessel concept of MODUs initiated in the OCSLA '78 integration of the TAD language and title III.¹³⁷ Certainly nothing in OPA's legislative history suggests Congress's desire to diminish rather than enhance the statutory punch of a combined OCSLA-OPA foundation for the Macondo Tort.

Finally, Professor Robertson's favored approach precipitates open warfare between OCSLA and OPA, in which one or the other must yield. Professor Robertson would discard OCSLA, moreover, on the basis of his claim that it has been repealed, presumably by judicially disfavored implication, because the statute is "older, less comprehensive, and less specific respecting oil spill liability."¹³⁸

But there is no need to go down this path because accommodation is easily achieved under the hybrid approach. Professor Robertson's awkward offering posits, moreover, that Congress *expressly* repealed one element of OCSLA—title III—at the same time that it *implicitly* repealed a second more salient provision—the 1333(a)(1) TAD language—which it recognized as central to its refashioning of oil pollution-discharge liability only 12 years earlier. If Congress wished to cancel both elements, its obvious route was expressly to repeal both, rather than to leave repeal of the TAD language to the surmise of a future court.

Likewise problematic are the grounds Professor Robertson cites for selecting OPA over OCSLA. Although OCSLA was originally adopted in 1953, Congress's decision to leave the 1978 section 1333(a)(1) intact occurred *concurrently* with OPA's adoption in 1990. A claim of OCSLA's lesser "specificity" makes sense, moreover, only if Professor Robertson's equation of the Macondo blowout with a "vessel-related oil spill . . . into state waters" makes sense.¹³⁹ But it does not. Reduction of the OCSLA blowout to this state-waters mode carries with it the astonishing consequence of vaporizing not only OCSLA section 1333(a)(1)'s TAD language but also the entirety of sections 1333(a)(1) and

137. See *supra* text accompanying notes 59–60.

138. Robertson, *supra* note 2, at 345.

139. *Id.*

1333(a)(2)(A), *neither of which is operative for events originating in state waters.*

Likewise negated is the Supreme Court's embrace of OCSLA as "defin[ing] a body of law applicable to the seabed, the subsoil and the . . . structures . . . on the Outer Continental Shelf."¹⁴⁰ Finally, OPA's near-total silence concerning the OCS¹⁴¹ undermines the override claim by positioning OCSLA as the more specific statute on OCS matters and, hence, as an indispensable guide to its core concern, OCS resource extractive operations.

140. *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 355 (1969).

141. Excluding OPA's "Outer Continental Shelf facility" definition and a single related provision, OPA section 2704(c)(3) (dealing with the allocation of financial liability as between such facilities and a "vessel"), OPA is silent concerning the OCS.