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### SRTMA: Reappraising the BP Well Blowout in Light of Pippen, Theriot, Doiron, and Grubart

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# **SRTMA: Reappraising the BP Well Blowout in Light of Pippen, Theriot, Doiron, and Grubart**

*John J. Costonis\**

## PREFACE

*The present Article, along with a recently published companion piece,<sup>1</sup> addresses choice of law and jurisdictional issues posed by tortious or contractual events associated with the binary terrestrial/aquatic enterprise of oil and gas drilling operations on the nation's Outer Continental Shelf (OCS). Among the circuits, the Fifth Circuit has been this jurisprudence's dominant author because the OCS adjacent to the Gulf states is home to most of the nation's offshore oil and gas production. The Circuit has struggled to accommodate general maritime oil pollution law with pertinent federal statutes and with the United States Supreme Court's view of the general maritime law, both independent of or as modified by these statutes as the Court understands both. No easy task, the Circuit's efforts have generated what Professor David W. Robertson has labeled "an infamously chaotic area of the law,"<sup>2</sup> a view undisputed in the Circuit's candid self-assessment of these efforts.<sup>3</sup>*

*Featured in both articles is Congress's Outer Continental Shelf Lands Act (OCSLA),<sup>4</sup> which speaks directly to the choice of federal law, if available, and for adjacent state law when gaps in federal law require the adoption of state law as surrogate federal law. Similarly notable is Congress's Oil Pollution Act of 1990 (OPA).<sup>5</sup> OPA precludes such gaps by defining a comprehensive federal recovery and damages remedial scheme featuring substantive, procedural, and limitation of liability prescriptions. These prescriptions duplicate, and in many instances surpass and reconfigure, the pre-OPA general maritime law, thereby*

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1. John J. Costonis, *The BP MDL and Its Aftermath: Whither OPA's Displacement Jurisprudence?*, 93 TUL. L. REV. 511 (2019).

2. 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, 489 (2007).

3. See *infra* text accompanying note 168.

4. Pub. L. No. 83-212, 67 Stat. 462 (1953) (codified and amended as 43 U.S.C. §§ 1331–1356(a) (2006 & Supp. III 2009)).

5. Pub. L. No. 101-380, 104 Stat. 484 (1990) (codified and amended as 33 U.S.C. §§ 2701–2762 (2006 & Supp. III 2009)).

*furnishing the framework for my prior article's claim that OPA displaces the pre-OPA maritime law oil pollution tort.*

*The Supreme Court's contributions are twofold. One is its interpretation of OCSLA's legislative history as so hostile to admiralty law's role in oil discharge governance that it substantiates the Court's conclusion that "exploration and development of the Continental Shelf are not themselves maritime commerce."<sup>6</sup> The second is its redefinition of admiralty jurisdiction perfected in its 1995 opinion in *Jerome B. Grubart v. Great Lakes Dredge & Dock Co.* to include both an event's location on navigable waters and its status as having a "substantial relationship to a traditional maritime activity" (SRTMA).<sup>7</sup> These Supreme Court rulings—the second of which comports with the Fifth Circuit's many rulings that activities servicing maritime oil and gas drilling operations are not inherently maritime in character—mirror a viewpoint confirmed in the Circuit's *en banc* *In re Doiron* decision addressed at length in this Article.<sup>8</sup>*

*The positions favored in a consolidated Limitation of Liability/BP MDL trial was that OPA does not displace the general maritime law oil pollution tort and that OCS oil and gas operations conducted from a vessel qualify as a SRTMA event. This Preface leaves my disagreement with both contentions to the bodies of the articles themselves and instead briefly explores plausible linkages between the Circuit's admiraltycentrism—framed in one opinion as the Circuit's "reflexive invocation of admiralty jurisdiction to cover contracts involving movable offshore rigs"<sup>9</sup>—to the "infamous[] *chao[s]*" cited by Professor Robertson.*

*Useful as background for pursuing these linkages are the contrasting conceptions of the federal admiralty judge's role advanced, respectively, by Fifth Circuit Judges John Brown and W. Eugene Davis. Writing in 1992, Judge Brown's choice of a title, Admiralty Judges: Flotsam on the Sea of Maritime Law?,<sup>10</sup> reflects his thesis that centuries of aggressive, indeed heroic, American admiralty judges and admiralty opinions have been replaced in more recent times by Congressional legislation more invasive of admiralty jurisdiction's boundaries and a Supreme Court more deferential to this legislation. Hence, Judge Brown's plaint that the Court "has recently abandoned its Constitutional duty of enunciating maritime law in favor of conforming admiralty law to Congressional enactments*

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6. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 425 (1985).

7. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995) (quoting *Sisson v. Ruby*, 947 U.S. 358, 462 (1990)).

8. See *infra* Section I.C.

9. See *Lewis v. Glendel Drilling Co.*, 898 F.2d 1083, 1087 (5th Cir. 1990).

10. Judge John Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?*, 25 HOUS. J. INT'L L. 257 (2003) (reprinted from 24 J. MAR. L. & COM. 249 1993).

and filling in gaps in maritime law only when authorized by Congress.”<sup>11</sup> Judge Brown offers the following passage from Justice O’Connor’s opinion in *Miles v. Apex Marine Corp.* as evidence of what he terms the “Demise of the Admiralty Judge”<sup>12</sup>:

*We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress.*<sup>13</sup>

Several of Judge Brown’s opinions referenced in the current Article manifest this shift in the relative prominence of the two institutions’ lawmaking roles. They begin with *Pure Oil Co. v. Snipes*,<sup>14</sup> in which Judge Brown selected admiralty law to cover a worker’s death on an OCS fixed platform. The Supreme Court overruled *Snipes* in *Rodrigue v. Aetna Casualty & Insurance Co.*,<sup>15</sup> which interpreted OCSLA to favor surrogate state law over admiralty law in such instances. Other decisions include *Sohyde Drilling Co. v. Coastal States Gas Producing Co.*,<sup>16</sup> which both overrode the Admiralty Extension Act<sup>17</sup> and ruled that a well blowout is not SRTMA-qualified. Additionally, Judge Brown performed an admiralty contract analysis in *Union Texas Petroleum Corp. v. PLT Engineering, (PLT)*,<sup>18</sup> which employed OCSLA and *Rodrigue* to deny admiralty law status for an OCS gathering pipe project. In *PLT*, Judge Brown stated that *Theriot v. Bay Drilling Corp.*,<sup>19</sup> a leading admiralty contract precedent, afforded “no comfort” against this OCSLA § 1333(a)(2)(A) choice because it ignored that “Congress determined that the general scope of

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11. *Id.* at 283.

12. *Id.* at 294 (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990)).

13. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990).

14. 293 F.2d 60 (5th Cir. 1961).

15. 395 U.S. 352 (1969).

16. 644 F.2d 1132 (5th Cir. 1981).

17. Pub L. No. 80-695, 62 Stat. 496 (1948) (codified as amended at 46 U.S.C. app. § 740 (2006)).

18. 895 F.2d 1043 (5th Cir. 1990)

19. 783 F.2d 527, 538–39 (5th Cir. 1986). *Theriot* is discussed in Section I.C of this Article.

OCSLA's coverage, . . . would be determined principally by locale,"<sup>20</sup> rather than by subject matter.

Judge Davis, author of the Fifth Circuit's *In re Doiron en banc* decision,<sup>21</sup> takes a different view of the matter. Confident that "[admiralty judges] do not deserve the pejorative—'flotsam on the sea of admiralty,'"<sup>22</sup> he views the Supreme Court opinions cited by Judge Brown as "reflect[ing] the role that the Constitution sets forth for admiralty judges, as the Supreme Court has defined that role for 150 years."<sup>23</sup> "Where Congress has acted," he contends, "the admiralty judge's role is similar to what it always has been: to determine applicable maritime law according to principles that have endured for centuries and in light of rules and codes set forth by the appropriate governing authority."<sup>24</sup> For Judge Davis, it's not so much about the heroics of Justice Story in *DeLovio v. Boit*<sup>25</sup> or Justice Brown in *The Osceola*<sup>26</sup> as it is about disciplined coordination with Congress when initiatives of the latter impact admiralty law as understood by admiralty judges.

If the BP litigation's non-displacement and pro-SRTMA outcomes are to be the measure, Judge Davis's commitment to the continuing vigor of the admiralty judge comes out ahead, although for reasons not necessarily aligned with his stance. In fact, the BP MDL's two holdings are heroic, if misconceived, understandings of Congress's OCSLA and OPA and the Supreme Court's SRTMA concept. If my critique of both as admiraltycentric is credible, they improperly arrest initiatives designed to cabin and contextualize the scope of admiralty tort law and of admiralty jurisdiction as both bear upon OCS oil and gas operations.

By the term "admiraltycentric," I intend either the attribution of admiralty jurisdiction when it is not warranted, or the faulty attribution of substantive admiralty law rather than state law or federal statutory law when either of the latter governs. An instance of the former is this Article's opposition to designating an event as an admiralty tort even though it does not satisfy the SRTMA requirement. The latter occurs when an admiralty-

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20. *Union Texas Petroleum Corp. v. PLT Eng'g, Inc.*, 895 F.2d 1043, 1048–49 (5th Cir. 1990) (quoting *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 219 (1986)).

21. 879 F.3d 568 (5th Cir. 2018).

22. W. Eugene Davis, *The Role of Federal Courts in Admiralty: The Challenges Facing the Admiralty Judges of the Lower Federal Courts*, 75 TUL. L. REV. 1355, 1385 (2001).

23. *Id.* at 1368–69.

24. *Id.* at 1384.

25. 7 Fed. Cas. 418 (No. 3776) (C.C.D. Mass. 1815) (Justice Story).

26. 189 U.S. 158 (1903).

displacing federal statute such as OPA § 2702 governs a maritime oil discharge, but admiralty law is favored as a consequence of a faulty application of OCSLA § 1333(a).<sup>27</sup> I do not deem these outcomes admiraltycentric because they favor an admiralty outcome. Their fault lies instead in the patent shortcomings offered in their defense that both articles painstakingly identify.

Four considerations incentivizing the BP MDL's choice of the two outcomes offer clues as to why the relevant OCS oil and gas jurisprudence is so "infamously chaotic." Commenting on the centuries-long warfare between the English common law courts and admiralty courts for control over waterborne commerce, for example, 18th century English biographer Roger North cautioned that "[i]t is the foible of all judicatures to value their own justice and pretend that there is none so exquisite as theirs; while, at the bottom, it is the profits accruing that sanctify any court's authority."<sup>28</sup>

North's observation sheds light on the BP pro-admiralty outcome if, in place of his reference to "profits accruing that sanctify any court's authority," we substitute the dramatic benefits that the BP disaster's expeditious resolution secured for the nation's six-state Gulf region and population, its environment, its admiralty bar, and the enhancement of the Fifth Circuit's already considerable prestige as the nation's leading admiralty tribunal. That fealty to non-SRTMA and pro-displacement jurisprudence might be traded off for these is perhaps unsurprising when the stakes are as compelling as those in the BP disaster's exigent setting. The MDL's jurisprudential overreach, the prior article advises, has already begun to be reversed, however, in the Circuit's later oil spill litigation unburdened by these exigencies.<sup>29</sup>

There is also the tension between the Supreme Court and the Fifth Circuit over what the former deems the latter's expansive view of "maritime commerce." This matter traces back to the Court's 1985 opinion in *Herb's Welding, Inc. v. Gray*,<sup>30</sup> if not to its 1969 *Rodrigue* opinion, which singled out Congress's flat rejection of an initial OCSLA bill proposing admiralty law's governance of events occurring on OCS situses. The Circuit has rationalized its departure from dissonant Supreme Court jurisprudence by recourse to its own rules disallowing deviation

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27. See *infra* text accompanying note 265.

28. Roger North, quoted in 1 W.S. HOLDSWORTH, HISTORY OF ENGLISH LAW 558 n.2 (3rd ed. 1927).

29. This trade-off, its sources, and the Fifth Circuit's apparent reconsideration of its pro-displacement posture in subsequent oil spill litigation are discussed in greater detail in Costonis, *supra* note 1, at 547–51.

30. 470 U.S. 414, 425 (1985).

from prior panel rulings absent an *en banc* reversal of the same<sup>31</sup> or by evading the dissonance between, for example, BP MDL's reasoning and Congress's or the Court's stated requirements.<sup>32</sup>

Unstable jurisprudence is also a consequence of sharp divisions among Fifth Circuit judges respecting jurisdictional issues posed by OCS drilling operations.<sup>33</sup> There is the further dilemma of having to select a

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31. See *Lewis v. Glendel Drilling Co.*, 898 F.2d 1083, 1086 (5th Cir. 1990).

32. Illustrative relative to whether the BP blowout met *Grubart's* SRTMA requirement is the BP federal district court's pre-trial ruling responding affirmatively on the exclusive basis of *Theriot v. Bay Drilling Corp.*, 783 F.2d 527 (5th Cir. 1986), a precedent narrowly focused on an analysis of standards for an admiralty *contract*, thereby avoiding altogether the fundamental objections to the SRTMA ruling raised in the body of this Article. See *In re Oil Spill by the Oil Rig "Deepwater Horizon" (B1 Bundle)*, 808 F. Supp. 2d 943 (E.D. La. 2011), *aff'd sub nom.*, *In re Deepwater Horizon*, 745 F.3d 157 (5th Cir. 2014). The Fifth Circuit compounds the evasion by adding to the lower court's citation a further citation to *Grubart*, which avoids the fundamental elements of the latter's requirements as set forth in this Article. See *infra* Section II.A. For an illustration of avoidance on the displacement issue, see Costonis, *supra* note 1, at 537–38, which highlights the district court's spurious distinction between the OPA and general maritime law claims allegedly premised on the former's concern only for *Robins Drydock*-qualified claims, namely those in which the claimant's own property is not physically damaged, rather than including this category alongside claims arising from physical damage to claimant's owned property. Compare OPA § 2702(b)(2)(E) (covering *Robins Drydock*-qualified claims) with OPA § 2702(b)(2)(B) (duplicating maritime law claims, namely those satisfying the physical damages and claimant ownership requirements duplicated in OPA § 2702(d)(2)(B)). Avoidance of OPA's express duplication of the general maritime law claim enables the court to disregard that OPA "speaks directly" to the remedy afforded by general maritime tort, thereby displacing it under the Supreme Court's rulings in *City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981), and *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978).

33. See, e.g., conflicts concerning, *inter alia*, the status of a jack-up drilling vessel as an OCSLA situs under OCSLA § 1333(a)(2)(A) and the status of OCS oil and gas drilling activity as a "maritime" activity for purposes of choice of admiralty or OCSLA-denominated state law as surrogate federal law, as stated in the majority opinion (Higginbotham, J.) and the dissenting opinion (Demoss, J.) in *Demette v. Falcon Drilling Co.*, 280 F.3d 492 (5th Cir. 2002), *overruled on other grounds* by *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778 (5th Cir. 2009); the status of OCS drilling operations as SRTMA- or non-SRTMA-qualified, as asserted in a section of a majority opinion reserved to its author (Clement, J.) and in a dissenting opinion (Higginbotham, J.) in *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208 (5th Cir. 2013); *PLT* step one (location on an OCSLA situs) as either location on a vessel or offshore facility under conventional OCSLA § 1333(a)(2)(A) guidelines or as the location on which a

single governing law for a binary activity—OCS resource development—featuring undeniable aquatic and terrestrial components. Lying in wait, finally, are the complexities of the statutory and judge-made norms and the constitutional and practical frameworks in which the norms are to be selected and applied.

To this observer, what is most striking about the dimensions of the BP story recounted here is the tenaciousness with which the Fifth Circuit’s predisposition to the “reflexive invocation of admiralty jurisdiction” in the MDL has preserved admiralty law from the very devolution that Judge Brown viewed as a *fait accompli* 30 years ago. In this sense, the BP MDL belongs at the heroic level, however one might question its conception of the relation between the pertinent federal statutes and admiralty law jurisprudence as proper beyond the singular character of the disaster itself.

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majority of a contract’s performance will be rendered, as asserted in a majority opinion (Davis, J.) or in a dissenting opinion (Garza, J.) in *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778 (5th Cir. 2009) (en banc).



## INTRODUCTION

This Article is my second in a series contesting key choice of law outcomes recorded in an eastern federal district court pre-trial proceeding<sup>34</sup> (*BI Bundle*) in the BP Multidistrict Litigation (MDL) following the April 2010 BP Outer Continental Shelf (OCS) oil well blowout. The first of these articles<sup>35</sup> questions *BI Bundle*'s ruling that Congress's adoption of the Oil Pollution Act of 1990 (OPA)<sup>36</sup> does not displace the pre-OPA general maritime marine pollution tort. The article outlines the ruling's incompatibility with subsequent federal Fifth Circuit OPA decisions, one of which, referred to here as *Wildlife*,<sup>37</sup> reappears in this Article in a different and more problematic context.<sup>38</sup> This Article also details the ruling's discord with the plain meaning of such key OPA provisions as OPA § 2751(e), which denies admiralty status to maritime law norms that provide "otherwise" than OPA's many discordant commands. It also highlights the United States Supreme Court's constitutional jurisprudence favoring federal statutory displacement of federal common or maritime law that is inconsistent with or otherwise "speaks directly" to issues addressed by the statute.<sup>39</sup>

The present Article critiques *BI Bundle*'s associated position that designates as an admiralty maritime tort the Macondo well blowout that occurred during BP's well-drilling from a vessel, the Deepwater Horizon, on the OCS. It contests *BI Bundle*'s holding that the BP blowout satisfies the capstone 1995 Supreme Court ruling in *Jerome B. Grubart v. Great Lakes Dredge & Dock Co. (Grubart)*<sup>40</sup> conditioning admiralty tort jurisdiction on a determination that the tort-based activity is "substantially related to [a] traditional maritime activity"<sup>41</sup> (SRTMA), a position the Court introduced some 23 years earlier in *Executive Jet Aviation v. City of*

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34. See *BI Bundle*, 808 F. Supp. 2d 943, *aff'd sub nom.*, *In re Deepwater Horizon*, 745 F.3d 157 (5th Cir. 2014).

35. See Costonis, *supra* note 1.

36. Pub. L. No. 101-380, 104 Stat 484 (1990) (codified as amended at 33 U.S.C. §§ 2701–2762 (2006 & Supp. III 2009)).

37. *In re Deepwater Horizon*, 745 F.3d 157.

38. *Wildlife* dealt with the question of whether OPA, other federal statutes, and general maritime law pre-empted state law. The issue addressed in this Article is whether the BP blowout is SRTMA-qualified. *Wildlife* is discussed in relation to its problematic citation in *In re Larry Doiron, Inc.*, 879 F.3d 568 (5th Cir. 2018).

39. See Costonis, *supra* note 1, *passim*.

40. 513 U.S. 527 (1995). The Court's three prior SRTMA opinions are *Sisson v. Ruby*, 497 U.S. 358 (1990); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982); and *Exec. Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972).

41. *Grubart*, 513 U.S. at 534.

*Cleveland (Executive Jet)*.<sup>42</sup> Finding that the *Grubart* scenario complied with the SRTMA condition, the Court selected federal admiralty law and jurisdiction over Illinois state law as the proper norm for the *Grubart* dispute's adjudication.

But for the conflation of admiralty tort standards with admiralty contract standards in *BI Bundle* and the subsequent Fifth Circuit opinions addressed below, my SRTMA critique would have commenced by framing the inquiry exclusively as it is addressed in the 2011 *BI Bundle* pre-trial ruling and 2014 consolidated Limitation of Liability/BP MDL trial,<sup>43</sup> which allocated economic and property liability among the MDL's principal defendants. This inquiry centers on whether the faulty management of Macondo well's production casing and temporary abandonment operations, the improperly performed activity accounting for the well blowout, satisfies *Grubart's* SRTMA requirement.

Featured would be: (1) the Supreme Court's rationale for adding the conceptual SRTMA requirement to its venerable spatial/maritime location criterion for admiralty tort jurisdiction; (2) the legislative history of the Outer Continental Shelf Lands Act<sup>44</sup> (OCSLA) and the Supreme Court's OCSLA jurisprudence, principally *Rodrigue v. Aetna Casualty & Surety Co. (Rodrigue)*<sup>45</sup> and *Herb's Welding, Inc. v. Gray (Herb's Welding)*,<sup>46</sup> as both bear on the SRTMA question; (3) OCSLA § 1333(a) choice of law prescriptions concerning the relative priority of general maritime law in relation to relevant federal statutes—principally OCSLA itself and OPA; (4) the relevance of the Fifth Circuit's recurrent portrayal of oil and gas drilling and servicing operations as “inherently” or “peculiarly non-

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42. 409 U.S. 249 (1973). *Executive Jet* used the adjective “significant” rather than “substantial.” *Id.* at 268.

43. See *In re Oil Spill by the Oil Rig “Deepwater Horizon,”* 21 F. Supp. 3d 657 (E.D. La. 2014). As explained by the court:

[T]he Phase One trial concerned two cases within this Multidistrict Litigation: the Transocean entities' limitation action . . . and the United States' claims under the Clean Water Act (“CWA”) and Oil Pollution Act of 1990 (“OPA”) . . . . The Phase One trial addressed fault allocation for the loss of well control, blowout, explosion, fire, and oil spill. This includes determining if any Defendant engaged in misconduct in excess of ordinary negligence. The Phase One trial also addressed Transocean's limitation defense, as well as various claims and defenses between and among the several Defendants.

*Id.* at 730 (internal citations omitted).

44. Pub. L. No. 101-380, 104 Stat. 484 (1990) (codified as amended at 33 U.S.C. §§ 1331–1356(a) (2000 & Supp. II 2009)).

45. 395 U.S. 352 (1969).

46. 470 U.S. 414 (1985).

maritime”); and (5) the BP MDL court’s findings of fact and law in the 2014 liability trial.

The Article will pursue this roadmap, following a review of the Fifth Circuit’s conflation of the SRTMA tort standard with a predecessor tort and two contract standards in pertinent maritime oil and gas litigation. Apt examples of both are furnished in *B1 Bundle*, *Wildlife*, and *In re Doiron* (*Doiron*),<sup>47</sup> the latter of which is a 2018 Fifth Circuit en banc decision that reformulated the circuit’s admiralty contract standard for these operations.

*B1 Bundle*, for example, extolls one of the circuit’s leading contract decisions, *Theriot v. Bay Drilling Corp.* (*Theriot*),<sup>48</sup> as its exclusive authority for its single-sentence claim that “[t]he operations of the DEEPWATER HORIZON bore a substantial relationship to traditional maritime activity,” quoting, in a parenthetical appended to *Theriot*’s citation, that “oil and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce.”<sup>49</sup>

The Fifth Circuit, upon review, then compounds the conflation by joining *Grubart*, the most recent exponent of SRTMA as an admiralty tort jurisdiction standard, with *Theriot*, the admiralty contract standard opinion, in its affirmation that:

A strong argument exists for the proposition that the [BP] disaster occurred while the [Deepwater Horizon] vessel was engaged in the maritime activity of conducting offshore drilling operations, and the disaster had a significant effect on maritime commerce. *Cf. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 *passim*, . . . (1995) (maritime law applies to damages where drill barge flooded underwater tunnel and buildings on river bank); *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538–39 (5th Cir. 1986).<sup>50</sup>

This Article disputes the propriety of their co-citation in light of their status as exemplars of the opposite ends of the binary tort/contract divide. It also exposes the differences dividing *Grubart*’s “repair or maintenance work on a[n in-state] navigable waterway performed from a vessel,”<sup>51</sup> the case’s SRTMA-qualified tort, from BP’s wrongful activity—faulty casing

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47. 879 F.3d 568 (5th Cir. 2018) (en banc).

48. 783 F.2d 527 (5th Cir. 1986).

49. See *B1 Bundle*, 808 F. Supp. 2d 943, 951 (E.D. La. 2011), *aff’d sub nom.*, *In re Deepwater Horizon*, 745 F.3d 157 (5th Cir. 2014).

50. 745 F.3d 157, 166 (5th Cir. 2014).

51. See *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 528 (1995).

and temporary abandonment of a well in the subsoil<sup>52</sup> and on the seabed<sup>53</sup> of the OCS, a federal enclave in which the competing norms are not *Grubart's* admiralty law versus state law at all, but federal statutory law, selected by OCSLA § 1333(a)(1)<sup>54</sup> and judge-made maritime law.

*Theriot* and *BI Bundle/Wildlife* return in *Doiron*, which advances its two-step formulation of an admiralty contract standard within the overall premise that marine oil and gas operations are “maritime commerce” to replace the six-factor test defined in the Fifth Circuit’s 1990 decision in *Davis & Sons Inc. v. Gulf Oil Corp. (Davis)*:<sup>55</sup> “Is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters?”<sup>56</sup> If so, “does the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract?”<sup>57</sup>

*Doiron* invokes *Theriot* by observing that the latter’s evaluation of a contract for supplying a submersible drilling barge was “clearly maritime,” because “[o]il and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce.”<sup>58</sup> But it also brings *Wildlife* and, implicitly, *BI Bundle* back into the picture by referencing the incomplete admiralty contract standard of an oil spill that “occurred while the vessel . . . was engaged in the maritime activity of conducting offshore drilling operations.”<sup>59</sup>

Unstated both in *Doiron* and in *BI Bundle/Wildlife* is that the phrase *Theriot* and *Doiron* employ to anchor their choice of law—“oil and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce”—paraphrases the standard articulated in *Pippen v. Shell Oil Co. (“Pippen”)*,<sup>60</sup> a maritime tort case. *Pippen* employs it to resolve a dispute concerning an employee’s entitlement to compensation under the

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52. The subsoil is referred to as a “well bore.”

53. The seabed is referred to as a “wellhead.”

54. See *infra* text accompanying note 265.

55. 919 F.2d 313 (5th Cir. 1990).

56. *In re Larry Doiron, Inc.*, 879 F.3d 568, 576 (5th Cir. 2018).

57. *Id.*

58. *Id.* at 575 (quoting *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538–39 (5th Cir. 1986)).

59. *Id.* at 575 (quoting *In re Deepwater Horizon*, 745 F.3d 157 (5th Cir. 2014)).

60. 661 F.2d 378 (5th Cir. 1981). *Pippen's* formulation is that “[s]ince offshore drilling—the discovery, recovery, and sale of oil and natural gas from the sea bottom—is maritime commerce, it follows that the purpose of Pippen’s work was to facilitate maritime commerce.” *Id.* at 384. (emphasis added).

Longshore and Harbor Workers' Compensation Act (LHWCA).<sup>61</sup> At issue was whether the employee, injured while engaging in wireline operator activities, qualified for compensation under the LHWCA's "maritime employment" status requirement.<sup>62</sup>

The answer, the Fifth Circuit panel stated, turns on whether the employee's activities had a "realistically significant relationship to . . . maritime activity,"<sup>63</sup> which requires that "the purpose of the employee's activities is to facilitate maritime commerce."<sup>64</sup> "*Since offshore drilling the discovery, recovery, and sale of oil and natural gas from the sea bottom is maritime commerce,*" the court decreed, "it follows that the purpose of Pippen's work was to facilitate maritime commerce," hence confirming that the work "had a realistically significant relationship to maritime commerce."<sup>65</sup>

In these opening pages, four standards have already been encountered, two for admiralty torts and two for admiralty contracts. The former include *Grubart's* SRTMA conceptual standard and *Pippen's* realistically significant relationship to the maritime commerce principle.<sup>66</sup> The two contract standards are those set forth in *Davis & Sons's* six-factor test<sup>67</sup> and in *Theriot/Doiron's*<sup>68</sup> joinder of maritime oil and gas operations conceived as "maritime commerce" with the substantiality of a vessel's role in the contract's performance. Account must also be taken in both the

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61. 33 U.S.C.A. §§ 901–950 (West 2018).

62. See 33 U.S.C.A. § 902(3), which defines an "employee" as "any person engaged in maritime employment."

63. *Pippen*, 661 F.2d at 382 (quoting *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994, 998 (5th Cir. 1981)).

64. *Id.* at 383–84.

65. *Id.* at 384 (emphasis added).

66. A subsidiary tort standard referenced in *B1 Bundle* is the Admiralty Extension Act, 46 U.S.C. § 30101, which covers "injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land."

67. *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990). *Davis & Sons* enumerates the following six factors: content of the specific work order; work actually done by crew; work performed aboard a vessel on navigable waters; relation of work being done to vessel's mission; principal work of injured worker; work actually being performed by injured worker. *Id.* at 316.

68. Although the conceptual relationship of the two opinions is subject to ambiguities discussed below, see *infra* text accompanying notes 243–59, both include the elements of marine oil and gas operations conducted from a vessel on navigable waters as "maritime commerce" and of the contractual expectation and actuality of the vessel's "substantial" engagement of a vessel in the contract's performance.

tort and contract contexts of whether the litigated event occurred within territorial waters or on the OCS.<sup>69</sup> The latter is of particular consequence in the BP blowout scenario because its occurrence on the OCS brings OCSLA's choice of law rules directly into play, a development that, in conjunction with *Grubart's* SRTMA principle, compromises the status of the BP blowout as SRTMA-compliant.

Part I offers an analysis of the standards' rationales as a basis for disentangling them and ensures that the proper one is matched with *BI Bundle*. Focus will center on *Grubart's* SRTMA, *Pippen's* "realistically significant relationship to maritime . . . commerce,"<sup>70</sup> and *Theriot/Doiron's* maritime commerce/substantiality of vessel presence. Tort law's venerable location standard needs no further elaboration, and *Davis & Sons's* six-factor test bears only brief notice because it has been overtaken by *Theriot/Doiron*. Standards beyond SRTMA have been pursued for the specific purpose of demonstrating that neither the *Pippen* admiralty tort nor the derivative *Theriot/Doiron* admiralty contract standard should be conflated or confused with SRTMA.

There is also the question of whether *Theriot/Doiron* can be or, as the product of decisions addressing events on *state* territorial waters, need to be accommodated with OCSLA's legislative history, the Supreme Court's *Rodrigue* and *Herb's Welding* opinions, and the Fifth Circuit's resort to *Herb's Welding* in *Union Texas Petroleum Corp. v. PLT Engineering Inc. (PLT)*,<sup>71</sup> which calls for "constru[ing] *Theriot* narrowly and constru[ing] it to its facts."<sup>72</sup> Either individually or in concert with one another, these decisions and the support they derive from OCSLA's legislative history are not conclusively compatible with the *Theriot/Doiron* standard.<sup>73</sup> Moreover, they discredit *Pippen*, whose rationale is featured in this Article because it has largely gravitated to *Doiron* through *Theriot*. Other than the two issues posed later in Section II(A)(4),<sup>74</sup> these not inconsiderable concerns are left for exploration elsewhere.

Broadly conceived, the Fifth Circuit's contemporary treatment of these standards reflects the gradual confluence of what initially were separate SRTMA and OCSLA stories. A striking, even prophetic, exception effectively acknowledging that both are joined at the hip is the

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69. See *infra* text accompanying notes 114–39.

70. *Pippen*, 661 F.2d at 382 (quoting *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994, 998 (5th Cir. 1981)).

71. *Union Texas Petroleum Corp. v. PLT Eng'g, Inc.*, 895 F.2d 1043 (5th Cir. 1990).

72. *Id.* at 1059.

73. See *infra* Section I.C.

74. See *infra* text accompanying notes 242–58.

Court's attention in its 1973 *Executive Jet* opinion to its 1969 landmark OCSLA opinion in *Rodrigue v. Aetna Casualty & Surety Co.*, (*Rodrigue*).<sup>75</sup> *Rodrigue* distinguished itself by looking to OCSLA to reverse two Fifth Circuit decisions applying admiralty law to accidents occurring on OCS stationary platforms, thereby effectively overruling the Circuit's 1961 decision in *Pure Oil Co. v. Snipes*,<sup>76</sup> which applied admiralty law to these accidents. *Executive Jet* both noted that *Rodrigue* concerned the "maritime or non-maritime nature of the tort and its relationship to maritime navigation" and rebuffed the Fifth Circuit's choice of admiralty law because "the accidents bore no relation to any navigational function."<sup>77</sup> The quoted language functionally parallels the SRTMA principle stated as such or in terms of the activity's "inherently non-maritime" character that was destined to be repeated in one form or another in scores of Fifth Circuit marine oil and gas decisions following *Executive Jet*.<sup>78</sup>

Use of the SRTMA phrase was ignored altogether in *Herb's Welding*, which in my judgment began an ultimately successful process of extending both OCSLA and *Rodrigue* well beyond what might be called the "reductive" interpretation of *Rodrigue* blessed by the Fifth Circuit then and now.<sup>79</sup> Under the reductionist perception, Congress deemed stationary drilling platforms "artificial islands,"<sup>80</sup> which were never subject to admiralty law in the first place. Hence, other situses such as drilling barges and semi-submersibles that, as vessels, had engaged with admiralty law pre-OCSLA continued to do so by virtue of admiralty law's presence "of its own force"<sup>81</sup> post-OCSLA. So viewed, OCSLA exacts nothing from admiralty law, just as *BI Bundle* views OPA as leaving pre-OPA admiralty

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75. *Exec. Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972).

76. 293 F.2d 60 (5th Cir. 1961).

77. *Exec. Jet*, 409 U.S. at 258–59.

78. *See, e.g.*, cases collected in Section II.A.1–3.

79. *Walsh v. Seagull Energy Corp.*, 836 F. Supp. 411, 415 (S.D. Tex. 1993) explains the rationale for the Circuit's position:

The legislative history of [OCSLA] clearly shows that Congress intended to preempt the application of maritime law to activities on platforms on the OCS. Unfortunately for the sake of clarity, however, the statute itself does not say this. Rather, the statute boiled down says only that federal law applies on OCS oilfield structures, and that *gaps* in the federal law there will be filled by the law of the adjacent state. Nothing is said about the inapplicability of maritime law. This silence leaves open the possibility that, where the pre-existing maritime law would have already applied on the OCS, OCSLA added nothing.

80. *See Rodrigue v. Aetna Cas. & Ins. Co.*, 395 U.S. 352, 355 (1969).

81. *See id.*

tort law undiminished. Both results are quite remarkable assertions of the primacy of federal lower court judge-made law over the contrary prescriptions of Congress or the Supreme Court in the instances cited.

*Herb's Welding* might have dismissed admiralty law simply by pointing out that, as a welder assigned to maintain OCS stationary platforms, Gray was working on one of those "artificial islands."<sup>82</sup> But the case also engaged the LHWCA, a statute Gray invoked to obtain compensation for his injuries providing that his status as a worker constituted "maritime employment."<sup>83</sup> It came to the Court from a Fifth Circuit opinion,<sup>84</sup> which decided the dispute in Gray's favor solely as an LHWCA dispute dealing with a platform based in state waters even though the gas field on which Gray worked included OCS statutory platforms. The Circuit employed the tort test *Pippen* had derived from a prior Fifth Circuit precedent: namely, whether Gray's work "bore a realistically significant relationship to traditional maritime activity involving navigation and commerce of navigable waters."<sup>85</sup> As noted, it directly cited to and quoted *Pippen's* identification of oil and gas drilling with "maritime commerce."<sup>86</sup>

Since Part I explores in depth the Supreme Court's nullification of the Fifth Circuit's reasoning and result, it is sufficient here to gauge *Herb's Welding's* pivotal role in the OCSLA story on the basis of the Supreme Court's response to its question of whether there was anything "inherently maritime" about Gray's tasks as a welder maintaining stationary platforms.<sup>87</sup> No, the Court concluded with a clear eye on OCSLA's legislative history and its previous *Rodrigue* opinion, because these tasks "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>88</sup>

Thus, the core of this Article's anti-SRTMA position in relation to the BP blowout: namely, the disqualification under SRTMA of oil and gas services deemed "inherently non-maritime" as mirrored, in turn, by *Herb's*

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82. A second, independent ground for the same result is that the oil and gas service operations conducted on fixed platforms are not SRTMA-compliant when deemed inherently non-maritime. See *infra* Section II.A.2.

83. See LHWCA § 902(2).

84. *Herb's Welding v. Gray*, 703 F.2d 176 (5th Cir. 1985).

85. *Id.* at 179 (citing *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994, 998 (5th Cir. 1981)).

86. *Id.* at 180.

87. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 425 (1985).

88. *Id.*



*Welding's* conception of these same services as remote from "traditional maritime activities."

The OCSLA situs in *Herb's Welding* was the stationary platform on which Gray worked as a welder. *Rodrigue* ruled admiralty law out of bounds for such platforms in what I have termed its reductionist interpretation because Congress treated the platforms as "islands" to which admiralty law does not apply despite the artificiality of this designation.<sup>89</sup> The Supreme Court's labeling in *Herb's Welding* of Gray's work as "inherently non-maritime" opens up a second route to admiralty law's non-application to Gray's platform, namely non-compliance with the SRTMA principle the Court had earlier implicitly acknowledged in *Executive Jet*. This innovation is largely overlooked by commentators and by the Fifth Circuit itself, which has premised *Herb's Welding's* outcome solely on its status as a stationary platform.<sup>90</sup>

But there is more. If the inherently non-maritime nature of a stationary platform activity provides a basis independent of a platform's "island" status to bar admiralty law's application to it, why wouldn't the same be true for non-maritime activities conducted on and from vessels? The answer preceding *Executive Jet* was clear: blockage by the location principle whereby, excluding the Admiralty Extension Act exception, admiralty law governs activities occurring on navigable waters regardless of their nature.<sup>91</sup> But *Executive Jet* more than intimated the severity of SRTMA's qualification of admiralty law's prior location principle by its non-reductive interpretation of *Rodrigue*. As earlier noted, *Executive Jet* states that *Rodrigue* addressed the "maritime or non-maritime nature of the tort and its relationship to maritime navigation" and, more to the point for this Article's purpose, precluded the Fifth Circuit's choice of admiralty law because "the accidents bore no relation to any navigational function."<sup>92</sup>

Looking back at a half century's evolution of the Fifth Circuit's SRTMA jurisprudence, one can see more clearly now than in the early 1970s *Rodrigue's* and *Herb's Welding's* generative role in reshuffling choice of law outcomes in oil and gas litigation.

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89. See *Rodrigue v. Aetna Cas. & Ins. Co.*, 395 U.S. 352, 362 (1969).

90. See opinions cited in David W. Robertson, *Jurisdiction and Choice of Law Issues in OCS Oil Spill Cases*, 59 LA. B.J. 344 (2012). For subsequent discussion of this issue, see *infra* Section II.A.2.

91. The Admiralty Extension Act, 46 U.S.C. app. § 740, extends to injuries suffered on land but caused by a vessel on navigable water.

92. *Exec. Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 258–59 (1972).

One way to frame the inquiry is to devote Part I to a review of the SRTMA, *Pippen*, and *Doiron* concepts. Are they asking the same or different questions? Are their rationales so fungible as to render defensible *BI Bundle*'s reliance on *Theriot*'s contract standard to justify its portrayal of the BP blowout tort as SRTMA-qualified? Useful for context in Part II as well are highlights of OCSLA's legislative history, further consideration of *Rodrigue* and *Herb's Welding* as both bear on *Pippen*, and the roles of OCSLA § 1333(a) and a so-called *PLT* three-step test as choice of law analytical vehicles.

Part II concludes that different questions are being asked, that SRTMA is not fungible with the other two standards, and that the Supreme Court severely undermined the *Pippen* standard in *Herb's Welding*. Part II also briefly surveys Fifth Circuit jurisprudence addressing the role of the SRTMA principle as it bears on choice of law issues in marine oil and gas disputes. Included are the principle's role in simple tort actions as well as in related third-party actions premised on indemnity contract claims, where the question becomes whether the contracts should be governed by admiralty or non-admiralty law. Consistent with Justice Souter's counsel in *Grubart* that the SRTMA determination must address the "given case,"<sup>93</sup> Part II concludes by confirming the non-SRTMA status of the BP blowout scenario, primarily with the aid of the very conclusions of fact and law declared in the 2014 trial that allocated fault among the principal BP MDL defendants.

### I. SRTMA, *PIPPEN*, AND *THERIOT/DOIRON* STANDARDS

The gradual confluence of the SRTMA and OCSLA stories anchors this Article's position opposing *BI Bundle*'s holding that the BP blowout satisfied the SRTMA standard. Both stories are told below. I have divided them into separate subsections because, however much each reinforces the other, their evolution and sources are distinct. *Grubart* and its three SRTMA predecessors are silent on OCSLA, for example, because their events all occurred in non-OCS state waters. *Grubart* addresses its tortious event's claim to admiralty jurisdiction under 28 U.S.C. § 1333(1), moreover, while OCSLA § 1333(a) focuses on choice of law, leaving OCSLA jurisdiction to § 1349(b)(1).

Under OCSLA § 1333(a)(2)(A), torts occurring on stationary platforms are not governed under admiralty law because this provision vests governance in adjacent state law unless admiralty law is deemed to

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93. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 542 (1995).

apply of its own force. But the SRTMA principle provides an independent basis for the same result, namely that the operations conducted from stationary drilling platforms fail under the principle, thereby effacing admiralty law and jurisdiction altogether. Finally, *Grubart's* SRTMA principle governs admiralty tort jurisdiction in both territorial and superadjacent OCS waters, while OCSLA presumably addresses choice of law issues in an OCS setting only.

Dividing the two stories is somewhat awkward because many of the same opinions not only figure in both stories, but are present as well in this Article's portrayal of the *Pippen* and *Theriot/Doiron* standards. Such is the labyrinthine nature of oil and gas operations' binary marine and terrestrial component, and the decades-long tension between the Fifth Circuit and the Supreme Court over which of the two merits priority in fashioning choice of law outcomes.

#### A. The SRTMA/OCSLA Confluence

##### 1. The SRTMA Standard

*Grubart* cuts to the chase in defining the SRTMA test as one that “turns on the comparison of traditional maritime activity to the arguably maritime character of the tortfeasor’s activity in a given case.”<sup>94</sup> The keynote of the relationship is the similarity or resemblance of the pairings. *Grubart*, for example, emphasized this factor in the wrongfully conducted activity before it—“repair or maintenance work on a navigable waterway performed from a vessel”<sup>95</sup>—with marine practices employing “barges and similar vessels [that] have traditionally been engaged in repair work similar to [that] . . . contracted to perform here.”<sup>96</sup>

Several features are noteworthy in this definition. One is that the unit of comparison with traditional maritime activity is the “activity giving rise to the incident,”<sup>97</sup> as described above in *Grubart*, or, as exemplified in other of the Court’s SRTMA decisions, the “negligent operation of a vessel on navigable waters,”<sup>98</sup> or the “storage and maintenance of a vessel at a marina on navigable waters.”<sup>99</sup> These portrayals are formulated neither as “hypergeneralization[s],”<sup>100</sup> nor as narrow descriptions of the “precise

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94. *Id.*

95. *Id.* at 540.

96. *Id.*

97. *Id.*

98. *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982).

99. *Sisson v. Ruby*, 497 U.S. 358, 365 (1990).

100. *Grubart*, 513 U.S. at 542.

cause”<sup>101</sup> of the incident, but as “the general conduct from which the incident arose.”<sup>102</sup>

Another is that less remoteness between the paired elements affords greater assurance that selecting admiralty law to govern the activity will not be arbitrary because the “reasons for applying special admiralty rules would apply in the suit at hand.”<sup>103</sup> The elements’ similarity increases the likelihood that admiralty’s traditional and long-term experience with the same activity will contribute wized expertise respecting governance of its faulty performance. Hence Justice Stewart’s observation in *Executive Jet*, which declined to apply admiralty law to an airplane crash in Lake Erie:

Through 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, captures and prizes, limitation of liability, cargo damages, and claims for salvage.<sup>104</sup>

Justice Stewart concluded: “[Admiralty] [r]ules and concepts . . . are wholly alien to air commerce. The matters with which admiralty is basically concerned have no conceivable bearing on the operation of aircraft . . . .”<sup>105</sup>

Implicit in Justice Stewart’s reasoning is the reverse, namely that the expertise that admiralty law lacks is the very expertise that aviation science and practice enjoy, such that these, not admiralty law, are guardrails that aid in selecting an appropriate governing law. Restricting SRTMA to “traditional” maritime activity, moreover, reinforces the Court’s prescription favoring the mature expertise on the admiralty side that is so valued by its SRTMA rationale. This portrayal is demonstrably false when predicated on admiralty law’s supposed awareness and facility in dealing with the emerging technology, practice, and policy dimensions of OCS oil and gas operations when OCSLA was adopted in 1953<sup>106</sup> and in the decades to follow.

Much the same can be said of admiralty’s distance from the complex environmental and public health and safety considerations resulting from

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101. *Sisson*, 497 U.S. at 365.

102. *Id.* at 364.

103. *Grubart*, 513 U.S. at 539–40.

104. *Exec. Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 270 (1972).

105. *Id.*

106. See Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L. REV. 23 (1953) (outlining the novelty of the OCS oil and gas initiative in the mid-20th century and Congress’s effort to initiate an appropriate legal framework for its governance in OCSLA, as adopted in 1953).

OCSLA's comprehensive 1978 revision to correct the 1953 version's single-minded focus on exploiting the OCS's mineral wealth.<sup>107</sup> Congress's remedial efforts are also expressed concomitantly in the Clean Water Act and, most directly in the case of marine oil discharges, in OPA. Well off the mark is any suggestion that the judge-made general maritime law's simplistic negligence tort is a match for these complexities, on which Congress, the U.S. Department of the Interior, and related agencies have labored for decades.

Depending upon the facts, *Executive Jet* also cautions, the strict location test may be "impossible to apply with any degree of certainty," as evidenced in that case's scenario of a plane crash resulting from the ingestion of seagulls by the plane's engines as it rose above its Cleveland runway but crashed in nearby Lake Erie.<sup>108</sup> "Under the locality test," Justice Stewart observes, "the tort 'occurs' where the alleged negligence took effect, and in the case of aircraft that locus is often most difficult to determine"<sup>109</sup> because, "unlike waterborne vessels, they are not restrained by one-dimensional geographic and physical boundaries."<sup>110</sup> Finding SRTMA the source of a more cogent resolution of the question, the Court concluded: "In the view we take of the question before us we need not decide who has the better of [a] dispute [driven by the location principle]."<sup>111</sup> The challenge under OPA or maritime law of determining where and when the discharge resulting from the BP blowout occurred—below the OCS seabed, at the OCS seabed, or descending from the Deepwater Horizon—is one of the BP blowout's genuine imponderables and most persuasive reasons for denying it SRTMA status.<sup>112</sup>

Finally, SRTMA is one of *Grubart*'s three independent tests, the other two being the potential to disrupt maritime commerce and, along with SRTMA, the location of the allegedly wrongful activity on navigable waters. Disruption and location are not featured in this Article because their satisfaction in the BP scenario is broadly conceded. But SRTMA's separateness from the disruption and location measures is of primary

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107. For an account of these revisions, see John Costonis, *The Macondo Well Blowout: Taking the Outer Continental Shelf Lands Act Seriously*, 42 J. MAR. L. & COM. 511, 540–44 (2011).

108. *Exec. Jet*, 409 U.S. at 266.

109. *Id.*

110. *Id.* at 268.

111. *Id.* at 267.

112. See *infra* text accompanying notes 278–83.

importance because proof of the independent SRTMA variable is essential to a finding that the BP blowout is an admiralty tort.<sup>113</sup>

The admiralty contract measure, we have already seen and will see again, fuses the elements of: (1) conducting oil and gas operations; (2) from a vessel inextricably engaged in the pertinent contract's performance; (3) on navigable water; and (4) under an overall mantle of "maritime commerce." *Grubart*, on the other hand, goes the other way by narrowing its concern to location, a non-issue in *BI Bundle* and *Wildlife*, and to the SRTMA connection test alone. Hence, *Grubart* defines—and isolates—the "activity giving rise to the incident" as the unit to be compared with a traditional maritime activity. If this granular activity meets the SRTMA resemblance link and if it also meets the location requirement, the tort is within admiralty jurisdiction. If not, the tort falls outside of admiralty jurisdiction even if the location and disruption requirements are met.

## 2. OCSLA/Rodrigue Standard

The SRTMA story both reinforces and is reinforced by the OCSLA story, as reflected in OCSLA's legislative history, the statute's choice of law prescriptions in OCSLA §§ 1333(a)(1) and (a)(2)(A), and the Supreme Court's decisions in *Rodrigue* and *Herb's Welding*, among others.

The point of the OCSLA/*Rodrigue* story is plain enough even if tracing it through these sources is not. Reviewing the 1953 OCSLA hearings,<sup>114</sup> the Supreme Court definitively confirmed Congress's recognition that admiralty law is an unfortunate choice to govern OCS tortious oil and gas servicing activities. It observed that Congress "was acutely aware of the inaptness of admiralty law," particularly highlighting

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113. The structure of Justice Souter's treatment of the SRTMA issue in *Grubart* precisely reflects the foregoing division between the two SRTMA components, which appear in the opinion at Part B, pp. 534–35 (location/vessel) and Part C, pp. 538–40 (SRTMA). Midway through Part B, the Court states 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 . . . ." Part C opens with the sentence: "We now turn to the maritime connection enquiries." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 539 (1995). Only then does the opinion restate and undertake to resolve the SRTMA inquiry.

114. For a more detailed discussion of the pertinent elements of OCSLA's legislative history, see Costonis, *supra* note 107, at 526–34.

that OCSLA “applied the same law to the seabed and subsoil as . . . to the artificial islands, and admiralty law was obviously unsuited to that task.”<sup>115</sup>

The Court also singled out witness 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>116</sup> It reasoned that “[s]ince the Act treats seabed, subsoil and artificial islands the same, . . . the most sensible interpretation of Congress’ reaction to this testimony is that admiralty treatment was eschewed altogether.”<sup>117</sup>

These quotes demonstrate that the OCSLA statute, like the Truman Proclamation<sup>118</sup> it implements, overwhelmingly focuses on one objective and the location at which it is to be achieved: the exploitation of the OCS’s terrestrial mineral resources on or below the OCS seabed. Whether a vessel or stationary platform is employed for drilling purposes hardly competes as other than incidental to these two factors, except regarding remedies for seamen or workers injured or killed while engaged in the extraction effort. Hence the expert witness’s testimony in Senate procedures relating to the LHWCA 1972 amendments:

“Irrespective of design [, that is,] bottom resting, semi-submersible, or full floating,” these [drilling platforms] perform only as a base from which the drilling industry conducts its operations. The operations, once the structure is in place, are no different from that which takes place on dry land. All of the equipment and methods utilized in the drilling operations are identical to our land based operations.<sup>119</sup>

This is the perspective on the exploitation of the OCS’s mineral wealth that undergirds the force of the Supreme Court’s observation that OCSLA “applied the same law to the seabed and subsoil as . . . to the artificial islands, and admiralty law was obviously unsuited to that task.”<sup>120</sup>

The issues associated with the injury or death of one or several seamen or OCS platform workers should be addressed in their own terms, rather than entangled with the resolution of property and economic claims of tens

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115. See *Rodrigue v. Aetna Cas. & Ins. Co.* 395 U.S. 352, 364–65 (1969).

116. *Id.* at 365 n.12.

117. *Id.*

118. Truman Proclamation No. 2776, 10 Fed. Reg. 13, 303 (Sep. 28, 1945); Exec. Order No. 9633, 10 Fed. Reg. 12, 305, 1945 WL 3400 (Sep. 29, 1945).

119. *Hearings on S. 2318 et al. before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 92d Cong., 2d Sess., 410–11 (1972) (Statement of General Counsel, International Association of Drilling Contractors).

120. *Rodrigue*, 395 U.S. at 365–66.

of thousands of Gulf residents or enterprises, the vast majority of which are located inland from the Gulf states' coast. The failure to distinguish between the two is among the most fundamental illustrations of the BP MDL litigation's admiraltycentric bent.

A similar message derives from the confusion of the Exxon Valdez event, properly identified as a "spill," with the BP well "blowout." Without doubt, admiralty law was the right choice for assigning private rights and duties in the pre-OPA Exxon Valdez spill—an event engaging a vessel in state waters transporting a cargo of oil across the ocean's surface.<sup>121</sup> But the BP oil and gas blowout, which stemmed from loss of well control in a well bore located on the Mississippi Canyon 5,760-acre lease block some 15,200 feet below the OCS with a total depth of 20,200 feet from the wellhead to the Deepwater Horizon deck,<sup>122</sup> is literally in another environment than the Valdez spill, which splendidly illustrates an activity that bears a "substantial relationship to a traditional maritime activity."<sup>123</sup> Congress clearly had this difference in mind when it amended OCSLA in 1978 to include § 1332(6)'s "Congressional declaration of policy" that "operations in the [OCS] should be conducted . . . 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 . . . life or health."<sup>124</sup>

The same message of admiralty law's constrained role in the OCS oil and gas exploitation picture is detailed both in the legislative history and wording of OCSLA §§ 1333(a)(1) and (a)(2)(A), which provide as follows:

(a)(1). *The Constitution and the laws . . . of the United States are extended to the subsoil and seabed of the [OCS] 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, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such*

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121. Costonis, *supra* note 1, disputes the *BI Bundle* position that the general maritime marine pollution tort was not displaced by OPA's adoption in 1990.

122. *In re Oil Spill by the Oil Rig "Deepwater Horizon,"* 21 F. Supp. 3d 657, 671 (E.D. La. 2014).

123. Because the *Valdez* spill occurred in state waters, OCSLA was inapplicable. Had the spill been on waters above the OCS, however, remediation of qualified, privately incurred economic damages would have been assigned to admiralty tort law in the year preceding OCSLA's adoption.

124. 43 U.S.C. § 1332(6) (2018).



resources, to the same extent as if the [OCS] were an area of exclusive Federal jurisdiction located within a state.

(a)(2)(A). To the extent that they are applicable and not inconsistent with this subchapter or with 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, which would be within the area of Shelf . . . (emphasis added).

As conceived by OCSLA's drafters, their work envisaged formulation of a choice of law framework featuring three different normative choices and a two-stage process.<sup>125</sup> At the outset of the hearings, the alternatives included federal non-admiralty law, federal admiralty law, and state law. The drafters selected admiralty law in the original Senate bill, which declared that "[a]ll acts occurring . . . on any structure (other than a vessel), which is located on the [OCS] or on the waters above the [OCS] . . . 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>126</sup> But this alternative was decisively rejected in no small part, *Rodrigue* confirms, because of testimony declaring that admiralty law "never had to deal with the resources in the ground beneath the sea, and its whole tenor is ill adapted for that purpose,"<sup>127</sup> which the Supreme Court concluded rendered "sensible" the interpretation that "Congress' reaction" was to "eschew [admiralty treatment] altogether."<sup>128</sup>

State law as such also failed to garner the necessary support, even though it comprehensively managed the civil and criminal issues likely to arise among drilling platform workers from states adjacent to these drilling platforms. Objections to state law included the status of the OCS as "uniquely an area of exclusive federal jurisdiction and control,"<sup>129</sup> as well

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125. See Costonis, *supra* note 107, at 530–33.

126. *Outer Continental Shelf: Hearings on S. 1901 Before the S. Comm. on Interior and Insular Affairs*, 83rd Cong. 2 (1953) [hereinafter *Insular Hearings*].

127. *Rodrigue v. Aetna Cas. & Ins. Co.*, 395 U.S. 352, 365 n.12 (1969) (quoting *Insular Hearings*, *supra* note 126, at 668 (Statement of Richard Young Esq. Member of the New York State Bar)).

128. *Id.* at 365 n.12.

129. See 99 Cong. Rec. 6961, 6963 (1953).

as the impropriety for the conduct of the nation's foreign policy of "intermingling of national and international rights in the area."<sup>130</sup>

Nevertheless, Congress established state law's priority 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>131</sup> The compromise neither pertained to nor was designed to accommodate admiralty law, which Congress appeared to have eliminated from consideration by this step.<sup>132</sup> Rather, it focused on state law and non-admiralty federal law. The compromise transformed the OCSLA-selected state law into surrogate federal law when appropriate to do so under OCSLA § 1333(a)(2)(A).

Senator Condon, who presided over the Senate's definitive rejection of admiralty law and superintended the bill that became OCSLA 1953, confirmed this format in his statement that:

To carry out the primary purpose of the measure, a body of law is extended [under OCSLA § 1333(a)(1)] to the outer shelf area, consisting of: (a) The constitution and the laws . . . of the Federal Government; . . . and (c) *in the absence of such applicable Federal law . . . , the civil and criminal laws of the State adjacent to the outer shelf area [under OCSLA sec. 1333(a)(2)(A)].*<sup>133</sup>

A two-stage process implements this format. The first determines whether applicable federal non-admiralty law exists; if so, it applies. If a gap in federal law leaves the matter uncovered,<sup>134</sup> however, the second step employs as surrogate federal law OCSLA-endorsed state law that is not itself "inconsistent" with other federal law. As noted, OCSLA § 1333(a)(1) addresses the first step; OCSLA § 1333(a)(2)(A) addresses the second.

Taking this apparent restriction on OCSLA's election of adjacent state law into account, the Fifth Circuit approved the following three-part test in *Union Texas Petroleum Corp. v. PLT Engineering, Inc. (PLT)*:

(1) The controversy must arise on a situs covered by OCSLA (i.e., the subsoil, seabed, or [artificial] structures permanently or temporarily attached thereto). (2) Federal maritime law must not apply of its own force. (3) The state law must not be inconsistent

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130. *Id.*

131. *Rodrigue*, 395 U.S. at 365.

132. *Walsh v. Seagull Energy Corp.*, 836 F. Supp. 411, 415 (S.D. Tex. 1983).

133. S. REP. NO. 83-411, at 2 (1953) (emphasis added).

134. *See Rodrigue*, 395 U.S. at 357; *Nations v. Morris*, 183 F.2d 577, 585 (5th Cir. 1973).

with Federal law.”<sup>135</sup>

Working through the three steps is standard in conventional OCSLA oil and gas litigation<sup>136</sup> conducted under OCSLA § 1333(a)(2)(A). Litigants seeking to avoid admiralty law’s selection in this process commonly deny that activity on the basis of which admiralty law is deemed to “apply of its own force“ doesn’t merit admiralty status.<sup>137</sup>

But the BP scenario, properly understood, doesn’t follow the conventional Fifth Circuit model<sup>138</sup> because OCSLA § 1333(a)(1) provides the appropriate choice of law clause, not § 1333(a)(2)(A). As already observed, recourse to the latter is called for only when there is a gap. But no gap exists for remediating the property and economic damages addressed in *BI Bundle*. OPA not only duplicates the relevant prior general maritime law damages requirements but substantially expands its OPA § 2702(b) category of damages well beyond the general maritime law remedy.<sup>139</sup>

### B. Pippen Standard

Although deemed the *Pippen* test, this Article’s account of the test’s formulation and its later disparagement by the Supreme Court flows from two Fifth Circuit’s decisions, *Pippen*<sup>140</sup> and *Herb’s Welding, Inc. v. Gray*,<sup>141</sup> and the Supreme Court’s effective reversal of the latter opinion.

Pippen, an employee of Superior Electric, was injured in Louisiana waters while performing wireline services on Inland Well’s drilling barge. Inland Well brought a third-party action for indemnity against Superior Electric in the event the court declared it liable to Pippen. Superior Electric sought dismissal of Inland Well’s complaint, arguing that LHWCA § 905(b) forbade such actions by a vessel owner against the employer of an injured employee caused by the negligence of the vessel. Inland Well

135. 895 F.2d 1043, 1047 (5th Cir. 1990).

136. Although OCSLA plays a central role in the BP OCS litigation as well, the more appropriate choice in the BP scenario is § 1333(a)(1), rather than § 1333(a)(2)(A). See *infra* text accompanying notes 275–77. If not, the default choice is adjacent state (Louisiana) law pursuant to OCSLA § 1333(a)(2)(A). In either case, admiralty law is an inappropriate choice.

137. See, e.g., *Texaco Expl. & Prod., Inc. v. AmClyde Engineered Prods. Co.*, 448 F.3d 760 (5th Cir. 2006); *Hufnagel v. Omega Serv. Indus., Inc.*, 182 F.3d 340 (5th Cir. 1999).

138. The Fifth Circuit model is detailed in *Costonis*, *supra* note 107, at 530–34.

139. See *Costonis*, *supra* note 1, *passim*.

140. *Pippen v. Shell Oil Co.*, 661 F.2d 378 (5th Cir. 1981).

141. 703 F.2d 176 (5th Cir. 1983).

responded that Superior Electric was not entitled to the LHWCA § 905(b) bar because Pippen's performance of wireline services did not qualify his work as "maritime employment" under LHWCA § 902(3).

The court, which described Pippen's suit as a "maritime tort action,"<sup>142</sup> ruled for Superior Electric. Its reasoning matched the court's enumeration of the *Pippen* test's elements for "maritime employment." As already noted, the formula requires that the plaintiff's work must have a realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters. The court then offered its perception of the match between these elements and the *Pippen* scenario itself.

Pippen worked, the court began, as a wireline operator at the time of his injury. His responsibilities were essential both to the function of the vessel and to the completion of the offshore drilling process. The court concluded that: "Since offshore drilling the discovery, recovery, and sale of oil and natural gas from the sea bottom" is maritime commerce, "it follows that the purpose of Pippen's work was to facilitate maritime commerce."<sup>143</sup> As we have seen, the introductory clause of this formulation has been commandeered as a decisive component in *Theriot's* admiralty contract standard and as the fulcrum supporting *Doiron's* two-step restatement of the standard.

Four points stand out in this reasoning. First, the formula and its recapitulation in the scenario's various linkages premises its maritime tort standard on a relationship of functionality of the worker's effort in facilitating mineral extraction, rather than of SRTMA's similarity of the work so performed with some counterpart in traditional maritime activity. That is, the tort does not lose its admiralty status if the activity fails the SRTMA test, so long as the activity facilitates the drilling process, which, in turn, *Pippen* blesses as "maritime commerce."

*Pippen* illustrates the point in distinguishing its scenario from a same-year Fifth Circuit decision, *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*,<sup>144</sup> which denied SRTMA status for allegedly wrongful activity that, recalling *BI Bundle*, resulted in an action for property damages arising from the blowout of a gas well, the wireline services for which were being conducted from a vessel.<sup>145</sup> Observing *Sohyde's* portrayal of these services as "hardly of a peculiarly maritime

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142. *Pippen*, 661 F.2d 378.

143. *Id.* at 384.

144. 644 F.2d 1132 (5th Cir. 1981).

145. Unlike the BP MDL scenario, OCSLA played no role in the *Sohyde* blowout, which occurred in Louisiana waters.

nature,”<sup>146</sup> *Pippen* continued, “[I]ikewise, we do not conclude that *Pippen*’s function or role was of a peculiarly maritime nature. Indeed, his job could have been performed either offshore or on land.”<sup>147</sup> What counts is the “purpose of the work, not solely . . . the particular skills used.”<sup>148</sup>

Second, *Pippen*’s unit of analysis is not SRTMA’s granular “wrongful activity,” but an aggregation of multiple elements gathered together under the mantle of “maritime commerce.” Third, *Pippen* essentially assumes that oil and gas operations constitute “maritime commerce,” largely—if not exclusively—because a vessel’s substantial utilization is an inextricable feature of master contracts, which typically provide both for indemnification and for the services of the contractor or subcontractor whose employee is injured in the underlying tort.<sup>149</sup> That assumption fared very poorly indeed in *Herb’s Welding*, which, as shortly detailed, effectively dismissed it out of hand before unqualifiedly declaring that the “exploration and development of the Continental Shelf are not themselves maritime commerce.”<sup>150</sup>

But SRTMA goes the other way. It segregates the element of the vessel’s location on navigable waters—as well as *Pippen*’s various other elements—from the oil and gas activity being conducted on the vessel, focusing solely on the latter’s degree of whether the dispute is “substantially salty,”<sup>151</sup> hence qualifying for admiralty tort status.

Finally, because *Pippen* features an activity occurring on or under state waters, its transfer as a rationale for distinguishing admiralty from non-admiralty contracts may enjoy more latitude than one formulated for the OCS activities that put in play the constraints earlier considered in the OCSLA and SRTMA discussion.<sup>152</sup> One might expect that *Theriot* and

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146. *Pippen*, 661 F.2d at 384 n.10 (quoting *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1136 (5th Cir. 1981)).

147. *Id.* (emphasis added).

148. *Id.* at 382 (quoting *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1221 n.16 (5th Cir. 1980)).

149. The link between an underlying tort and the related indemnification contract was decoupled with respect to determining whether the contract is in admiralty by *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778 (5th Cir. 2009).

150. *Herb’s Welding, Inc. v. Gray*, 470 U.S. 414, 425 (1985).

151. The phrase is that of Justice John Brown in *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1137 (5th Cir. 1981).

152. In addressing the variables that may influence the admiralty versus non-admiralty contract question, the Fifth Circuit’s opinion in *Lewis v. Glendel Drilling*, 898 F.2d 1083 (5th Cir. 1990), acknowledges that “[b]y act of Congress, whether the contract covered activity in state territorial waters or on the Outer Continental Shelf will also have an impact on the choice of law,” citing, *inter alia*, *Laredo Offshore Constructors Inc. v. Hunt Oil Co.*, 754 F.2d 1223 (5th Cir. 1985),

*Doiron* would likely be similarly restricted, but, as we have seen, discipline in selecting and applying jurisdictional and choice of law tests cannot be assumed in Fifth Circuit oil and gas jurisprudence.<sup>153</sup>

Four years after *Pippen*, the Supreme Court reversed the Fifth Circuit's endorsement of the *Pippen* test in *Herb's Welding*, severely undermining and effectively overruling the standing of the *Pippen* test as the measure of a maritime tort.<sup>154</sup> The Court, one might surmise from the following paragraphs, signaled its readiness to endorse a more vigorous reading of OCSLA's legislative history than the *Rodrigue's* two dimensions permit.

Gray, who was injured while welding a gas flow line on a Louisiana fixed platform, successfully appealed to a Department of Labor Benefit Review Board an administrative law judge's ruling that cited *Rodrigue* in holding that Gray's work lacked the connection with "maritime employment" demanded by the LHWCA § 902(3) because it "totally" involved oil production from submerged lands.<sup>155</sup> The Board reversed on the alternative ground provided by OCSLA § 1333(b), which grants LHWCA benefits to offshore workers injured on the OCS, occasioning the appeal of *Herb's Welding's* to the Fifth Circuit.

The Fifth Circuit declined to consider "whether [OCSLA] applies to this case,"<sup>156</sup> instead turning to the LHWCA's "maritime employment" status requirement. The court neutralized *Rodrigue's* identification of a fixed platform as an island by observing that "[m]aritime employment turns not on geography but on the maritime nature of the work," adding that "the purpose of the work is the central inquiry, not the particular skills used by the worker."<sup>157</sup>

It then ruled in Gray's favor in an analysis that duplicated—and cited—*Pippen*. Its test, therefore, was "whether Gray's work had a realistically significant relationship to traditional maritime activity

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which denied a contract admiralty status because it concerned construction of a fixed platform on the OCS.

153. In *Mays v. C-Drive LLC*, No. 16-13139, 2018 WL 3642005 (E.D. La. Aug. 1, 2018), the Fifth Circuit's eastern federal district court of Louisiana held that an indemnification contract is in admiralty under the *Doiron* two-step test in a third-party indemnification action arising in consequence of an injury suffered by a pipeline worker injured while working on an OCS pipeline. The opinion is silent on the question posed in text.

154. *Herb's Welding v. Gray*, 703 F.2d 176 (5th Cir. 1983).

155. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 417 (1985).

156. *Herb's Welding*, 703 F.2d at 178 (characterizing the platform worker as located "in territorial waters").

157. *Id.* at 179.

involving navigation and commerce on navigable waters.”<sup>158</sup> The Fifth Circuit cited a finding that Gray’s work is vital to gas and oil drilling, which, in turn, it deemed as “maritime commerce,” hence qualifying Gray’s status as one of “maritime employment.”<sup>159</sup>

The Supreme Court also accepted the issue of whether Gray’s welding work constituted maritime employment under the LHWCA § 902(3), but only as its point of departure. The Court located Gray’s work on the Bay Marchand oil and gas field, whose drilling platforms were partly within Louisiana waters and partly on the OCS. The Court viewed this collocation arrangement as bringing both OCSLA and the LHWCA into play. The Court made clear that with OCSLA came its legislative history and *Rodrigue*’s evaluation of that history, neither of which flatter the concept of admiralty law’s governance of OCS fixed platform oil and gas operations.

The Court then turned to the Fifth Circuit’s rationale that “Gray’s work bore ‘a realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters’ . . . because it was an integral part of the offshore drilling process, which the court held in *Pippen v. Shell Oil Co.* . . . was itself maritime commerce.”<sup>160</sup> The Supreme Court was not kind to this rationale, which, in its view, contributed to the “Fifth Circuit’s expansive view of maritime employment.”<sup>161</sup> It described as “untenabl[y]” over-inclusive the claim that “offshore drilling is maritime commerce and that anyone performing any task that is part and parcel of this activity is in maritime employment” because “this approach would extend coverage to virtually everyone on the stationary platform.”<sup>162</sup> As if that were not enough, the Court added that “[t]he history of the Lands Act at the very least forecloses the Court of Appeals’ holding that offshore drilling is a maritime activity and that any task essential thereto is maritime employment for LHWCA purposes.”<sup>163</sup>

The Court likewise made clear that it did not limit its evaluation to the LHWCA’s use of the term “maritime,” and the analysis extended to the term’s generic use over the entire field of OCS oil and gas operations. The Court stated, “We cannot assume that Congress was unfamiliar with *Rodrigue* and the Lands Act [OCSLA] when it referred to ‘maritime

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158. *Id.*

159. *Id.* at 179–80.

160. *Herb’s Welding, Inc.*, 470 U.S. at 418–19 (quoting *Herb’s Welding v. Gray*, 703 F.2d 176, 179–80 (5th Cir. 1983)).

161. *Id.* at 423.

162. *Id.* at 421.

163. *Id.* at 422.

employment’ in defining the term ‘employee’ [in its 1972 addition of § 902(3) to the LHWCA].”<sup>164</sup>

The Court went further still in a passage that doubles as an exposition of a non-SRTMA activity:

Gray’s welding work was far removed from traditional LHWCA activities . . . . He 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 . . . .<sup>165</sup>

Potentially the most unsettling of *Herb Welding’s* declarations as they relate to the later decisions of *Theriot* and *Doiron* is *Herb Welding’s* unqualified assertion that “exploration and development of the Continental Shelf are not themselves maritime commerce.”<sup>166</sup> This question, as noted earlier, is largely beyond the scope of this Article, but it richly deserves attention and possible harmonization in an admiralty contracts environment.

### C. The Theriot/Doiron Standard

David W. Robertson, an astute commentator on this jurisprudence, authored a 2007 article provocatively subtitled *Correcting the Fifth Circuit’s Mistakes*,<sup>167</sup> which labeled the Circuit’s “copious jurisprudence on the Outer Continental Shelf Lands Act . . . an infamously chaotic area of the law.” One source of the chaos singled out was the “inherent weaknesses of the constraints on panels’ treatments of one another’s work—in combination with the court’s reluctance to conduct en banc hearings.”<sup>168</sup> Similarly candid expressions of the Circuit’s own frustration appear in other Fifth Circuit panel decisions.<sup>169</sup>

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164. *Id.* at 422–23.

165. *Id.* at 425.

166. *Id.*

167. Robertson, *supra* note 2, at 489.

168. *Id.* at 489.

169. *See, e.g.,* *Hoda v. Rowan Companies, Inc.*, 419 F.3d 379, 380 (5th Cir. 2005) (noting that the court’s OCSLA jurisprudence “creates uncertainty, spawns litigation, and hinders the rational calculation of costs and risks”); *Smith v. Penrod Drilling Co.*, 960 F.2d 456, 460 (5th Cir. 1992) (“our case law arguably conflicts with OCSLA”) (overruled on other grounds); *Grand Island Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778 (5th Cir. 2010); *Lewis v. Glendel Drilling Co.*, 898 F.2d 1083, 1084 (“uncertain policy underpinning our result”), 1087



*Doiron*, the long-awaited en banc opinion,<sup>170</sup> shows evidence of being designed to offer deliverance from the chaos in its effort to provide a relatively clear, simple, and administrable admiralty contract standard rooted in one legal claim and two factual requirements. The legal rule, which, as we have seen, comes to *Doiron* from *Theriot* by way of *Pippen* is as follows: “Oil and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce.”<sup>171</sup>

The first of the two factual inquiries, which is also vintage *Pippen*, asks whether the contract “provide[s] services to facilitate the drilling or production of oil and gas on navigable waters.” Recall *Pippen*’s linkages: as an integral part of the offshore drilling process, the work triggering the litigation is necessary “to facilitate” that process, which itself is “maritime commerce.”<sup>172</sup> This rationale, which neither asks nor cares whether the work is “inherently maritime,”<sup>173</sup> ought to be less difficult to administer than the *Davis & Sons*’s multi-factor test, given the Circuit’s seven decades of cataloging facilitative activities since OCSLA’s passage in 1953.<sup>174</sup>

The second inquiry, which asks whether the contract provides or the parties expect that a vessel will play a substantial role in the contract’s performance, looks to *Theriot*<sup>175</sup> and its progeny for their indexes of

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(“inconsistent lines of authority”) (“case radiates with the uncertainties that exist in this area of the law”).

170. The pathway to *Doiron* was illuminated somewhat by the court’s earlier decision in *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778 (5th Cir. 2009) (en banc). See *infra* text accompanying notes 223–24.

171. *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538–39 (5th Cir. 1986) (paraphrasing somewhat the statement in *Pippen v. Shell Oil Co.*, 661 F.2d 378, 384 (5th Cir. 1978) that “[s]ince offshore drilling—the discovery, recovery, and sale of oil and natural gas from the sea bottom—is maritime commerce, it follows that the purpose of *Pippen*’s work was to facilitate maritime commerce”). Aside from the criticism of this view in *Herb’s Welding*, commentators have portrayed the issue as severe overreaching by the judiciary on a matter properly left to Congress. See *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 1054 (5th Cir. 1982) (Gee, J., dissenting).

172. *Pippen v. Shell Oil Co.*, 661 F.2d 378, 384 (5th Cir. 1981).

173. See *supra* text accompanying notes 144–47.

174. In *In re Crescent Energy Services L.L.C.*, 896 F.3d 350, 360–61 (5th Cir. 2018), the court cited multiple factors as confirming the substantiality under *Doiron* step two of the use of a vessel, including its utility both as a work platform and for storage of equipment, including a crane, as well as the conduct from the vessel of a wireline project, “the most important component of the work.”

175. *Theriot* quotes Benedict that “[i]n order that . . . [maritime] character should attach, there must be a direct and proximate juridical link between the

“substantiality” factors. Although some variance in post-*Doiron* treatment of this topic is inevitable, it too should fall well short of the pre-*Doiron* period’s “infamously chaotic” range of judicial efforts to distinguish admiralty from non-admiralty contracts.

Several of *Doiron*’s dimensions merit comment in relation to this Article’s thesis that *BI Bundle*’s exclusive reliance on *Theriot* to support its position that the BP blowout “bore a substantial relationship” is demonstrably misconceived. Moreover, Part II of this Article explains why *Wildlife*’s addition of *Grubart* to *BI Bundle*’s citation of *Theriot* is likewise off-target.

Most directly in contention is that *Grubart*’s SRTMA admiralty tort standard differs by rationale and goal from the *Theriot/Doiron* admiralty contract standard. The tests’ respective uses of the key term “relationship” reflects a different rationale associated with different goals.

The SRTMA test finds its concept of the relationship between the tortious activity and traditional maritime activity on resemblance or similarity in support of the goal, as stated initially in *Executive Jet*, of insuring that the “reasons for applying special admiralty rules would apply in the suit at hand.”<sup>176</sup> Stated conversely, the tortious activity must not be so remote from “traditional maritime activity,” the emblem of admiralty law’s wisdom, as to disqualify the latter’s selection to govern the dispute occasioned by the activity.

The *Theriot/Doiron* test’s goal, as derived from *Pippen*, however, is to insure that the regulated activity enjoys a realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters. This goal is achieved, *Pippen* holds, when the activity being assessed facilitates an intermediate activity that, in turn, qualifies as “maritime commerce.” Facilitation, therefore, is the concept upon which the relationship is premised. *Pippen*’s firm imprint is evident in *Doiron*’s step one, which requires as the intermediate step that the contract provide “services to facilitate the drilling or production of oil and gas on navigable waters.”<sup>177</sup> As to the latter’s link to “maritime commerce,” *Doiron*, following *Theriot* and *Pippen*, leaves no doubt, at least for those not troubled by the Supreme Court’s hostility to *Doiron*’s

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contract and the operation of a ship.” 1 ERASTUS C. BENEDICT, BENEDICT ON ADMIRALTY § 183 (7th ed. 1985). Also, the *Theriot* court observed that the contract before it “did not merely touch incidentally on a vessel, but directly addressed the use and operation of the Drilling Barge Rome.” *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538 (5th Cir. 1986).

176. See *supra* text accompanying note 103.

177. *In re Larry Doiron, Inc.*, 879 F.3d 568, 573 (5th Cir. 2018).

proposition: “Oil and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce.”<sup>178</sup>

An independent basis for the respective tests’ difference is that *Theriot/Doiron* not only omit SRTMA’s resemblance criterion but aggressively dismisses its relevance altogether. *Theriot/Doiron* focus generically on the injured employee’s work to determine if it aligns with—or facilitates—the vessel’s mission, which, as integral to maritime commerce, is itself inherently maritime. Thus, a doctor’s work aboard a hospital vessel facilitates the vessel’s mission, even though her medical skills are not peculiarly maritime taken by themselves. A major reason why *Doiron* rejects *Davis & Sons*’s six-factor test is that its second prong—“what did the crew actually do?”—requires “the panel to parse the precise facts related to services performed under the contract and determine whether those services are inherently maritime.” *Doiron* holds, however, that parsing the facts is not only time-consuming and imprecise, but also unnecessary because “[t]he fact is, none of these services are inherently maritime.”<sup>179</sup>

Taken at its word, this statement is as profoundly significant for SRTMA tort analysis as it is mundane for *Theriot/Doiron* contract analysis. It concedes that a non-SRTMA outcome is appropriate for any allegedly wrongful activity arising from the provision of oil and gas services from a vessel in navigable waters. *Doiron*’s effort to secure greater clarity in the administration of admiralty contract disputes promises, perhaps unwittingly, increased certainty and efficiency in the SRTMA standard’s administration in tort disputes.

The respective standards differ in two further respects. The admiralty standard focuses on a complex set of linkages connecting the injured employee’s work ultimately to marine oil and gas drilling as “maritime commerce.” SRTMA explores, typically in a more granular fashion,<sup>180</sup> whether the specific tortious activity is sufficiently similar to traditional maritime activity to ensure that the “reasons for applying special admiralty rules would apply in the suit at hand.”<sup>181</sup>

The second concern differentiates the tests on broader policy grounds intrinsic to the division between tort and contract generally. *Doiron* notes that its admiralty contract test “places the focus on the contract and the expectations of the parties . . . [thereby] assist[ing] the parties in evaluating

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178. *Id.* at 575 (quoting *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538–39 (5th Cir. 1986)).

179. *Id.*

180. *See supra* text accompanying note 114.

181. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 539–40 (1995).

their risks, particularly their liability under indemnification clauses in the contract.”<sup>182</sup> It compares the similarity of this analysis to its prior en banc opinion in *Grand Isle Shipyard Co. v. Seacor Marine, LLC*,<sup>183</sup> which approved the “focus of the contract” criterion over the situs of the injury as the determinative variable for evaluating oil and gas contractual indemnity agreements. “Applying tort rules,” *Grand Isle* noted, “allow[s] the fortuitous location of an accident to determine the situs—and the applicable law—of a contractual controversy.”<sup>184</sup>

## II. THE MACONDO WELL’S PRODUCTION CASING AND TEMPORARY ABANDONMENT ACTIVITY: AN “INHERENTLY NON-MARITIME”/NON-SRTMA OCS OIL AND GAS OPERATION SERVICE

Part I undertook to disentangle the standards associated with the SRTMA tort, *Pippen*’s “maritime employment,” and *Theriot/Doiron*’s admiralty contract to clear the way to evaluate whether *BI Bundle* improperly conferred SRTMA status on the BP blowout. The Part clarifies that, in its reliance on *Theriot*, a leading Fifth Circuit contract standards opinion, *BI Bundle* chose the wrong champion for the former’s SRTMA tort determination. *Wildlife*’s muddled mixing of admiralty contract and torts standards doesn’t sustain the SRTMA case either. A “strong argument,” it asserts, yet notably fails to present, “exists for the proposition,” first, that the blowout occurred “while the vessel was engaged in the maritime activity of conducting offshore drilling operations,” and, second, that the “disaster had a significant effect on maritime commerce.”<sup>185</sup> It cites *Theriot*, presumably for the first observation, and *Grubart*, presumably for the second. Again, *Theriot* fails as an out-of-place *contract* standard while *Grubart* is in the right church but the wrong pew. *Grubart* does indeed formulate a mature SRTMA standard, but *Grubart*’s Chicago River and construction barge scenario, which neatly aligns with the standard, differs fundamentally from the BP OCS blowout scenario, which does not.<sup>186</sup>

Comparatively, *Doiron* chose the wrong church *and* the wrong pew. It selected *Wildlife* to demonstrate that “maritime law applied in reference to the oil spill that ‘occurred while the vessel[, Deepwater Horizon,] was

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182. *In re Larry Doiron*, 879 F.3d at 576.

183. 589 F.3d 778 (5th Cir. 2010).

184. *Id.* at 787.

185. *In re Deepwater Horizon*, 745 F.3d 157, 166 (5th Cir. 2014).

186. The fundamental differences between the two scenarios appear in this Article’s detailed account of the BP MDL/LLA trial’s conclusions of fact and law discussed in Section II.B, *infra*.

engaged in the maritime activity of conducting offshore drilling operations.”<sup>187</sup> This language is a segment hewn from the admiralty *contract* standard reviewed in Part I and endorsed by *Doiron* itself. It clearly fails, moreover, to square with the *tort* standard associated both with *Wildlife*'s citation and with *Wildlife*'s paraphrase of *Grubart* that *Wildlife* included to align itself with *B1 Bundle* and the BP OCS tort scenario.

*A. SRTMA/“Inherently Non-Maritime” Activity in the Fifth Circuit*

The improperly conducted Macondo well production casing and temporary abandonment activity is not SRTMA-compliant because it is “inherently non-maritime” under the confluence of the OCSLA/SRTMA analytic pathways detailed. Grounded in well-established Fifth Circuit oil and gas jurisprudence, this subsection commences by dividing the latter into representative opinions reflecting what I have termed either a “solo tort” or a “dual *Rodrigue/Grubart*-action.” I contrast both categories of opinions with a third set of opinions that feature a combined underlying tort/third-party indemnification action, titled here a “tort/indemnification action.”

The solo tort group, which *Sohyde Drilling Co. v. Coastal States Gas Producing Co.* illustrates,<sup>188</sup> manifests the OCSLA/SRTMA pattern's power to secure non-admiralty law's governance over tortiously conducted marine oil and gas operations that are deemed “inherently non-maritime” and hence are remote from *Grubart*'s connection to a “traditional maritime activity.”<sup>189</sup> Two opinions represent the dual *Rodrigue/Grubart* action: *Texaco Exploration and Production, Inc. v. AmClyde Engineered Products Co. (AmClyde)*<sup>190</sup> and *Hufnagel v. Omega Service Industries (Hufnagel)*,<sup>191</sup> so labeled because they overlay *Rodrigue*'s and *Grubart*'s confluent reasoning in concluding that admiralty law does not apply of its own force to tortious activities on stationary platforms under *PLT* step two in either case.

The tort/indemnification action reviews two opinions, *Thurmond v. Delta Well Surveyors (Thurmond)*<sup>192</sup> and *Hoda v. Rowan Companies, Inc.*

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187. *In re Larry Doiron*, 879 F.3d at 575 (quoting *In re Deepwater Horizon*, 745 F.3d 157, 166 (5th Cir. 2014)).

188. 644 F.2d 1132 (5th Cir. 1981).

189. *See Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 425 (1985).

190. 448 F.3d 760 (5th Cir. 2006).

191. 182 F.3d 340 (5th Cir. 1999).

192. 836 F.2d 952 (5th Cir. 1988).

(*Hoda*),<sup>193</sup> which illustrate the pre-*Doiron* basis upon which the Circuit divides admiralty from non-admiralty contracts relating to oil and gas development operations. *Thurmond* denies, but *Hoda* affirms, admiralty contract status for the indemnification clauses at issue.

### I. Sole Tort Action

Decided 1981—the same year as *Pippen—Sohyde Drilling Co. v. Coastal States Gas Producing Co.*<sup>194</sup> merits scrutiny as a solo tort decision assessing an oil and gas well blowout that resulted from an improperly conducted workover operation conducted by Sohyde on a semisubmersible vessel on Louisiana waters. *Sohyde* concluded that the blowout failed to satisfy the admiralty tort jurisdiction's SRTMA principle, which, unlike OCSLA § 1333(a), reaches activities in both state and OCS waters. The decision affords valuable guidance for assessing the BP blowout's failure, as well as other tortious oil and gas happenings in both locations.

*Sohyde*, like *B1 Bundle*,<sup>195</sup> addressed the Admiralty Extension Act,<sup>196</sup> which extended admiralty jurisdiction to damages suffered on land that are caused by a vessel in navigable waters. In light of the Act's legislative history, *Sohyde* refused to exempt the blowout from the demands of the SRTMA principle.<sup>197</sup> Applying *Executive Jet* in conjunction with an earlier Fifth Circuit decision,<sup>198</sup> *Sohyde* addressed the roles of the parties, the types of vehicles and instrumentalities involved, and the event's causation and type of injury. It deemed the parties' roles as workover contractor and well operator to be “hardly of a peculiarly maritime nature.”<sup>199</sup> Leaving open whether the semi-submersible was a “vessel” for purposes of this action,<sup>200</sup> the court also reasoned that the tortious activity—the improperly conducted workover—lacked a “peculiarly salty flavor.”<sup>201</sup>

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193. 419 F.3d 379 (5th Cir. 2005).

194. 644 F.2d 1132 (5th Cir. 1982).

195. *B1 Bundle*, 808 F. Supp. 2d 943, 951 (E.D. La. 2011), *aff'd sub nom.*, *In re Deepwater Horizon*, 745 F.3d 157 (5th Cir. 2014).

196. 46 U.S.C. § 30101 (2018).

197. *Sohyde Drilling Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1134–35 (5th Cir. 1982).

198. *Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973).

199. *Sohyde*, 644 F.2d at 1137.

200. *Id.*

201. *Id.*

Also counting against SRTMA conformance were both the status of the “instrumentalities” involved as “essentially the same as those involved in a land-based workover operation”<sup>202</sup> and the status of the failed workover operation as a causative factor that “could just as easily have occurred on land.”<sup>203</sup> Finally, the court stressed that the property damages being sought were “indistinguishable from those arising from land-based well blowouts.”<sup>204</sup> Lest the significance be lost regarding the property damages feature, which marks *BI Bundle* as well, almost all of this Article’s tort cases derive from the same non-property damages scenario it equates with the “Fifth Circuit model”—namely, a scenario narrowly centered upon the death or injury on a platform or vessel of one or several workers engaged in marine oil and gas operations.<sup>205</sup>

## 2. *Dual-Status Fixed Platform Action*

Part I observed that *Grubart*’s SRTMA neatly interfaces with the pathway created by OCSLA, *Rodrigue*, and *Herb’s Welding*.<sup>206</sup> In some instances and on its own account, however, *Grubart*’s SRTMA duplicates or supplements outcomes available under this pathway. For example, the SRTMA principle affords an alternative basis to OCSLA and *Rodrigue*’s “artificial islands” rationale for denying admiralty law’s governance of

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202. *Id.*

203. *Id.*

204. *Id.* at 1138.

205. In a second property damages case, *Houston Oil & Minerals Corp. v. American International Tool Co.*, 827 F.2d 1049 (5th Cir. 1987), the Fifth Circuit sharply distinguished property damages suits from the Fifth Circuit oil and gas personal injury and death paradigm, which focuses on “the general maritime law remedies for a vessel’s unseaworthiness, the protections of maintenance and cure, and the statutory rights provided by the Jones Act, 46 U.S.C. § 688, [which] extend to certain oil field employees working on special-purpose watercraft in the exploration for oil and gas lying beneath navigable waters.” *Id.* at 1052. The *Houston Oil* panel felt “constrained to apply non-maritime principles in consequence of our holding in [*Sohyde*],” *id.* at 1053, even though doing so “requires the application of potentially inconsistent rules of law to different claims arising from a single incident,” which “invites the spectre of unwanted confusion with a potential for unjust results and a loss of the uniformity admiralty law seeks to provide.” *Id.* at 1054. The Circuit’s evident discomfort with a property damages scenario found in *Sohyde* or *BI Bundle*, in contrast with its comfort with a model premised on the personal injury and death of one or several workers on a drilling vessel or platform, is revisited in Section II.B.

206. *See supra* Section I.A.

injuries incurred by workers on fixed platforms.<sup>207</sup> Separate and apart from the injuries' location on an OCSLA § 1333(a)(2)(A) fixed platform situs may be the inherently non-maritime character of the activity that the worker was performing when injured. Consideration of dual-basis decisions affords a novel angle from which to observe the confluence of the two pathways respecting inherently non-maritime activities.

Two of various relevant Fifth Circuit OCS oil and gas opinions<sup>208</sup> serve to illustrate the dual basis concept: *Texaco Exploration and Production, Inc. v. AmClyde Engineered Products Co. (AmClyde)*<sup>209</sup> and *Hufnagel v. Omega Service Industries (Hufnagel)*.<sup>210</sup> Both arose from activities conducted on a fixed platform under OCSLA §§ 1333(a)(1) and 1333(a)(2)(A),<sup>211</sup> and each avoids blockage by admiralty law's application

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207. The dual basis blocking admiralty law's application to fixed platform injuries is often overlooked by reasoning that attributes this result solely to the location of the injury on a fixed platform in light of the Supreme Court's reference to the distinction offered by lower courts between injuries suffered on vessels and those on fixed platforms. *See* *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 416 n.2 (1985); Robertson, *supra* note 90. But the illustrative dual-basis cases in text, and certainly *Herb's Welding* itself, are as attentive to the inherently non-maritime nature of the activity occurring on their respective fixed platforms as they are to the simple presence of the latter.

208. *See, e.g.,* *Fornah v. Schlumberger Tech. Corp.*, 737 Fed. Appx. 677, 680–82 (5th Cir. 2018); *Hicks v. BP Expl'n & Prod'n Inc.*, 308 F. Supp. 3d 878 (E.D. La. 1986); *cf. Stiltner v. Exxon Corp.*, 593 F. Supp. 18, 19 (E.D. La. 2018).

209. 448 F.3d 760 (5th Cir. 2006).

210. 182 F.3d 340 (5th Cir. 1999).

211. The BP blowout event also satisfies the *PLT* step one situs requirement, but it does so through a different route tied to the Deepwater Horizon's status under OCSLA § 1333(a)(1) as a “device . . . temporarily attached to the seabed.” *BI Bundle*, 808 F. Supp. 2d 943, 944–53 (E.D. La. 2011), *aff'd sub nom., In re Deepwater Horizon*, 745 F.3d 157 (5th Cir. 2014). My focus in reviewing the two cases in text, however, is on *PLT* step two to illustrate that admiralty law fails to apply of its own force either because the tortious activity is not SRTMA-qualified, or because OCSLA § 1333(a)(1) or § 1333(a)(2)(A)—or both—choice of law rules preclude admiralty law's selection. Properly, *AmClyde* highlights the presence of fixed platforms as an important factor in justifying the choice of non-admiralty law under its specific facts. But the inclusion in *BI Bundle*'s scenario of the Deepwater Horizon vessel as an OCSLA § 1333(a)(1) “device . . . temporarily attached to the seabed” also satisfies *PLT* step one, as evidenced by the inclusion of such devices in this step by *Demette v. Falcon Drilling Co.*, 280 F.3d 492, 497 (5th Cir. 2002), *overruled on other grounds*, *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778 (5th Cir. 2009), the determinative Fifth Circuit opinion on this matter.



of its own force under *PLT* step two in light of their respective dual status under the OCSLA, *Rodrigue*, and *Grubart* rationales.

*AmClyde* addressed the property claims arising from the completion of an OCS fixed drilling tower when the main load line of a barge-mounted crane failed, causing a deck section suspended from the crane to fall into the Gulf. As the successor to the crane's designer, AmClyde was among the parties Texaco sued for the total loss of the module and damages related to reconstruction. The panel sustained Texaco's claims, which it concluded, while closely connected to the OCS's development, were not sufficiently linked to traditional maritime activity to satisfy *Grubart's* SRTMA standard.<sup>212</sup>

The court then turned to *Rodrigue* and *Herb's Welding*. It quoted *Rodrigue's* declaration that "'drilling platforms [are] not even suggestive of traditional maritime affairs.'"<sup>213</sup> Additionally, the court neither found inherently maritime activity nor identified OCS oil and gas development with maritime commerce.<sup>214</sup> *AmClyde*, like *Sohyde* before it, also viewed Texaco's claims for property damages as a marker of the non-admiralty nature of these claims because they "are not the stuff of traditional maritime activity on the high seas."<sup>215</sup> *AmClyde* also acknowledges the barge crane's role in the equation, but it is careful to instruct that a good deal more than vessel presence alone is required to "support either admiralty jurisdiction or the application of substantive maritime law."<sup>216</sup>

*Hufnagel* is a sole tort case in which Hufnagel, an employee of an oil platform services company, sued his employer and a platform owner in state court following an injury he sustained while working as a rigger on an OCS stationary platform. Upon removal of the lawsuit to a federal district court, the claimant petitioned for remand, which the federal court

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212. *Texaco Expl. & Prod., Inc. v. AmClyde Engineered Prods. Co.*, 448 F.3d 760, 771 (5th Cir. 2006).

213. *Id.* at 774 (quoting *Rodrigue v. Aetna Cas. & Ins. Co.*, 395 U.S. 352, 360 (1969)).

214. *Id.* at 774–75.

215. *Id.* at 774.

216. *Id.* at 775. *AmClyde's* service as a precedent is evident in *Petrobras America, Inc. v. Vicinay Cadenas, S.A.*, 815 F.3d 211 (5th Cir. 2016), the facts of which roughly track those in *AmClyde* insofar as *Petrobras* addressed whether *Grubart's* SRTMA requirement was satisfied in an event in which a component failed in an underwater structure during an offshore production installation, which caused the structure to fall to the sea floor. *Petrobras* cited *AmClyde's* holding that its own tort claims are "inextricably connected with the development of the Outer Continental Shelf and an installation for the production of resources there." *Id.* at 218. "[A]s *AmClyde* confirms," it added, "development on the Outer Continental Shelf is not a traditional maritime activity." *Id.*

denied on the basis that his OCSLA claim supported removal jurisdiction. Because OCSLA does not displace admiralty law, however, substantive maritime law continues to govern if both OCSLA and admiralty jurisdiction apply. The court resolved the choice in favor of OCSLA-determined adjacent state law when, in its *PLT* step two ruling, it concluded that because admiralty tort jurisdiction law was nullified under *Hufnagel*'s facts, it did not apply "on its own force."

The Fifth Circuit agreed, expressly basing the conclusion that *Hufnagel*'s claim was not maritime upon both the OCSLA/*Rodrigue* and the SRTMA rationales. As to the former, it cited *Rodrigue*'s insistence that the platform was not "within admiralty jurisdiction" and was viewed as an artificial island.<sup>217</sup> Nor was "*Grubart*'s connection test"<sup>218</sup> satisfied because the activity giving rise to *Hufnagel*'s accident—the repair of a fixed platform—lacked a significant relation to navigation. In the court's view, the activity's sole focus was the pursuit of minerals from the shelf.<sup>219</sup>

### 3. The Tort/Indemnification Action

Neither the decades-long chaos preceding *Doiron* in the tort–indemnification contract sphere, nor the Fifth Circuit's determined effort to end this chaos upends the foregoing non-SRTMA portrayal of tortious oil and gas development service activities. On the contrary, *Doiron* categorically acknowledges that "none of these services are inherently maritime."<sup>220</sup> None, therefore, will be SRTMA-qualified.

A defensible generalization of the Fifth Circuit's approach to these pre-*Doiron* tort–contract opinions is two-fold. Scenarios involving third-party indemnification contract actions that are set in motion by an underlying tort and that expressly or implicitly engage the conduct of oil and gas operations from a vessel in navigable water under the mantle of "maritime commerce" warrant admiralty contract governance. Those that arise from an underlying tortious service activity that is not "inextricably intertwined" with the foregoing assemblage and, in consequence, fail to

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217. *Hufnagel v. Omega Serv. Indus., Inc.*, 182 F.3d 340, 351–52 (5th Cir. 1999).

218. *Id.* at 352.

219. *Id.* For other Fifth Circuit opinions drawing on both OCSLA/*Rodrigue* and the SRTMA principle to deny admiralty governance of events occurring on fixed platforms, see *Fornah v. Schlumberger Tech. Corp.*, 737 Fed. Appx. 677, 680–82 (5th Cir. 2018); *Hicks v. BP Expl'n & Prod'n Inc.*, 308 F. Supp. 3d 878, 890–91 (E.D. La. 2018); cf. *Stiltner v. Exxon Corp.*, 593 F. Supp. 18, 19 (E.D. La. 1983).

220. *In re Larry Doiron, Inc.*, 879 F.3d 568, 573 (5th Cir. 2018) (en banc).

bear sufficient resemblance to a traditional maritime counterpart face non-admiralty contract management.<sup>221</sup>

This generalization eliminates the need to become entangled in the “famously chaotic” contract opinions that the Fifth Circuit itself has recognized as random, inconsistent, and unprincipled.<sup>222</sup> This Article limits itself to the selection of two opinions from the pre-*Doiron* era, *Thurmond* and *Hoda*, as tort/indemnification action twin paradigms—the first featuring a non-admiralty and the second an admiralty contract outcome. The second also illustrates the debt its rationale owes to *Pippen* and *Theriot*, as well as why the reciprocal of *Doiron*’s ultimate admiralty contract paradigm is *Doiron*’s wholesale labeling of tortious oil and gas servicing activities as inherently non-maritime.

These observations have undergone modification in light of the admiralty law standard changes called for in the Circuit’s 2009 *Grand Isle* decision and, of course, in the 2018 *Doiron* decision. *Grand Isle* is best understood as *Doiron*’s herald because it decoupled the indemnification contract from the underlying tort, thus converting what had earlier been a joint consideration of the tort and contract into a pure contract evaluation. In the former instance, the court’s choice of non-admiralty law for the tort as non-SRTMA, for example, might produce a similar result for the contract when the event’s situs for *PLT* step one is a stationary platform, or it might create the converse result if a vessel is deemed the situs.<sup>223</sup> *Grand Isle* does not necessarily preclude either outcome; however, it premises its determination not on situs, but on a focus-of-the-contract standard, which may or may not call for a different result than the prior tort situs-based evaluation.<sup>224</sup>

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221. As noted below, *infra* text accompanying notes 223–24, the generalization does not accurately describe post-*Doiron* Fifth Circuit admiralty contract jurisprudence.

222. See Kenneth Engerrand, *Primer of Remedies on the Outer Continental Shelf*, 4 LOY. MAR. L.J. 19, 33–66 (2006), as updated in Kenneth Engerrand, *Reconsideration of Maritime Oilfield Contract Jurisdiction*, 1, 26–34 (Seventeenth Annual Judge Alvin B. Rubin Conference on Maritime Personal Injury Law, April 26, 2019). Engerrand’s comprehensive review of Fifth Circuit jurisprudence concludes that agreements historically listed as admiralty contracts are those dealing with drilling and workover casing, catering, repair, and well-site supervision, while those classified as non-maritime include wireline work, testing, and completion operations.

223. *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 783–88 (5th Cir. 2009) (en banc).

224. In *Grand Isle*, the employee was injured on a vessel, but the court chose adjacent state (Louisiana) law rather than admiralty law because the contract

*Thurmond*, a tort/indemnification action denying admiralty status to the indemnification clause of a wireline services contract, exhibits the usual pattern of a third-party action between an injured worker's employer and a third party who claimed entitlement to indemnification from the employer.<sup>225</sup> The latter relied on admiralty law, which endorses such indemnification agreements, while the former sought a shield under the Louisiana Oilfield Anti-Indemnity Act,<sup>226</sup> which does not. A state waters case, *Thurmond* does not employ the OCSLA/*PLT* three-step process, but admiralty tort jurisdiction and substantive law will nonetheless override the Louisiana statute if admiralty law is deemed to "apply of its own force."<sup>227</sup>

The Fifth Circuit opinion agreed with the employer because the contract's principal obligation was the performance of the nonmaritime wireline service duties performable both on land-based and offshore wells.<sup>228</sup> As in *Rodrigue*, *Thurmond* also cited expert testimony offered prior to OCSLA's enactment 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>229</sup>

In *Hoda v. Rowan Companies*, the Fifth Circuit classified as an admiralty contract a Master Service Agreement and associated work orders under which an OCS well owner, Westport, hired a well equipment and maintenance firm, Greene, to manage the torquing required to install

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called for the majority of the contract's performance to occur on the fixed platform. *Id.* at 787–89.

225. An additional defendant was the company that provided the barge from which the wireline services would be conducted. The defendants were linked to one another and the third-party plaintiff, the well owner, by a "blanket contract." *Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 953 (5th Cir. 1988).

226. LA. REV. STAT. § 9:2780 (2018).

227. *But see* *Domingue v. Ocean Drilling & Expl'n Co.*, 923 F.2d 393 (5th Cir. 1991) (an OCS wireline services tort/indemnification action in which the *PLT* three-step test was employed and in which admiralty law was deemed not to apply of its own force).

228. *Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 955 (5th Cir. 1988). The court offered the additional reason that the wireline services were to be performed by the injured worker while "standing on the small protective wooden jacket of the wellhead, a fixed platform . . . . The wellhead was an island, a small one but an island." *Id.* In this respect, *Thurmond* recalls both *AmClyde* and *Hufnagel*, which similarly premised their non-admiralty tort outcomes both on the non-maritime nature of the pertinent activity and on the events' performance on a completed (*Hufnagel*) or partially completed (*AmClyde*) fixed platform.

229. *Id.* (quoting *Insular Hearings*, *supra* note 126) (internal quotations omitted).

and change blow-out preventers. It also engaged Rowan Companies to provide a vessel on which to stow equipment and to carry other laborers to engage in preliminary activities supporting Greene's employees' subsequent torquing tasks. The agreement included an indemnification clause that required Greene to indemnify Westport and its contractors, including Rowan, from claims by Greene's employees. One of Greene's employees, Hoda, sued Rowan after tripping over hoses on the vessel's deck in the course of his work. Rowan filed a third-party complaint against Greene seeking indemnity that the court granted, approving Rowan's position that, as a component of an admiralty contract, the indemnity contract was enforceable and hence not nullified by the Louisiana Oilfield Indemnity Act, as Greene had countered.

Applying the *Davis & Sons* multi-factor test, the Fifth Circuit affirmed in a pre-*Doiron* opinion that is notable on two grounds. The basis on which it deemed the agreement an admiralty contract clearly recognizes that, had Hoda's torquing activity been evaluated in the underlying tort suit, it would have been deemed nonadmiralty because it was not SRTMA-qualified. In addition, its *Pippen*-sourced reasoning converts these nonmaritime activities into agents for a contract's admiralty status on the basis that they serve as links in an overall effort that, in facilitating the mission of the vessel, confirm the latter's status as maritime commerce.

The first point is encased in *Hoda*'s unequivocal declaration that "[b]eyond doubt, the torquing services Greene's provided pertain solely to oil and gas development and, *in and of themselves*, have nothing to do with traditional maritime activity or commerce."<sup>230</sup> The second turns on the court's linking the Hoda crew's torquing services to *Davis & Sons*'s "Factor no. 4, the question whether Greene's work was 'related to the mission of the vessel.'"<sup>231</sup> The court did so by reasoning that:

[T]he torquing up and torquing down of the blow-out preventer stacks was but a discrete function in a carefully orchestrated series of actions conducted by Rowan during the drilling of the well. Greene's services were 'inextricably intertwined' with the activity on the rig, were dependent on Rowan's placement of the equipment on which Greene's employees worked, and could not be performed without the rig's direct involvement.<sup>232</sup>

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230. *Hoda v. Rowan Companies, Inc.*, 419 F.3d 379, 382 (5th Cir. 2005) (emphasis added).

231. *Id.* at 383 (quoting *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 316 (5th Cir. 1990)).

232. *Id.* at 383.

It closed by paraphrasing *Demette v. Falcon Drilling Co.*'s observation that "torquing up and torquing down blow-out preventers 'is an integral part of drilling, which is the primary purpose of the vessel,'" as "not merely descriptive, but [as] deriv[ing] from the functional interrelationship of Greene's work with the rig."<sup>233</sup>

Both *Hoda* and *Doiron* evidence that the *Pippen*-rooted formula linking oil and gas development services that "facilitate" a vessel's mission to maritime commerce poses no threat to this Article's non-SRTMA thesis. *Hoda* deems torquing blow-out preventers as definitively non-maritime. *Doiron*, it will be recalled,<sup>234</sup> abandons *Davis & Sons*'s concern for examining the relation between a particular dispute's oil and gas operation service with previously adjudicated operations because "[t]he fact is, none of these services are inherently maritime."<sup>235</sup> If they are indeed not inherently maritime, as already observed but worth repeating, neither are they SRTMA-qualified.

The *Hoda* panel accurately observed that "[t]his court's decisions have reflected the inherent tensions between the non-maritime nature and concerns of traditional oil and gas drilling and those of the salty locale in which such exploration often occurs."<sup>236</sup> The Fifth Circuit's admirable concern for protecting the well-being of seamen and platform workovers, however, has needlessly—perhaps even purposely—distanced Circuit jurisprudence from according the weight due to oil and gas drilling's "non-maritime values," such as those identified earlier in the contrast between the Exxon Valdez ocean surface oil spill and the Macondo sub-OCS well blowout.<sup>237</sup> The well-being of workers above the OCS can and should be safeguarded, of course, concurrently with honoring the OCSLA/OPA non-admiralty values engaged by a sub-seabed oil and gas discharge governed by OPA. With one exception,<sup>238</sup> moreover, negligence committed aboard the vessel, although central in a maritime negligence action, is of no import in an OPA action because OPA § 2702 imposes strict liability on those

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233. *Id.* (quoting *Demette v. Falcon Drilling Co.*, 280 F.3d 492, 501 (5th Cir. 2002)).

234. *See supra* text accompanying note 179.

235. *In re Larry Doiron, Inc.*, 879 F.3d 568, 573 (5th Cir. 2018).

236. *Hoda v. Rowan Companies, Inc.*, 419 F.3d 379, 382–83 (5th Cir. 2005).

237. *See supra* text accompanying notes 118–25.

238. OPA § 2704(c)(1)(A) provides that in the event of a Responsible Party's gross negligence, the lower level of damages chargeable to the latter under the OPA § 2704(a) limitation of liability regime is increased to an ordinary damages level. *See Costonis, supra* note 1, at 542–45.

owning or operating whichever source—vessel or well or both—that discharges the hydrocarbons.<sup>239</sup>

Another factor weighing on the “traditional oil and gas” side is the far-reaching OPA remedial reform statute, as enriched by the elevated pursuit of environmental values in the CWA amendments post-1972 and the comprehensive 1978 revisions of OCSLA 1953.<sup>240</sup> Similarly remote from the Fifth Circuit’s conventional model for adjudicating platform negligence incidents impacting one or, rarely, several workers is the *BI Bundle* scenario itself. *BI Bundle* not only features *Sohyde*’s economic and property damages, but, unlike the conventional model’s one or several vessel- or platform-located workers, it encompasses 110,000 claimants, largely land-based and located some tens or even hundreds of miles distant from the OCS, the Deepwater Horizon, and the Macondo well.<sup>241</sup> Insistence on forcing the *BI Bundle* scenario into the ill-fitting Fifth Circuit model worsens and, in certain respects, lies at the root of the standards’ confusion portrayed in this Article’s Introduction, thereby affording another illustration of the unfortunate fruit of admiraltycentric imprecision.

#### 4. *Doiron Redux*

In its search for an exit from its “infamously chaotic” jurisprudence, the Circuit’s flight to *Doiron* is somewhat risky because the Supreme Court is already on record for its opposition to the Circuit’s “expansive view of maritime employment.”<sup>242</sup> Additionally, the Court has exercised outright hostility toward *Pippen*, whose reasoning has taken residence in *Doiron*’s admiralty contracts setting. A seasoned account of these vulnerabilities and an appropriate response to them exceeds the scope of this Article, which to this point has used both tort and admiralty contract cases because both bear on its basic SRTMA inquiry.

*Doiron*’s new standard, however, poses two conceptual issues of common interest to both inquiries. The first is *Doiron*’s premising its two-step test on its declaration that marine oil and gas operations conducted

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239. See OPA § 2702(a), which has been uniformly interpreted to find a Responsible Party’s fault on strict liability.

240. See Costonis, *supra* note 107, at 540–44.

241. Although the Admiralty Extension Act extends admiralty tort jurisdiction to damages on land caused by a vessel, *Sohyde* has ruled that the Act is no less subject to the SRTMA principle than activities whose damaging consequences are initiated and consummated on vessels. See *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1135–36 (5th Cir. 1981).

242. *Herb’s Welding, Inc. v. Gray*, 470 U.S. 414, 423 (1985).

from a vessel qualify as “maritime commerce,” a proposition that brings into play prior consideration of OCSLA’s legislative history<sup>243</sup> as considered in *Rodrigue*, as well as of *Pippen*, *Theriot*, and *Herb’s Welding*.

*Doiron* models its admiralty contract analysis on the Supreme Court’s 2004 decision in *Norfolk Southern Railway Co. v. Kirby (Kirby)*.<sup>244</sup> *Kirby* calls to mind *Grubart*’s recognition on the tort side that mechanical application of standard rules does not work for certain cases, which is a posture *Kirby* adopted with respect to a mixed contract that envisaged both sea and land carriage of goods.<sup>245</sup> In such instances, *Grubart* calls for the variant SRTMA evaluation in torts. *Kirby* advises a similar flight from conventional principles in contract:

To ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute, as we would in a putative maritime tort case. . . . Nor can we simply look to the place of the contract’s formation or performance. Instead, the answer “depends upon . . . the nature and character of the contract,” and the true criterion is whether it has “reference to maritime service or maritime transactions.”<sup>246</sup>

*Kirby* leaves us with guardrails favorably poised for categorizing an agreement as an admiralty contract: Maritime commerce’s protection is maritime jurisdiction’s source.<sup>247</sup> “Vindication” of that priority results from “focusing [the] inquiry on whether the principal objective of a contract is maritime commerce.”<sup>248</sup> Further, “so long as a bill of lading

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243. *Doiron*, along with *Pippen* and *Theriot*, involved state waters scenarios. A plausible interpretation of *Doiron* might limit its application accordingly. However, *Doiron* has been applied to rule that an agreement is an admiralty contract in an OCS scenario. The decision did not discuss the issue in text. See *Mays v. C-Drive LLC*, No. 16-13139, 2018 WL 3642005 (E.D. La. Aug. 1, 2018).

244. 543 U.S. 14 (2004).

245. The agreements in question called for the waterborne transportation of machinery from Sidney, Australia, to Savannah, Georgia, and thence by railroad to Huntsville, Alabama. The seaborne phase was uneventful, but the train carrying the machinery to Huntsville derailed, causing extensive damage.

246. *Kirby*, 543 U.S. at 23–24 (citations omitted).

247. *Id.* at 25 (“We have reiterated that the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce.”) (quoting *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991) (internal quotations omitted)).

248. *Id.*



requires substantial carriage of goods by sea, its purpose is to effectuate maritime commerce—and thus it is a maritime contract.”<sup>249</sup>

Helpful though these prescriptions are, however, they leave unclear which of two constructions is intended. Is the reasoning that the *Kirby* contract is a maritime contract because it concerns the carriage of goods by vessel at sea? Or is this function determinative of the agreement’s classification not because of the kind of use intended overall, but because its fulfillment demands and the parties intend the substantial, indeed indispensable, use of a vessel to perform it?<sup>250</sup> In either case, fidelity to *Kirby* requires that *Doiron* respect *Kirby*’s insistence that the “principal objective” of an admiralty contract is itself a maritime activity conformable with maritime commerce.

Meeting this challenge may not be an easy task. Neither *Pippen* nor *Theriot*, both of which preceded *Herb’s Welding*, undertake to demonstrate why marine oil and gas operations constitute “maritime commerce.” *Doiron* does make an effort of sorts, but only in a footnote that quotes several sentences from *Boudreaux v. American Workover*,<sup>251</sup>

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249. *Id.* at 27.

250. The same question may be posed of *Theriot*’s reliance on *Pippen*’s position that marine oil and gas operations conducted from a vessel constitute maritime commerce. *Theriot* emphasizes that “[t]he contract did not merely touch incidentally on a vessel, but directly addressed the use and operation of the ‘Drilling Barge Rome.’” *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 538 (5th Cir. 1986). Subsequent Fifth Circuit opinions have construed this language to support an admiralty contract standard focused exclusively or nearly so on the “substantial use” of a vessel, rather than as also requiring that the character of that use—for example, marine drilling for oil and gas—itself be recognized as “maritime commerce.” *See, e.g., Lewis v. Glendel Drilling Co.*, 898 F.2d 1083, 1086 (5th Cir. 1990) (*Theriot*’s conclusion “that the contract ‘focused on the use of a vessel’ . . . inescapably leads to the same conclusion in this case.”); *Smith v. Penrod Drilling Co.*, 960 F.2d 456, 459 (5th Cir. 1992) (quoting *Theriot*, the court stated that the “‘main piece of equipment to be supplied by [the contractor] was a vessel,’ [and] we held that ‘[t]he contract thus focused upon the use of a vessel in a maritime transaction and is a maritime contract governed by maritime law.’”) (citations omitted).

251. *In re Larry Doiron, Inc.*, 879 F.3d 568, 575 n.45 (5th Cir. 2018) (quoting *Boudreaux v. American Workover, Inc.*, 664 F.2d 463, 468 (5th Cir. 1982)). The facile identification of marine oil and gas drilling with “maritime commerce” in *Boudreaux*’s majority opinion is harshly criticized in the opinion’s dissent in a manner that anticipates *Herb’s Welding*’s later assault on *Pippen*, the opinion that the *Boudreaux* majority deemed “dispositive” for its own proceeding. *See Boudreaux v. American Workover, Inc.*, 664 F.2d 463, 469–80 (5th Cir. 1982) (Gee, J., dissenting).

which also precedes *Herb's Welding* and, unlike *BI Bundle*,<sup>252</sup> does not engage OCSLA. *Boudreaux* makes no effort, however, to justify its posture by identifying or confronting the tensions in the binary land/water field as this Article has detailed or as *Hoda*<sup>253</sup> and *Lewis v. Glendel Drilling Co.*<sup>254</sup> forthrightly acknowledge.

At this juncture, it remains to be seen whether, hypothetically considered, the Supreme Court would choose to extend its *Herb's Welding* reasoning from tort to contract in recognizing the migration of the *Pippen* rationale from tort to contract. If the Court chooses to do so, however, it might not find the maritime commerce claim any more persuasive currently than it did in *Herb's Welding*—four years after *Pippen*—when it denied that “exploration and development of the Continental Shelf are not themselves maritime commerce.”<sup>255</sup>

A second issue concerns *Doiron*'s final iteration of its standard as including two steps only: those relating to a contract concerning oil and gas operations and to the substantiality of the use of a vessel.<sup>256</sup> In the body of the opinion, however, *Doiron* overrode the *Davis & Sons* test, which inquired into the nature of these services, in part because “none of these services are inherently maritime.”<sup>257</sup> How credible is it when an exercise ostensibly designed to determine whether a contract is in admiralty opts to exclude from the inquiry the very elements most likely to establish that it is not in admiralty?<sup>258</sup> If it is correct to read *Doiron* as failing to lock

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252. The BP blowout occurred on the OCS, but *Boudreaux*'s setting is “inland waters.” *Boudreaux*, 664 F.2d at 469–80.

253. See *supra* text accompanying notes 228–39.

254. 898 F.2d 1083, 1087–88 (5th Cir. 1990) (observing that “[t]his case radiates with the uncertainties that exist in this area of the law [that is, distinguishing between an admiralty and a non-admiralty contract].”). Confounding a legal term of art with its use in popular discourse, on the other hand, *Boudreaux* labels marine oil and gas drilling as maritime commerce because it is . . . maritime commerce. Tautological reasoning of this nature invites a similarly tautological response declaring that, since oil and gas extraction engages significant terrestrial values—the basis of the entire enterprise, after all, is the extraction of *sub-seabed* oil and gas—it is a terrestrial exercise. Such reasoning, of course, resolves nothing. In both cases, a cogent predicate independent of the conclusion itself needs to be furnished before a SRTMA determination should be rendered or denied.

255. *Herb's Welding, Inc. v. Gray*, 470 F.2d 414, 425 (1985).

256. *In re Larry Doiron, Inc.*, 879 F.3d 568, 575–76 (5th Cir. 2018).

257. *Id.* at 573.

258. A post-*Doiron* admiralty contract case commences with the phrase, “The *Doiron* test requires the court to consider *just* two questions,” *Mays v. C-Drive*

“maritime commerce” into its test, which *Kirby* surely requires, while effectively declaring its standard satisfied by fiat in *Doiron* step one, *Doiron*’s test may reduce to little more than *Theriot*’s substantiality of a vessel’s connection to a service operation.<sup>259</sup> This, of course, is where things stood before *Doiron*, despite *Doiron*’s appeal to *Kirby* for change.

A counterargument meriting attention is that “maritime commerce” need not mean the same thing in the legal discourse of both tort and contract in light of the different policies and purposes served by the two systems. Contract law typically merits greater flexibility than tort law because it seeks to allow private parties freedom to arrange their affairs as they mutually agree.<sup>260</sup> Comparatively, tort law often seeks to vindicate unyielding public policies originating in the deeper soil of public health, safety, and welfare. Moreover, *Lewis v. Glendel* advises that because oil industry players “may already have adjusted” prevailing practices to existing protocols, “[w]e should not lightly ‘straighten out’ the formal logic of the law where to do so would upset stable commercial expectations.”<sup>261</sup>

However controversial, *Theriot* has been a staple of Fifth Circuit admiralty contract discourse for more than three decades, and for those admiraltycentrically inclined, it can loosely be read to cover *Doiron*’s elements of maritime commerce, marine oil and gas operations, and substantiality of vessel use. For a circuit determined to exit from its “infamously chaotic” handiwork, moreover, *Doiron* satisfies Seventh

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LLC, No. 16-13139, 2018 WL 3642005 (E.D. La. Aug. 1, 2018) (emphasis added), and completes its analysis on the basis of *Doiron* Steps one and two.

259. The construction in text is a plausible reading of *Mays*.

260. See *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 787 (5th Cir. 2009) (en banc). The first clause in text must be qualified when—as in the instance when an OCSLA § 1333(a)(2)(A) selects Louisiana law—implicating the Louisiana Oilfield Indemnity Act, a private contract’s choice of law clause opting for admiralty law is invalid. See *Matte v. Zapata Offshore Co.*, 784 F.2d 628, 631 (5th Cir. 1986).

261. *Lewis v. Glendel Drilling Co.*, 898 F.2d 1083, 1087 (5th Cir. 1990). *Grubart* itself points somewhat in the same direction on the tort side in its refusal to add additional requirements to its SRTMA test:

[E]xisting case law . . . reflects customary practice in seeing jurisdiction as the norm when the tort originates with a vessel in navigable waters, and in treating departure from the locality principle as the exception. For better or worse, the case law has thus carved out the approximate shape of admiralty jurisdiction in a way that admiralty lawyers understand reasonably well.

*Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995).

Circuit Judge Richard Posner’s counsel that in matters of admiralty tort and contract, “the most important requirement of a jurisdictional rule is not that it appeal to common sense but that it be clear.”<sup>262</sup>

*B. The BP Blowout: A Profile of the Tortious Activity*

The tortiously conducted Macondo well’s production casing and temporary well abandonment activity was an OCS oil and gas service operation. *Doiron* categorically recognizes the inherently non-maritime status of these operations, and the Fifth Circuit’s solo tort, dual basis, and tort/indemnification cases illustrate it in various settings. The latter are not unseated by *Theriot*, a contract case, or *Grubart*, which mandates a division between an activity’s location and its character that precludes classifying inherently non-maritime drilling services as SRTMA-compliant.<sup>263</sup>

BP’s Limitation of Liability/MDL trial findings,<sup>264</sup> as supplemented by related MDL rulings, tell a story dominated by a complex sequence of non-navigational mishaps that occurred in transitioning the Macondo well from an exploratory well to a production facility. Its highlights include the following elements.

1. OCSLA Choice of Law Provisions: Sections 1333(a)(1) and 1333(a)(2)(A)

The relevant OCSLA choice of law provision is not OCSLA § 1333(a)(2)(A), but OCSLA § 1333(a)(1). The latter deems the Deepwater Horizon as an OCSLA situs that is a “temporarily attached” device and selects OPA as the governing norm for damages falling within its province by extending to OCS situses “the Constitution and laws of the United States.” Section 1333(a)(2)(A) comes into play only when necessary to fill gaps in federal law,<sup>265</sup> a scenario decidedly not present

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262. *Tagliere v. Harrah’s Illinois Corp.*, 445 F.3d 1012, 1013 (7th Cir. 2006).

263. *See supra* note 113 and accompanying text.

264. *See In re Oil Spill by the Oil Rig “Deepwater Horizon,”* 21 F. Supp. 3d 657 (E.D. La. 2014). As explained by the court:

[T]he Phase One trial concerned two cases within this Multidistrict Litigation: the Transocean entities’ limitation action . . . and the United States’ claims under the Clean Water Act . . . and Oil Pollution Act of 1990. . . . This includes determining if any Defendant engaged in misconduct in excess of ordinary negligence . . . and defenses between and among the several Defendants.

*Id.* at 730.

265. *See supra* text accompanying notes 133 and 134.

here. OPA duplicates the general maritime law tort cause of action,<sup>266</sup> which, under the *Robins Drydock* principle, requires that the claimant's own property be damaged.<sup>267</sup>

## 2. OPA: Comprehensive Remedial Statute for Maritime Oil Discharges

In addition to this duplicative federal statutory cause of action, OPA creates other damage categories, switches from maritime law negligence to strict liability, creates its own limitation of liability regime, and removes various other maritime law impediments to recovery.<sup>268</sup> Stung by the inadequacies of statutory and general maritime law remedies exposed in the Exxon Valdez spill in the year preceding OPA, Congress unanimously moved to introduce these changes within the very next year. These considerations, buttressed by Supreme Court jurisprudence establishing the priority of federal statutory law over federal common law or general maritime law, are central elements of my earlier-stated position that OPA displaces the general maritime law oil pollution tort.<sup>269</sup>

## 3. *B1 Bundle* versus the Fifth Circuit Model

The first two observations differentiate *B1 Bundle* from the Fifth Circuit model. The Fifth Circuit model offsets admiralty law against state law, a contest that favors the choice of the preemptive admiralty law. *B1 Bundle*, on the other hand, opposes federal statutory law—OCSLA and OPA—to admiralty law, a contest that favors the former over admiralty law in the event of conflict. Federal statutory law will not be ousted by admiralty law because the absence of any gap excludes admiralty law and jurisdiction from the scenario, leaving OPA or, less likely, Louisiana state law<sup>270</sup> as the sole alternatives. This reasoning is similar but not identical to the reasoning in *AmClyde* or *Thurmond*, in which the inherent non-

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266. OPA § 2702(b)(2)(B) covers “damages for injuries to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property.”

267. See *B1 Bundle*, 808 F. Supp. 2d 943, 959–63 (E.D. La. 2011), *aff’d sub nom.*, *In re Deepwater Horizon*, 745 F.3d 157 (5th Cir. 2014) (explaining the principle’s origin as in *Robins Dry Dock & Repair v. Flint*, 275 U.S. 303 (1927)).

268. See Costonis, *supra* note 1, at 537–38, Appendix II.

269. See John Costonis, *The BP B1 Bundle Ruling: Federal Statutory Displacement of General Maritime Law*, 38 TUL. MAR. L.J. 1, 13–19 (2013).

270. The Louisiana alternative is a reserve alternative, only in the unlikely event that the gapless choice of OPA were deemed inappropriate. Admiralty substantive law is inapplicable in either instance because admiralty tort jurisdiction requires satisfaction of the SRTMA principle.

maritime character of contested oil and gas service operations left no space for admiralty law.

#### 4. Maritime Drilling Operations Liability: Economic and Property Damages versus Personal Injury and Death Remedies

Economic and property damages are *BI Bundle*'s exclusive remedy, twinning *BI Bundle* with *Sohyde*. The difference between the Fifth Circuit's assessment of these damages and its own model's personal injury or death remedy appears in *Broughton Offshore Drilling, Inc. v. South Central Machine, Inc.*,<sup>271</sup> which complained that *Sohyde* "invites the spectre of unwanted confusion with a potential for unjust results and a loss of uniformity admiralty law seeks to provide" and complained that "[u]nless and until *Sohyde* is overruled by an en banc court, we are bound by it."<sup>272</sup> The vehemence of this language exposes how distant from its conventional model the Circuit considers a property damage action and, frankly, how resistant it is to dealing with a federal statutory-based action other than within that model's impervious armor.

### CONCLUSION

The following observations conclude this Article's position that the BP Blowout failed as a SRTMA-qualified event by a selection of the most pertinent of the BP Limitation of Liability/MDL Trial's own findings.

#### 1. The Most Significant Determination

Without doubt, the most telling of all the findings is also its most briefly stated: the trial court's categorical declaration that "[f]rom February 2010 until April, 2010, the DEEPWATER HORIZON was engaged in drilling activities on the Macondo Well."<sup>273</sup> This is the most forceful, perhaps unwitting, acknowledgment that OCS drilling on and under OCS lands, rather than navigation or any other inherently maritime activity, was the overwhelming purpose, nature, and source of the activity that resulted in the BP blowout.<sup>274</sup> No more really need be said in defense of denying

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271. 911 F.2d 1050 (5th Cir. 1990).

272. *Id.* at 1054.

273. *In re Oil Spill by the Oil Rig "Deepwater Horizon,"* 844 F. Supp. 2d 746, 747-48 (E.D. La. 2012) (emphasis added).

274. *Cf.* *United States v. Kaluza*, 780 F.3d 647 (2015). The Fifth Circuit rebuffed on "failure to charge an offense" grounds a criminal procedure against two BP well site leaders for involuntary manslaughter under the Seaman's Manslaughter Act, 18 U.S.C. § 1115. The court deemed them outside of the statute's admiralty purview because, as members of the vessel's "drill crew"

that the blowout was “substantially related to a traditional maritime activity.”

## 2. Deployment of the Deepwater Horizon as an “Offshore Facility,” not as a “Vessel”

In a separate proceeding,<sup>275</sup> the court ruled that the Deepwater Horizon “was being used as an offshore facility [not as a vessel] at the time of the discharge . . . .”<sup>276</sup> Its employment in the Macondo well event was functionally interchangeable under OCSLA § 1333(a)(2)(A), that is, with that of a fixed platform or a lease block on which a well had been drilled. The only SRTMA issue specifically addressed in *BI Bundle* was whether the Deepwater Horizon is a “vessel.” OPA § 2701(18) confirms that outcome, of course. But the same section’s language that the Deepwater Horizon is a vessel “capable of use as an offshore facility,” combined with the district court’s affirmation that it was so used,<sup>277</sup> goes directly to the SRTMA concern for how the vessel was actually used, which is the heart of the SRTMA issue.

## 3. The Fatal “Discharge”: When Did “Loss of Control” Occur?

Under OPA § 2702(a), liability is placed on “each responsible party for a vessel or for a facility from which oil is discharged.” Clean Water Act 33 U.S.C. § 1321(a)(2) also imposes its civil penalties on the discharging party or parties, and it defines the term “discharge” using language essentially identical to that employed in OPA.<sup>278</sup> Transocean claimed that BP and a co-venturer were at fault because the oil was

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rather than “navigation crew,” they were not responsible for “marine operations, maintenance, or navigation of the vessel.” *Id.* at 657.

275. *In re Oil Spill*, 844 F. Supp. 2d 746. OPA § 2702(18) defines a “mobile offshore drilling unit” (MODU)—the Deepwater Horizon’s classification—as a “vessel . . . capable of use as an offshore facility,” while OPA § 2702(9) defines a “facility” as “any structure . . . or device (*other than a vessel*)” used for, *inter alia*, “exploring for, drilling for, [or] producing . . . oil.” OPA § 2701(22) defines “*offshore facility*” as “any facility of any kind . . . subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel . . . .”

276. *In re Oil Spill*, 844 F. Supp. 2d at 751.

277. *Id.*

278. The immediate concern in the opinion is liability to the federal government under a CWA civil penalty provision, but, as the court notes in pointing to the “similarity” of the paired provisions, *id.* at 757, both OPA and the CWA define the term “discharge” as “includ[ing], but . . . not limited to, spilling, leaking, pumping, pouring, emitting, emptying or dumping . . . .” *Compare* 33 U.S.C. § 1321(a)(2) (2018) (CWA) *with* 33 U.S.C. § 2701(7) (2018) (OPA).

discharged at “the place where the uncontrolled movement of oil began,”<sup>279</sup> namely, the sub-seabed well bore. BP and its former joint venturer Anadarko blamed Transocean because the oil entered the Gulf after it “passed through the [blowout preventer] and broken riser,” both of which are “appurtenances of the [vessel].”<sup>280</sup> The federal government blamed both, claiming that both discharged the oil.<sup>281</sup> The district court agreed with Transocean that the “discharge” occurs when and where “the uncontrolled movement of oil began.”<sup>282</sup> The Fifth Circuit ultimately rebuffed the district court’s so-called “single instrumentality” reasoning, leaving the question unresolved while nonetheless affirming the district court’s outcome.<sup>283</sup>

The trial court’s reasoning fixed the location of *BI Bundle*’s fault-creating event in the Macondo well bore thousands of feet below the OCS. The welter of the foregoing positions concerning the location and consummation of fault for the blowout’s discharge confirms the wisdom of *Executive Jet*’s redirection to a focus on the nature of event, rather than staying with admiralty’s traditional location standard when establishing the latter is so problematic. This is a sphere in which *Executive Jet*/BP blowout and *Kirby/Doiron* are very much in sympathy with one another in discarding traditional rigid standards in favor of a searching examination of the actual nature of the event before them.

#### 4. “Drilling Crew” versus “Navigation Crew”: A Distinction with a Profound Difference

Finally, the 100-plus page opinion sharply distinguishes between what it describes as the role of the Deepwater Horizon’s “drilling crew,” as supplemented by BP drilling overseers, and that of its “navigation crew,” whose function, with a single exception during the three-month drilling period, was to employ the “dynamically-positioned” MODU’s eight thrusters to keep the MODU relatively stationary over the well. Less than one page of a 61-page statement of facts refers to the navigation crew’s actions throughout this three-month period,<sup>284</sup> and less than five of a 26-page set assesses an exception concerning the timing of the role that the crew played in activating the vessel’s Emergency Disconnect System

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279. *In re Oil Spill*, 844 F. Supp. 2d at 757.

280. *Id.* at 757, 748.

281. *Id.* at 757.

282. *Id.*

283. See *In re Deepwater Horizon*, 772 F.3d 350, 355 (5th Cir. 2014), *reh’g en banc denied*, 775 F.3d 741 (5th Cir. 2015), *cert. denied sub nom*, *Anadarko Petroleum Corp. v. United States*, 135 S. Ct. 2891 (2015).

284. The half-page in question states that:



(EDS) to allow the Deepwater Horizon to float away from the well.<sup>285</sup> The set concludes that “[d]espite the master’s initial failings, the Court finds the HORIZON’s crew acted appropriately and bravely in the face of chaotic circumstances that are, frankly, difficult to genuinely understand,”<sup>286</sup> and the Court acknowledges that “activating EDS [promptly] would not have avoided the explosions.”<sup>287</sup>

Everything else in the opinion—all of the pages devoted to the introduction, operational details, and the complexities of parsing out liability among BP, *Transocean*, Cameron, and Halliburton—addresses what *Doiron* labels the inherently non-maritime dimension of a marine oil and gas servicing operation.

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The HORIZON had a master, chief mate, dynamic positioning operators, bosuns, able-bodied seamen, and ordinary seamen. These Transocean employees were commonly referred to as the “marine crew” and were responsible for, among other things, the MODU’s navigation function and keeping the MODU “on station” with the dynamic positioning system. There were other Transocean “crews” aboard the HORIZON. Notably, *the “drill crew” was primarily responsible for the MODU’s drilling function* and consisted of the Offshore Installation Manager, tool pushers, drillers, roustabouts, and others.

*In re Oil Spill by the Oil Rig “Deepwater Horizon,”* 21 F. Supp. 3d 657, 671 (E.D. La. 2014) (emphasis added).

285. *Id.* at 725–28.

286. *Id.* at 728.

287. *Id.*