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THE OUTER CONTINENTAL SHELF LANDS ACT'S PROVISIONS ON JURISDICTION, REMEDIES, AND CHOICE OF LAW: CORRECTING THE FIFTH CIRCUIT'S MISTAKES

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I
INTRODUCTION

The United States Court of Appeals for the Fifth Circuit comprises sixteen active and three senior judges. It decides cases in rotating three-judge panels. In a court so constituted, discrepancies between decisions of different panels are bound to develop. When such discrepancies become important enough, the Fifth Circuit is supposed to convene en banc in order to resolve the conflict and announce a binding circuit-wide rule.

But Fifth Circuit en banc hearings are infrequent.[1] More routinely, the court tries to minimize the incidence and effects of conflicting panel decisions by promulgating the following rules:

> In the event of conflicting panel opinions from this court, the earlier one controls, as one panel of this court may not overrule another.[2]
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> [I]t follows from our rule that one panel of the circuit may not overrule a prior panel that a later decision in conflict with the previous, controlling authority is not precedent.[3]

These rules contemplate that a disagreeing later panel should dutifully follow the earlier case while feeling free to call for an en banc rehearing to resolve the disagreement. If the later panel rebels, its decision is not entitled to respect.

These rules have not worked at all well. They are sometimes simply ignored.[4] And even when the disagreeing later panel follows the rules and goes along with its putatively errant predecessor, it can do so in such an

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[1]The court tries hard to discourage petitions for en banc rehearing. 5TH CIR. R. 35.1, captioned "Caution," states that "en banc hearing or rehearing is not favored," that a petition for en banc consideration is "extraordinary," that such a petition "is a serious call on limited judicial resources," and that unjustifiable petitions may lead to sanctions against both lawyer and client.

[2]Smith v. Penrod Drilling Corp., 960 F.2d 456, 459 n. 2 (5th Cir. 1992).

[3]Frey v. Amoco Production Co., 943 F.2d 578, 588 (5th Cir. 1991) (Jones, J., concurring).

[4]In Berry v. Sladco, Inc., 495 F.2d 523, 528 (5th Cir. 1974), it was held that 28 U.S.C. § 1961, which provides for postjudgment interest in federal-court cases, precludes awards of prejudgment interest in federal-court OCSLA cases. This holding reads a lot into a statute that is silent about prejudgment interest. But it was nevertheless followed by later panels in Aymond v. Texaco, Inc., 554 F.2d 206, 211-12 (5th Cir. 1977), and Musial v. A & A Boats, Inc., 696 F.2d 1149, 1154 (5th Cir. 1983). The holding of Berry v. Sladco was questioned, but not departed from, in Ellis v. Chevron U.S.A. Inc., 650 F.2d 94, 98 (5th Cir. 1981), which said that whether to award prejudgment interest in an OCSLA case should be "in the discretion of the trial court." Then came Olsen v. Shell Oil Co., 708 F.2d 976, 983-84 (5th Cir. 1983), in which the panel said that Berry, Aymond, and Musial were wrong; that Ellis was right; and that it would follow Ellis because it "is the better view." The Olsen panel did not even mention the rule that would have required it to adhere to Berry.

overtly grudging way as to destabilize future jurisprudence.[5] Moreover, a panel that disagrees strongly enough with an earlier panel decision can sidestep the problematic case in many ways, such as by pronouncing it correct in its "result [but not its] method of analysis,"[6] or by declaring the problematic case itself nonprecedential because of its conflict with still earlier decisions,[7] or by simply "confin[ing the problematic decision] to its facts."[8]

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[9]—have produced judicial complaints like the following:

> In each new case, a panel of this court must comb through a bewildering array of cases that rely on inconsistent reasoning in the hope of finding an identical fact situation. Absent en banc reconciliation, cases thus are decided on what seems to be a random factual basis.[10]

Here the court was characterizing a segment of its copious jurisprudence treating the Outer Continental Shelf Lands Act (OCSLA),[11] an infamously chaotic area of the law. Commentators routinely proclaim it so,[12] and the

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[5]See, e.g., Houston Oil & Minerals Corp. v. American Int'l Tool Co., 827 F.2d 1049, 1054 (5th Cir. 1987) (reluctantly following Sohyde Drilling & Marine Co. v. Coastal Gas Prod. Co., 644 F.2d 1132 (5th Cir. 1981), while predicting that doing so would lead to "unwanted confusion with a potential for unjust results and a loss of the uniformity admiralty law seeks to provide").

[6]Legros v. Panther Services Group., Inc., 863 F.2d 345, 349 (5th Cir. 1988).

[7]Id. at 350.

[8]Id. at 354 (Jones, J., dissenting).

[9]See supra note 1. Cf. David W. Robertson, *A New Approach to Determining Seaman Status*, 65 TEX. L. REV. 79, 117 & n. 232 (1985) (criticizing the Fifth Circuit for waiting too long to grant an en banc rehearing to resolve panel disagreements over how to define "seaman," and also for eventually selecting an inappropriate case in which to address the problem).

[10]Smith v. Penrod Drilling Corp., 960 F.2d 456, 461 (5th Cir. 1992) (footnote omitted).

[11]43 U.S.C. §§ 1331-1356a (1994).

[12]E.g., Donald T. Kramer, Annotation, *Construction and Application of § 4 of Outer Continental Shelf Lands Act of 1953 (43 U.S.C.A. § 1333), Relating to Laws Applicable to Subsoil and Seabed of Outer Continental Shelf and Artificial Islands and Fixed Structures Erected Thereon*, 163 A.L.R. FED. 1, 33 (2000) ("chaos"); Kenneth G. Engerrand, *Primer of Remedies on the Outer Continental Shelf*, 4 LOY. MAR. L.J. 19, 20 (2005) ("bewildering," "inconsistent," "perplexing"); Julia M. Adams and Karen K. Milhollin, *Indemnity on the Outer Continental Shelf—A Practical Primer*, 27 TUL. MAR. L.J. 43, 45 (2002) ("chaos"); Diogenes C. Panagiotis, *Offshore Update—Five Years After Passage: Contractual Indemnity, Defense and Insurance Under the Louisiana Oilfield Indemnity Act*, 10 MAR. LAW. 203, 204 (1985) ("various interpretations"); Vincent J. Foley, *Note, Defining "Operation" for Jurisdiction Pursuant to the Outer Continental Shelf Lands Act: EP Operating Ltd. Partnership v. Placid Oil Co.*, 19 TUL. MAR. L.J. 165, 167 (1994) ("disagreement among courts").

court itself is remarkably critical of its own work.[13] Probably few will dispute that reconciliation and reformation are long overdue.[14]

The problems in the Fifth Circuit's OCSLA jurisprudence will have to be corrected by the Fifth Circuit itself. The OCSLA gets little treatment in any circuit but the Fifth, so that the kind of inter-circuit conflict that gains Supreme Court attention is unlikely to develop.[15] And there is nothing particularly wrong with the OCSLA itself—the problems stem from the Fifth Circuit's misreadings of the Act—so no one can or should expect help from Congress. What needs to happen is several grants of en banc rehearing.

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[13]E.g., Hoda v. Rowan Companies, Inc., 419 F.3d 379, 380 (5th Cir. 2005) (stating that the Court's OCSLA jurisprudence "creates uncertainty, spawns litigation, and hinders the rational calculation of costs and risks by companies participating in [the offshore oil and gas] industry"); Demette v. Falcon Drilling Co., Inc., 280 F.3d 492, 517-18 (5th Cir. 2002) (DeMoss, J., dissenting, issuing a passionate call for rehearing en banc); Hodgen v. Forest Oil Corp., 87 F.3d 1512, 1523-24 (5th Cir. 1996) (discussing "a series of arguably inconsistent cases" and the "resulting confusion"); Smith v. Penrod Drilling Corp., 960 F.2d 456, 460 (5th Cir. 1992) ("our caselaw arguably conflicts with OCSLA"); Davis & Sons, Inc. v . Gulf Oil Corp., 919 F.2d 313, 315 (5th Cir. 1990) ("much confusion"); Lewis v. Glendel Drilling Co., 898 F.2d 1083, 1083 ("uncertain policy underpinning our result"), 1087 ("inconsistent lines of authority," "significant uncertainty") (5th Cir. 1990); Thurmond v. Delta Well Surveyors, 836 F.2d 952, 957 (5th Cir. 1988) (Garwood, J., dissenting, stating: "[I] am troubled by the tension, or perhaps outright inconsistency, between many of our opinions in this area."). Cf. Dozier v. Rowan Drilling Co., 397 F. Supp. 2d 837, 842 (S.D. Tex. 2005) ("Without a doubt, the Fifth Circuit law applicable to this issue is confusing"); EEX Corp. v. ABB Vetco Gray, Inc., 161 F. Supp. 2d 747, 750 (S.D. Tex. 2001) (stating that the OCS jurisprudence causes "wholly unproductive uncertainty and its related costs like unnecessary motions and wrong decisions"); Freeport v. McMoran Resource Partners, 827 F. Supp. 1248, 1250 (E.D. La. 1993) ("Uncertainty stalks the Fifth Circuit's OCSLA jurisprudence"); Broussard v. John E. Graham & Sons, 798 F. Supp. 370, 373 (M.D. La. 1992) (complaining of "inconsistency" among Fifth Circuit decisions).

[14]However, the Court's present Chief Judge, Hon. Edith Jones, has wondered aloud whether it may not be too late. In Lewis v. Glendel Drilling Co., 898 F.2d 1083, 1086 (5th Cir. 1990) (footnote omitted) she wrote:

> How to resolve these inconsistencies is perplexing. What appears to us as a serious legal conundrum may have had little effect in the real world. That is to say, oil companies, drilling contractors and oil field service companies, together with their insurers, may already have adjusted to the overlapping application of maritime and state law by choice of law clauses or adjustments in the rates of coverage. We should not lightly "straighten out" the formal logic of the law when to do so would upset stable commercial expectations."

[15]The Fifth and Third Circuits disagree on the coverage of 43 U.S.C. § 1333(b), which adopts the Longshore and Harbor Workers' Compensation Act as the principal remedy for injured OCS workers. Mills v. Director, OWCP, 877 F.2d 356 (5th Cir. 1989) (en banc), holds that § 1333(b) does not cover injuries incurred on land or in the waters shoreward of the OCS/state waters line. Curtis v. Schlumberger Offshore Service, Inc., 849 F.2d 805, 810 (3d Cir. 1988), holds that § 1333(b)'s coverage extends to injuries on land that are incurred "as the result of [mineral exploration and production] operations conducted on" the OCS (quoting the statute). The Supreme Court has not seen fit to resolve this inter-circuit conflict, despite the federal government's request for clarification. See W. Scott Hastings, *To Avoid Drowning in the Gaps of Workers' Compensation Coverage on the Outer Continental Shelf*, 35 J. MAR. L. & COM. 35, 42 (2004) (noting that the petition for certiorari in Pickett v. Petroleum Helicopters, Inc., 266 F.3d 366 (5th Cir. 2001), cert. denied, 535 U.S. 1090 (2002), was supported by the Solicitor General and the Solicitor of Labor).

Disappointed counsel in any case involving any of the issues treated in this article should seek rehearing en banc, and the court should grant these applications. There are multiple problems with the Fifth Circuit's reading of the OCSLA and of the relevant Supreme Court jurisprudence. To put it more directly, the Fifth Circuit has made at least six (and arguably as many as twelve) verifiable mistakes in its reading of these controlling sources. However, because these mistakes are interrelated, only two or three en banc decisions could suffice to straighten out the whole mess.

Section II below presents an analysis of the OCSLA's jurisdiction, remedies, and choice of law provisions in their intended and proper operation. The authorities supporting the propositions put forth in this section include the OCSLA itself, the relevant Supreme Court decisions treating OCSLA, and the better-reasoned decisions of panels and district and state courts in the Fifth Circuit. The arguments and citations in this section will assist counsel in seeking rehearing en banc in cases calling for correcting the Fifth Circuit's mistakes. Nothing (aside from mistaken decisions and expressions from some Fifth Circuit panels and district courts) stands in the way of the court's making the recommended corrections. There is no constitutional impediment. There is no impediment in OSCLA's language or legislative history. There is no impediment in any Supreme Court decision.

Section III then catalogues and briefly explains the Fifth Circuit's mistakes. This section is necessary to convey the scope of the problem. Moreover, the citations in this section will benefit lawyers who do not consider the court to have been mistaken or whose clients need to try to preserve and perpetuate the Fifth Circuit's mistakes.

Section IV returns to the reform agenda by analyzing three OCS cases in which the Fifth Circuit should have granted en banc rehearing. The discussion here shows how and why the panels in these cases were wrong, and it sets forth the statutory, jurisprudential, and policy arguments for the hypothesized correct decisions.

Section V sets forth this article's principal recommendations and demonstrates that these solutions favor no particular interests. Everyone benefits from clearer and more responsible law making. In some factual contexts, oil companies would benefit from the corrections called for here. In others, small offshore contractors would. Again depending on the particular context of the case, personal injury plaintiffs would be harmed by some of the solutions and helped by others. The impact of the solutions on the insurance industry would be similarly random. The purpose of this section is to urge all counsel who handle OCS cases to be on the lookout for situations in which one or more of this article's solutions might help their clients resist a disappointing result from a Fifth Circuit panel.

Section VI concludes with an exhortation to affected counsel to get to work, for or against particular solutions as their clients' needs may dictate. Let us inundate the Fifth Circuit with well-reasoned applications for en banc rehearing, and with vigorous oppositions. The adversary process can move the court to sort out its tangle. It is our job to bring that process effectively to bear.[16]

II
CONGRESS'S AND THE SUPREME COURT'S OCSLA: A PRIMER ON JURISDICTION, REMEDIES, AND CHOICE OF LAW

A. Defining Some Common Terms

Understanding the OCSLA, its background, and its jurisprudence is made easier by keeping in mind the definitions of a few key terms. (a) A state's *coast line* is "the line of ordinary low water mark along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."[17] (b) A *geographical mile* is "a distance of

[16]Judge DeMoss's call for en banc rehearing in Demette v. Falcon Drilling Co., 280 F. 3d 492, 518-19 (5th Cir. 2002), sets an exemplary tone:

> I realize, of course, that no single panel of our Court can overrule any prior panel decisions and that the changes and reconsiderations that I suggest herein can only be effected by an en banc reconsideration by our Court. In my view, that is precisely what we should do, and I have written at length in this dissent in order to put the parties to this appeal, the amicus in this appeal, and other interested agencies on notice that I will call for a ballot for en banc reconsideration, if strong suggestions for such course of action from the parties and other interests are forthcoming. In my opinion, the seabed of the Outer Continental Shelf adjacent to the states of Texas, Louisiana, and Mississippi contains the largest volume of both discovered and undiscovered oil and gas resources of all of the areas of the Outer Continental Shelf. It is also my opinion that the largest number of workers involved in the development of these oil and gas resources on the Outer Continental Shelf come from the States of Texas, Louisiana, and Mississippi and that most of the operators, contractors, and subcontractors who engage in the business of drilling and producing oil and gas from the Outer Continental Shelf are either headquartered in or have major facilities in the States of Texas, Louisiana, and Mississippi. We are also blessed to have within the States of Texas, Louisiana, and Mississippi an enormous concentration of legal talent (private practitioners, corporate counsel, and law school professors) who are familiar with (1) the history of the development of the oil and gas resources on the Outer Continental Shelf, (2) the statutory enactments by Congress, (3) the Supreme Court decisions interpreting the statutes, (4) the statutes and interests of the adjacent states, and (5) the historic, traditional, judge-made body of amorphous law affectionately known as "admiralty and maritime law." An en banc reconsideration of the enigmas raised here in this case, informed by briefs of counsel for the parties and interested amici, would be a first step in bringing greater uniformity and predictability to the law applicable to development of these increasingly critical natural resources.

[17]43 U.S.C. § 1301(c) (1994).

1852 meters" (about 6076 feet).[18] This is the same distance as a *nautical mile*[19] and is sometimes also called a *marine mile*.[20] (c) A *marine league* is three geographical (nautical) miles.[21] (d) A *statute mile* is 5280 feet.[22] (Occasionally this is called an "English mile."[23])

B. Historical Background

The OCSLA arose out of the struggles between the states and the federal government for ownership and control over the mineral resources lying beneath this country's vast continental shelf.[24] It was part of a compromise engineered by Congress and the Executive Branch during the first Eisenhower administration. A brief summary of the historical background will help provide a perspective on the OCSLA provisions that have been troubling the Fifth Circuit.

The first production of oil from submerged land occurred in 1894, from piers built into the Santa Barbara Channel.[25] At that time California claimed the ownership of all submerged lands out to three statute miles from shore,[26]

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[18]United States v. Louisiana, 394 U.S. 836, 844 (1969).

[19]AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 551, 875 (10th ed. 1981).

[20]See, e.g., United States v Texas, 339 U.S. 707, 720 (1950).

[21]United States v. Louisiana, 394 U.S. 836, 844 (1969).

[22]AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1260 (10th ed. 1981).

[23]See, e.g., United States v. California, 332 U.S. 19, 23 (1947).

[24]The magnitude of the area involved was sketched in H.R. REP. NO. 83-413 (1953), reprinted in 1953 U.S.C.C.A.N. 2177, as follows:

> Continental shelves have been defined as those slightly submerged portions of the continents that surround all the continental areas of the earth. They are a part of the same continental mass that forms the lands above water. They are that part of the continent temporarily (measured in geological time) overlapped by the oceans. The outer boundary of each shelf is marked by a sharp increase in the slope of the sea floor. It is the point where the continental mass drops off steeply toward the ocean deeps. Generally, this abrupt drop occurs where the water reaches a depth of 100 fathoms or 600 feet, and, for convenience, this depth is used as a rule of thumb in determining the outer limits of the shelf.
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> Along the Atlantic coast, the maximum distance from the shore to the outer edge of the shelf is 250 miles and the average distance is about 60 miles. In the Gulf of Mexico, the maximum distance is 200 miles and the average is about 93 miles. The total area of the shelf off the United States is estimated to contain about 290,000 square miles, or an area larger than New York, New Jersey, Pennsylvania, Ohio, Indiana, Illinois, and Kentucky combined. The area of the shelf off Alaska is estimated to contain 600,000 square miles, an area almost as large as Alaska itself.

1953 U.S.C.C.A.N. 2177 at 2178. The 600-foot "rule of thumb" may be misleading in some respects. "As United States petroleum resources have dwindled, innovative production companies have attempted to exploit oil and gas resources in deeper ocean waters." Fields v. Pool Offshore, Inc., 182 F.3d 353, 355 (5th Cir. 1999). See, e.g., Texaco Exploration and Production, Inc. v. AmClyde Engineered Products Co., 448 F.3d 760, 765 (5th Cir. 2006) (describing an OCS oil production operation in waters 1750 feet deep).

[25]David W. Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 TEX. L. REV. 973, 973 (1977).

[26]United States v. California, 332 U.S. 19, 23 (1947).

and in 1921 its legislature passed a statute "authorizing the granting of permits to California residents to prospect for oil and gas on blocks of land off its coast under the ocean."[27] The first offshore platform was built in the waters off California in 1932.[28] Subsequently California executed numerous mineral leases authorizing oil and gas exploration and production in its coastal waters out to the three-mile limit.[29]

Meanwhile, ambitious oil and gas exploration and production were occurring in the Gulf of Mexico. Louisiana and Texas both claimed to own all of the mineral resources out to 27 geographical miles off their coast lines.[30] (Texas at one time asserted dominion all the way "to the outer edge of the continental shelf,"[31] *viz.*, about 200 miles.[32]) During the Truman and Eisenhower administrations, the federal government vigorously contested the states' claims to any the offshore mineral resources. On September 28, 1945, President Truman issued a Proclamation[33] and an Executive Order[34] asserting the United States' dominion (vis-a-vis the rest of the world) over all of "the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States"[35] and calling on Congress and the Supreme Court to sort out "any issues between the United States and the several states."[36]

In 1947, the Supreme Court held that California had no right to any of the submerged lands or minerals beyond its coast line:

> California is not the owner of the three-mile marginal belt along its coast . . . . [T]he Federal Government rather than the states has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil.[37]

Three years later the Supreme Court reached the same conclusion regarding Louisiana's and Texas's claims.[38]

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[27]Id. at 38.

[28]David W. Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 TEX. L.REV. 973, 973 (1977).

[29]United States v. California, 332 U.S. 19, 23 (1947).

[30]United States v. Louisiana, 339 U.S. 699, 703 (1950); United States v. Texas, 339 U.S. 707, 720 (1950).

[31]United States v. Texas, 339 U.S. 707, 720 (1950).

[32]See supra note 24.

[33]Proclamation No. 2667, 10 Fed. Reg. 13,303 (Sept. 28, 1945).

[34]Executive Order No. 9633, 10 Fed. Reg. 12,305, 1945 WL 3400 (Sept. 28, 1945).

[35]Id.

[36]Id.

[37]United States v. California, 332 U.S. 19, 38-39 (1947).

[38]United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950).

The battleground then shifted to Congress.[39] On May 22, 1953, Congress enacted the Submerged Lands Act,[40] whereby the United States ceded to the coastal states its interests in the seabed and natural resources out to three geographical miles from the states' coast lines.[41] For Texas and Florida, the Act awarded more generous Gulf of Mexico boundaries at three marine leagues (nine geographical miles).[42] The Act confirmed the federal government's claim to all the rest.[43] Two months later (on August 7, 1953), Congress enacted the Outer Continental Shelf Lands Act (OCSLA).[44] OCSLA's purpose was "to amend the Submerged Lands Act in order that the area in the outer Continental Shelf beyond boundaries of the States may be leased and developed by the Federal Government."[45] Under the division of the continental shelf worked by these two Acts,[46] the states (leaving aside Alaska and Hawaii) got about 27,000 square miles of close-in continental shelf and the federal government got the rest, about 263,000 square miles.[47]

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[39]This is an oversimplification; there had been a great deal of legislative debate during the 1930s and 1940s. Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L. REV. 23, 28-31 (1953).

[40]43 U.S.C. §§ 1301-1315 (1994).

[41]43 U.S.C.§§ 1301(2), 1312 (1994).

[42]United States v. Louisiana, Texas, Mississippi, Alabama and Florida, 363 U.S. 1, 65 ("Texas is entitled to a grant of three leagues from her coast under the Submerged Lands Act"), 129 ("We hold that the Submerged Lands Act grants Florida a three-marine-league belt of land under the Gulf, seaward from its coastline") (1960). The Supreme Court's reasoning was dense. In a nutshell, the explanation for the Texas and Florida expansive seaward Gulf of Mexico boundaries is the following:

> The [Submerged Lands] Act contains a proviso [in 43 U.S.C. §§ 1302(2), 1312] that state waters may extend beyond [the three-geographical-mile limit] if such boundary existed at the time the state became a member of the Union. Under this provision, Texas is entitled to a marine boundary three leagues . . . from shore by virtue of an historical claim recognized upon admission in 1845. Florida has a marine boundary extending three leagues into the Gulf because of Article I of Florida's Constitution of 1868, approved by Congress upon readmission during Reconstruction.

Longmire v. Sea Drilling Corp., 610 F.2d 1342, 1347 n. 8 (5th Cir. 1980) (quoting David W. Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 TEX. L.REV. 973, 986 n. 96 (1977) (internal citations omitted)).

[43]43 U.S.C. § 1302 (1994).

[44]43 U.S.C. 1331-1356a (1994).

[45]H.R. REP. NO. 83-413 (1953), reprinted in 1953 U.S.C.C.A.N. 2177, 2177.

[46]See 43 U.S.C.§§ 1301(2), 1302, 1331(a), 1333(a)(1) (1994).

[47]H.R. REP. NO. 83-413 (1953), reprinted in 1953 U.S.C.C.A.N. 2177, 2178. Cf. Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L.REV. 23, 23, 32 (1953) ("By this Act Congress for the first time asserted jurisdiction over some 261,000 square miles of sea bed off our shores, an area almost one-tenth that of the continental United States . . . [and] larger than France . . . .").

C. Analyzing Ocsla's Key Provisions

1. Section 1331(a) delimits the Act's geographical coverage.[48]

The outer Continental Shelf is defined in 43 U.S.C. § 1331(a) to mean "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301[49] of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." As we saw in Section II-B just above, what this means for the Gulf of Mexico is that the OCSLA covers all submerged lands seaward of a notional line drawn three nautical miles off the coast lines of Louisiana, Mississippi, and Alabama and nine nautical miles off the Texas and Florida coast lines. This area is often called "the outer Shelf."

2. Section 1333(a)(1) asserts exclusive United States sovereignty over the subsoil and seabed of the outer Shelf and the fixtures and apparatus used to exploit[50] *the outer Shelf's natural resources*

The substantive provisions[51] of OCSLA lead off with 43 U.S.C. § 1333(a)(1), which provides in pertinent part:

> The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily affixed 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

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[48]Technically, 43 U.S.C. § 1331(a) is not § 1331(a) of OCSLA. The provision is §2(a) of OCSLA. But this technicality is of no relevance here. In this article, we will follow the usage of most lower courts by referring to the Title 43 section numbers as though they were the Act's section numbers.

[49]43 U.S.C. § 1301(a) defines "lands beneath navigable waters" to mean: "(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction; (2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and (3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined."

[50]One of the meanings of "exploit" is "take advantage of." *WestLaw Thesaurus*. The term is useful shorthand for the activities embraced in § 1333(a)(1): exploring, developing, producing, and transporting.

[51]43 U.S.C. § 1331 is OCSLA's definitions provision. 43 U.S.C. § 1332 is a "Congressional declaration of policy."

> the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State . . . .

In this provision, "jurisdiction" means "sovereignty."[52] The provision's purpose is to assert the federal government's exclusive dominion—exclusive of any claims of other countries and exclusive of any state claims—over the resources beneath the outer Continental Shelf.[53] Congress has sought to emphasize and make clear the breadth of this claim of national sovereignty by asserting it over not just the resources themselves but also over the fixtures and apparatus used to explore for, produce, develop, and transport the resources.

3. A careful analysis of § 1333(a)(1)'s coverage is essential for understanding OCSLA

The original (1953) version of § 1333(a)(1) covered the "subsoil and seabed of the outer Continental Shelf and . . . all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom."[54] At that time the statutory phrase "artificial islands and fixed structures" was adequate to cover the types of apparatus being used to exploit[55] offshore oil and gas.[56] But post-1953 technology created drill ships, semisubmersible drilling rigs, submersible drilling rigs, and jack-up rigs.[57] These and similar technological

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[52]Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 479-480 & n. 7 (1981) (stating that the phrase "exclusive federal jurisdiction" in 43 U.S.C. § 1331(a) means "exclusive political jurisdiction" and equating "political jurisdiction" with "sovereignty"); Amoco Production Co. v. Sea Robin Pipeline Co., 844 F.2d 1202, 1205-06 (5th Cir. 1988) ("The word 'jurisdiction' appears in the OCSLA at several different junctures. Except in § 1349, however, the word was used by Congress as a synonym for 'sovereignty' as part of the provisions delineating the relative powers of the United States federal government on the one hand and the governments of other countries and of the several states on the other.").

[53]See supra note 43. See also Curtis v. Schlumberger Offshore Services, Inc., 849 F.2d 805, 809 (3d Cir. 1988) ("This subsection [§ 1333(a)(1)] makes no reference to injuries and, as we read it, is a provision intended for the separate purpose of asserting federal jurisdiction over the seabed underlying the outer continental shelf."). Cf. 43 U.S.C. § 1332(1): "It is hereby declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act."

[54]Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L.REV. 23, 61-68 (1953) (appendix, setting forth the entire 1953 Act).

[55]See supra note 50.

[56]See Demette v. Falcon Drilling Co., 280 F.3d 492, 505 n. 1 (5th Cir. 2002) (DeMoss, J., dissenting, noting that jack-up rigs were not developed until the late 1950s).

[57]Dean A. Sutherland, *Significant Development in Maritime Personal Injury Law*, 64 LA. L.REV. 299, 302 (2004) ("Between 1953 and 1978, the oil and gas industry created a variety of 'special purpose' vessels, including jack-up rigs and semi-submersible rigs, from which the exploration, development, and production of oil and gas from the OCS could be performed."); W. Eugene Davis, *The Role of Federal*

developments[58] led the 1978 Congress to broaden § 1333(a)(1) in order to assure exclusive national dominion over all of the types of apparatus that are used for exploiting[59] the outer Shelf's mineral resources.[60] Concomitantly, the 1978 Congress provided very broad definitions of § 1331(a)(1)'s new terms "exploring," "developing," and "producing."[61]

No one has pointed this out until now, but there is a potentially troublesome ambiguity in the amended § 1333(a)(1): What does "erected" mean? Several analysts have assumed it means "raised up" or "elevated."[62] But

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Courts in Admiralty: The Challenges Facing the Admiralty Judges of the Lower Federal Courts, 75 TUL. L.REV. 1355, 1376 (2001) (listing twelve types of movable apparatus used in the offshore oil and gas industry); *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on S. 2318, S. 525, and S. 1547* 480-86 (1972) (setting forth diagrams presented by the International Association of Drilling Contractors of seven types of offshore oil-and-gas drilling apparatus).

[58]See, e.g., Fields v. Pool Offshore, Inc., 182 F.3d 353, 355 (5th Cir. 1999) (describing the "Neptune Spar" as "something akin to a giant buoy" developed for use in deep-water drilling operations); Fox v. Taylor Diving and Salvage Co., 694 F.2d 1349, 1351 (5th Cir. 1983) (describing a "submarine pipe alignment rig" as "a nonnavigable chamber used to create an airtight environment in which [underwater] pipeline repairs can be performed"); Jordan v. Shell Offshore, Inc., 2007 WL 127313 at * 4 (S.D. Tex. Jan. 10, 2007) (describing the vessel-like features of a "tension leg platform").

[59]See supra note 59.

[60]The House Committee Report explained the 1978 broadening of § 1333(a)(1) as follows:

> Section (a) amends section 4(1) of the OCS Act of 1953 by changing the term "fixed structures" to "and all installations and other devices permanently or temporarily attached to the seabed" and making other technical changes. It is thus made clear that Federal law is to be applicable to all activities on all devices in contact with the seabed for exploration, development, and production. The committee intends that Federal law is, therefore, to be applicable to activities on drilling ships, semi-submersible drilling rigs, and other watercraft, when they are connected to the seabed by drillstring, pipes, or other appurtenances, on the OCS for exploration, development, or production purposes."

H.R. REP. No. 95-590, at 128 (1977), reprinted in 1978 U.S.C.C.A.N. 1450, 1534.

[61]43 U.S.C. § 1331(k) defines exploration to mean "the process of searching for minerals, including (1) geophysical surveys where magnetic, gravity, seismic, or other systems are used to detect or imply the presence of such minerals, and (2) any drilling, whether on or off known geological structures, including the drilling of a well in which a discovery of oil or natural gas in paying quantities is made and the drilling of any additional delineation well after such discovery which is needed to delineate any reservoir and to enable the lessee to determine whether to proceed with development and production." 43 U.S.C. § 1331(l) defines development to mean "those activities which take place following discovery of minerals in paying quantities, including geophysical activity, drilling, platform construction, and operation of all onshore support facilities, and which are for the purpose of ultimately producing the minerals discovered." 43 U.S.C. § 1331(m) defines production as "those activities which take place after the successful completion of any means for the removal of minerals, including such removal, field operations, transfer of minerals to shore, operation monitoring, maintenance, and work-over drilling."

[62]See Demette v. Falcon Drilling Co., 280 F.3d 492, 497-98 & n. 19 (5th Cir. 2002) (asserting that § 1333(a)(1) draws a significant distinction between devices used for exploring, developing, or producing resources and devices used for transporting resources; that the first type of devices are covered only if they are "erected" on the seabed; that the second type, transport devices, do not need to be "erected" in order to be covered; and that the absence of an "erected" requirement for transport devices enables the essential conclusion that pipelines are covered); Dean A. Sutherland, *Significant Development in Maritime Personal*

upon reflection this assumption begins to seem necessarily wrong. Pipelines are an essential and pervasive feature of OCS oil and gas operations. They lie upon and are attached to the ocean floor—indeed, they are typically buried in it[63]—but they are certainly not raised up or elevated. Yet it is indisputable that pipelines have always been covered by § 1333(a)(1),[64] which has contained the "erected" term from the beginning. (Recall that the pre-1978 version of § 1333(a)(1) restricted its coverage of artificial islands and fixed structures to those "which may be erected" on the seabed.[65]) So the 1953 Congress—and thus, absent some indication of an intent to change the term's meaning, the 1978 Congress—must have intended the term "erected" in the more general sense of "placed," "built," "assembled," or "fashioned"[66] rather than the more specific sense of "raised up" or "elevated."[67]

Such an understanding of "erected" does not make the term surplusage. In both the original and present versions of § 1333(a)(1), the term has served in the general sense of "placed" or "assembled" as a way of introducing the statute's enumeration of the devices' required purposes.

Injury Law, 64 LA. L.REV. 299, 312-14 (2004) (criticizing *Demette* for failing to give proper weight to § 1333(a)(1)'s "erected" language and stating that "it is difficult to anticipate how a floating semi-submersible drilling rig can be 'erected' on the seabed of the OCS."). (Mr. Sutherland explains that semi-submersible rigs remain afloat, in a sense, while they are in drilling mode. Id. at 302 n. 13.)

[63]See Union Texas Petroleum Corp. v. PLT Engineering, Inc., 895 F.2d 1043, 1047 (5th Cir. 1990) (describing pipeline as "buried beneath the ocean floor"); Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge, 424 F.2d 684, 686 (5th Cir. 1970) (referring to a pipe line as "buried in" the seabed). But cf. Marathon Pipe Line Co. v. Drilling Rig Rowan/Odessa, 761 F.2d 229, 231 (5th Cir. 1985) (describing a pipeline as "lying beneath the sea on the bed").

[64]See Union Texas Petroleum Corp. v. PLT Engineering, Inc., 895 F.2d 1043, 1047-49 & n. 5(5th Cir. 1990) (treating the coverage of pipelines by § 1333(a)(2)(A)—which, like the pre-1978 § 1333(a)(1), is limited to "artificial islands and fixed structures erected on" the seabed—as indisputable); Continental Cas. Co. v. Associated Pipe & Supply Co., 447 F.2d 1041, 1044 (5th Cir. 1971) (same). Cf. EP Operating Limited Partnership v. Placid Oil Co., 26 F.3d 563, 565 n. 4, 569 (5th Cir. 1994) (asserting that a suit in which a part-owner of "52 miles of pipeline attached to the seabed of the OCS" sought a partition by licitation fell within § 1333(a)(1)).

It may be that under the post-1978 version of § 1333(a)(1), pipelines are covered regardless of whether they are deemed "erected." See supra note 63. But inasmuch as "licitation" is a Louisiana-law term (see BLACK'S LAW DICTIONARY (8th ed. 2004)), the EP Operating court was implicitly asserting that a suit involving a pipeline is covered by § 1333(a)(2)(A), which indisputably includes the "erected on the seabed" requirement.

[65]Supra note 64.

[66]See WEBSTER'S UNABRIDGED DICTIONARY 619 (2d ed. 1975) (listing as synonyms for the verb erect: "raise, set up, elevate, build, construct, found, establish, institute"); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 444 (10th ed. 1981) (defining the verb erect to mean: "1. To raise . . . . 2. To raise upright . . . . 3. To put together; fashion; assemble . . . ."). See also *WestLaw Thesaurus* (listing "create" as one of the synonyms for the verb erect).

[67]See Marathon Pipe Line Co. v. Drilling Rig Rowan/Odessa, 761 F.2d 229, 234 (5th Cir. 1985) (stating that a pipeline lying on the seabed "is an installation erected on the seabed."

It follows from the preceding two paragraphs that the term "erected" is not a stand-alone limitation on § 1333(a)(1)'s coverage. The provision's coverage limitations are these three:

- It does not cover installations or devices unless they are intended for or serve the purposes of exploring for, developing, producing, or transporting mineral resources.
- It does not cover installations or devices unless they have been placed upon the seabed and in some fashion—however temporary—attached there.
- It does not cover ships or vessels "when they are being used for the purpose of transporting OCS mineral resources."[68]

Using the statute's language, its coverage categories can be affirmatively stated as follows:[69]

(1) "[T]he subsoil and seabed of the outer Continental Shelf."

(2) "[A]ll artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected [i.e., placed] thereon for the purpose of exploring for, developing, or producing resources therefrom."

(3) "[A]ny such installation or other device (other than a ship or vessel) for the purpose of transporting such resources."[70]

Note that the coverage of § 1333(a)(1) does not extend to the waters over the outer Continental Shelf.[71] Congress realized that for international-law purposes these waters are regarded as high seas, and it wanted to say very

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[68]H.R. REP. 95-590, at 128 (1978), reprinted in 1978 U.S.C.C.A.N. 1450, 1534. This limitation may not add anything of substance to the provision's other limitations. OCSLA does not define "transporting," but it is hard to visualize an "attached" vessel as transporting anything. Moreover, attached vessels used for "producing resources" are covered, and "production" is defined to include "transfer of minerals to shore." 43 U.S.C. § 1331(m).

[69]See supra note 62 (explaining the similar but not identical listing in Demette v. Falcon Drilling Co., 280 F.3d 492, 497 (5th Cir. 2002)).

[70]The first "such" here is ambiguous, but not importantly so. To mean anything, it must require the transport devices to be permanently or temporarily attached to the seabed. This is no problem, because OCS pipelines are "attached to the seabed of the OCS." EP Operating Limited Partnership v. Placid Oil Co., 26 F.3d 563, 565 n. 4 (5th Cir. 1994). But does it also require them to be "erected" on the seabed? The answer is not important if erected means "placed" or "assembled," as it must (because pipelines were covered by § 1333(a)(1) before 1978, which unambiguously required them to be deemed erected on the seabed, and because they need to continue to be covered by § 1333(a)(2), which unambiguously requires them to be deemed erected on the seabed).

[71]See Offshore Logistics, Inc. v. Tallentire, 477 U.S. 209, 218 (1986) (stating that applying OCSLA to the deaths of platform workers in a helicopter crash 30 miles off Louisiana would be an unwarranted "extension of OCSLA far beyond its intended locale" and emphasizing "the narrowly circumscribed area defined by [OCSLA]"); Smith v. Pan Air Corp., 684 F.2d 1102, 1110 & n. 29 (5th Cir. 1982) (marking out a narrow extension of § 1333(a)(1) for cases in which platform workers sustain an "original impact" on a platform but "were not actually injured or killed until they fell, jumped, or were pushed into the surrounding seas"); Guess v. Read, 290 F.2d 622, 625 (5th Cir 1961) (noting that § 1333's coverage "does not include the sea above the subsoil and seabed and does not include the air above the sea").

clearly that they remain so.[72] In its "declaration of policy" in 43 U.S.C. § 1332(2), Congress admonished that "this Act shall be construed in such a manner that the character of the waters above the outer Continental shelf as high seas and the right to navigation and fishing therein shall not be affected." Concomitantly, Congress omitted these waters from its assertion of exclusive United States sovereignty in § 1333(a)(1).

Nor does § 1333(a)(1) cover vessels moving across or floating upon the waters over the outer Shelf.[73] The provision signals its exclusion of floating vessels in two ways. First, it excludes "ship or vessel" from category (3) in the above listing. Second, it limits category (2)[74] to apparatus that is "attached to" and "erected" (placed) on the seabed. Obviously a moving vessel is not attached. Nor is a ship that is tied up to an offshore platform. A ship afloat at anchor might in some senses be deemed "attached" to the seabed, but it cannot sensibly be characterized as having been "erected" (placed) on the seabed.[75]

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[72]See Williams v. Avondale Shipyards, Inc., 452 F.2d 955, 960 (5th Cir. 1971) (stating that the purpose of 43 U.S.C. § 1332(2) is to "carefully preserve[] the international character of the waters above the seabed"); Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L.REV. 23, 34-35 (1953) (indicating that Congress preserved the "high seas" character of the waters over the outer Shelf for international-law purposes); cf. Employers Mutual Cas. Co. v. Samuels, 407 S.W.2d 839, 843 (Tex. App. 1996) (stating that "high seas" are "the territory or no nation").

[73]Diamond Offshore Co. v. A&B Builders, Inc., 302 F.3d 531, 544 (5th Cir. 2002) (holding that a semi-submersible offshore drilling rig is not covered by §1333(a)(1) while it is en route to a drilling location but only after it has become "'attached' to and 'erected' on the seabed of the OCS"); EEX Corp. v. ABB Vecto Gray, Inc., 161 F. Supp. 2d 747, 749 (S.D. Tex. 2001) (noting that "ships . . . traveling over the shelf" are not covered by § 1333(a)(1)").

Courts have occasionally assumed that § 1333(a)(1) can be stretched to cover injuries to platform workers on floating vessels immediately adjacent to the platform. See, e.g., Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 475-76, 480 (1981) (assuming without discussion that § 1333(a)(1) covered injuries to a platform worker on a boat tied up at the platform); Beard v. Shell Oil Co., 600 F.2d 515, 517-18 (5th Cir. 1979) (same).

[74]If the term "such" in the statutory phrase "any such installation or other device (other than a ship or vessel) for the purpose of transporting . . . resources" is to have any meaning, it must mean "permanently or temporarily attached." As we saw supra text and notes 62-66, whether it also means "erected" is unimportant. The *Demette* panel was mistaken to believe otherwise.

[75]Diamond Offshore Co. v. A&B Builders, Inc., 302 F.3d 531, 544-45 (5th Cir. 2002), indicates that a semi-submersible drilling rig will be regarded as "attached to" and "erected on" the seabed when it has arrived at a drilling location and been "attached to the seabed by its anchors." However, this should not be read to imply that the normal anchoring of a ship would accomplish the same "attachment" and "erection." Here is how semi-submersibles are "anchored:"

> A semi-submersible drilling rig is a movable floating rig. Typically, it is towed to a location, where it is submerged about fifty feet and then anchored in place to complete the mooring of the rig. The rig's platform deck is supported on columns which are attached to large underwater displacement hulls, large vertical caissons, or some combination of both. The columns, displacement hulls, or caissons are flooded on location.

Dean A. Sutherland, *Significant Development in Maritime Personal Injury Law*, 64 LA. L.REV. 299, 302 n. 13 (2004) (citing THOMAS J. SCHOENBAUM, 1 ADMIRALTY AND MARITIME LAW § 3-9, at 108 n. 8 (3d ed. 2001), and HOWARD R. WILLIAMS & CHARLES J. MEYERS, MANUAL OF OIL AND GAS TERMS 996 (11th ed.

4. Section 1333(a)(1) cannot be read to delimit the coverage of the entire OCSLA

As we saw in section II-C-1 above, 43 U.S.C. § 1331(a) limits the coverage of the entire OCSLA to the area seaward of the coastal states' boundaries as established in the Submerged Lands Act. Section 1331(a) is the Act's only overarching coverage provision. Plainly § 1333(a)(1) is not intended as a further limit on the Act's coverage: Its purpose is to put forth a broad (but not limitless) proclamation of exclusive national sovereignty, not to describe the coverage of the Act.[76]

There are several ways to demonstrate the truth of this assertion. Preliminarily, it is useful to note that § 1333(a)(1) is not in the Act's definitions section, which is where one would expect to find the Act's overarching coverage provisions. Next one should simply look to look at § 1333(a)(1)'s language: It does not purport to define the Act's coverage.

A third way of demonstrating that § 1333(a)(1) restricts only its own coverage, not the entire Act's, is to observe that 43 U.S.C. § 1333(d)(1) explicitly goes beyond the reach of § 1333(a)(1) by authorizing the Coast Guard to regulate safety "on the artificial islands, installations, and other devices referred to in subsection (a) of this section *or on the waters adjacent thereto*" (emphasis supplied). If § 1333(a)(1) had been meant to set the entire Act's boundaries, § 1333(d) would be inconsistent with that aim. The Supreme Court has often counseled against interpreting a statute so as to create internal disharmonies.[77] Admittedly, one could reconcile any apparent disharmony between §§ 1333(a)(1) and 1333(d) by treating the latter as a single-purpose relaxation of the former's criteria. But a better way is to read §1333(a)(1) as limiting only the scope of the United States' assertion of exclusive national sovereignty, not of the whole Act.

A fourth way of demonstrating that it makes no sense to read § 1333(a)(1) as limiting the entire Act's coverage is to note that several of OCLSA's sections are explicitly tethered to the coverage limits set forth in § 1333(a)(1),[78]

2000). Cf. Global Industries Offshore LLC v. Pipeliners Local, 2006 WL 724815 at * 4 (W.D. La., March 16, 2006) (concluding that a "dynamically positioned" pipe-lay barge was not covered by OCSLA § 1333(a)(1) because it was not "attached" to the seabed).

[76]See supra notes 52-53.

[77]See Food and Drug Administration v. Brown & Williamson Tobacco Corp., 529 U.S. 230, 132 (2000) (citations and internal quotation marks omitted): "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into a harmonious whole."

[78]Section 1333(c) treats unfair labor practices "occurring upon any artificial island, installation, or other device referred in subsection (a) of this section." 43 U.S.C. § 1333(e) extends the Secretary of the Army's authority to prevent obstructions to navigation to "the artificial islands, installations, and other devices referred to in subsection (a) of this section." 43 U.S.C. § 1333(f) states that "[t]he specific application by

while others are not.[79] Respecting those that are: If § 1333(a)(1) limited the whole Act's coverage, the explicit references to its limits would be redundant. Respecting those that are not: A common-sense principle akin to the statutory construction canon *expressio unius est exclusio alterius* (meaning roughly "expressing one item of an associated group of series excludes another left unmentioned"[80]) counsels that the omission of any § 1333(a)(1) tether is a meaningful indication that no such tether was intended. Indeed, the Supreme Court has endorsed the principle that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[81] Plainly enough, "Congress knows how to include a [§ 1331(a)(1)-derived] situs requirement in a [provision] when it intends that such a requirement should exist."[82]

The fifth demonstration that § 1333(a)(1) is not an overarching coverage limitation is to examine §§ 1333(b) and 1349(b)(1) and the jurisprudence interpreting them. This is done in sections II-C-9, II-C-10, and II-C-11 below.

5. For some cases concerning "the subsoil and seabed of the outer Continental Shelf and artificial islands and fixed structures erected thereon," § 1333(a)(2)(A) makes the law of the adjacent state applicable. This provision's coverage is narrower than that of § 1333(a)(1)

The most litigious provision in OCSLA is 43 U.S.C. § 1333(a)(2)(A), which provides:

> To the extent that they are applicable and not inconsistent with this Act or with other Federal laws and regulations of the Secretary [of the Interior] now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed[83] are hereby declared

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this section of certain provisions of law to the subsoil and seabed of the outer Continental Shelf and the artificial islands, installations, and other devices referred to in subsection (a) of this section or to acts or offenses occurring or committed thereon shall not give rise to any inference that the application to such islands and structures, acts, or offenses of any other provision of law is not intended."

[79]Sections 1333(b) and 1349(b)(1) are treated infra Sections II-C-9, II-C-10, and II-C-11.

[80]Chevron U.S.A. Inc. v. Echazabal, 537 U.S. 73, 80 (2002) (internal quotation marks omitted).

[81]Russello v. United States, 464 U.S. 16, 23 (1983) (citation and internal quotation omitted).

[82]Mills v. Director, OWCP, 877 F.2d 356, 363 (5th Cir. 1989) (en banc) (Duhe, J., with Politz and Williams, JJ., dissenting).

[83]The original 1953 provision referred to state law "as of the effective date of this Act." Such a static adoption of state law had obvious shortcomings: Indeed, it was realized at the time that "if Congress adopted state law only as it exist[ed in 1953], it would probably become obsolete as conditions change[d]." Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L. REV. 23, 39 (1953). "To avoid such progressive obsolescence, Congress would have to review and adopt subsequent changes in state law." Id. at 39 n. 79. Nevertheless, the 1953 Congress yielded to Justice Department advice

> 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 the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area.[84] All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

The first thing to note about this provision is its limited coverage: By its plain terms it reaches only "the subsoil and seabed of the outer Continental Shelf and artificial islands and fixed structures erected thereon." It does not reach the "installations and other devices . . . temporarily attached to the seabed" that are included within § 1333(a)(1)'s coverage.[85] The dispar-

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that a dynamic adoption of state law—i.e., adopting future state law—might well "constitute an unconstitutional delegation of power" to the states. Id. at 39.

By 1975, the Supreme Court had significantly backed away from the cases that had fueled the Justice Department's 1953 "unconstitutional delegation" concerns. See generally David W. Robertson, *Displacement of State Law by Federal Maritime Law*, 26 J. MAR. L. & COM. 325 (1995); cf. Askew v. American Waterways Operators, Inc., 411 U.S. 325, 344 (1973) (stating that Knickerbocker Ice. Co. v. Stewart, 253 U.S. 149 (1920), and Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917) "have been confined to their facts"). Accordingly, Pub.L. 93-627 (1975) amended the provision to the present dynamic adoption version.

The 1975 amendment's ornate description of state law—"now in effect or hereafter adopted, amended, or repealed"—is ridiculous in suggesting on its face that Congress wanted to adopt repealed state law. The phrase was simply lifted without thought from other statutes. What Congress was trying to say was that adjacent-state repeal of a law theretofore incorporated as surrogate federal law by § 1333(a)(2)(A) will take that law out of the § 1333(a)(2)(A) adoption. Congress's meaning would have been better served by simply saying "now in effect or hereafter adopted." (To amend or repeal a law, a state legislature must adopt something.)

[84]When amending OCSLA in 1978, Congress noted that no President had yet determined and published the contemplated lines and exhorted the Carter administration to get to work on it. H.R. REP. NO. 95-590, at 128 (1978), reprinted in 1978 U.S.C.C.A.N. 1450, 1534. But so far no administration has responded. See Snyder Oil Corp. v. Samedan Oil Corp., 208 F.3d 521, 524 (5th Cir. 2000) ("The President has failed to publish the boundary projections required by OCSLA"). The Fifth Circuit has thus been forced to decide disputes over which state's law should be adopted by "consider[ing] four types of evidence in the 'adjacency' analysis: (1) geographic proximity; (2) which coast federal agencies consider the subject platform to be 'off of'; (3) prior court determinations; and (4) projected boundaries." *Snyder*, 208 F.2d at 524, citing Reeves v. B & S Welding, Inc., 897 F.2d 178 (5th Cir. 1990). More often than not, the law of the state nearest the platform will be selected. See *Snyder*, 209 F.3d at 525 & n. 3 (acknowledging the strong importance of "geographic proximity" but refusing to give that factor "a determinative position").

[85]We will see infra in Section III-B-1 that in many cases the courts have overlooked or purposefully ignored the fact that § 1333(a)(2)(A)'s coverage is narrower than § 1333(a)(1)'s. For cases recognizing § 1333(a)(2)(A)'s narrow coverage limits, see Parks v. Dowell Division, 712 F.2d 154, 156-57 (5th Cir. 1983) (holding that a "floating barge-like structure" that was "anchored adjacent" to a fixed platform and "otherwise secured to the platform" could not be deemed an extension of the platform and was therefore outside the reach of § 1333(a)(2)(A)); Smith v. Pan Air Corp., 684 F.2d 1102, 1105,1109-1112 (5th Cir. 1982) (holding that § 1333(a)(2)(A) did not apply to a case in which a helicopter struck an OCS platform's crane ball and then crashed into the sea); Walsh v. Seagull Energy Corp., 836 F. Supp. 411, 416 (S.D. Tex.

ity between the coverages of §§ 1333(a)(1) and 1333(a)(2)(A) is not an inadvertence.[86] The two provisions had the same coverage until 1978.[87] The coverage of § 1333(a)(1) was broadened in 1978 because Congress wanted to accommodate expanding offshore technology and to make "clear that Federal law is to be applicable to all activities on all devices in contact with the seabed for exploration, development, and production."[88] As that change was working its way through Congress, the Association of Trial Lawyers of America (ATLA) lobbied to leave § 1333(a)(2) unchanged.[89] The lobbying effort was successful: The House Committee Report on the 1978 amendments describes the broadening of §1333(a)(1) at length and thereafter states that Congress "has left [section 1333(a)(2)] untouched."[90] Note also that while Congress was leaving subsection (a)(2) of § 1333(a) "untouched," it was carefully changing subsections (c), (e), and (f) of § 1333 to reflect the broadening of subsection (a)(1)'s coverage.[91] As we saw

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1993) (noting that § 1333(a)(2)(A) does not cover the temporary installations covered by § 1333(a)(1) and finding the difference puzzling); cf. Barger v. Petroleum Helicopters, Inc., 692 F.2d 337, 340 (5th Cir. 1983) (noting that § 1333(a)(2)(A) "is considerably narrower" than § 1333(b)); Green v. Industrial Helicopters, Inc., 593 So.2d 634, 640 n. 5 (La. 1992) (same, quoting *Barger*); In re Dearborn Marine Service, Inc., 499 F.2d 263, 276 n. 25 (5th Cir. 1974) (rejecting an argument that § 1349(b)(1) [then numbered § 1333(b)] expands the reach of § 1333(a)(2)(A)). For secondary authorities pointing out the distinction between the coverages of §§ 1333(a)(1) and 1333(a)(2)(A), see Dean A. Sutherland, *Significant Development in Maritime Personal Injury Law*, 64 LA. L.REV. 299, 304 (2004) (describing the broadening of § 1333(a)(1)'s coverage that occurred in 1978 and pointing out that § 1333(a)(2)(A) was not correspondingly amended); Kenneth G. Engerrand, *Primer of Remedies on the Outer Continental Shelf*, 4 LOY. MAR. L.J. 19, 34 n. 125 (2006) (describing the differing coverages of the two provisions and citing Demette v. Falcon Drilling Co., 280 F.3d 492, 497 (5th Cir. 2002), as having "recognized the difference"). On another reading of *Demette*, the Court obscured the difference rather than recognizing it. See David W. Robertson and Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 27 TUL. MAR. L.J. 495, 574-75 (2003) (criticizing *Demette* for claiming that §§ 1333(a)(1) and 1333(a)(2)(A) have the same coverage).

[86]As we will see infra in Section III-B-1, some Fifth Circuit panels have mistakenly assumed that the disparity is a congressional mistake that demands judicial correction.

[87]See Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L.REV. 23, 62 (1953) (appendix setting forth original OCSLA and showing that §§ 1333(a)(1) and 1333(a)(2) were both confined to "subsoil and seabed of the outer Continental Shelf [and artificial islands and foxed structures erected thereon").

[88]H.R. REP. 95-590, AT 128 (1977), reprinted in 1978 U.S.C.C.A.N. 1450, 1534. See supra text and notes 58-60.

[89]David W. Robertson and Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 27 TUL. MAR. L.J. 495, 575 n. 759 (2003). ATLA's "main concern was that changing § 1333(a)(2) in conformity with the change to § 1333(a)(1) would jeopardize the seaman status of workers on jack-up, submersible, and semi-submersible rigs." Id.

[90]H.R. REP. NO. 95-590, at 128 (1977), reprinted in 1978 U.S.C.C.A.N. 1450, 1534.

[91]See supra note 78. In their original versions, these subsections all covered "artificial islands and fixed structures." See Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L.REV. 23, 62-63 (1953) (appendix, setting forth original Act, in which the present subsections (c), (e), and (f) were designated (d), (f), and (g) and showing the "artificial islands and fixed structures" wording of each).

above,[92] it is axiomatic that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[93]

6. For cases within its coverage, § 1333(a)(2)(A) makes adjacent-state law applicable, but only as surrogate federal law and only when such state law is "applicable and not inconsistent with [OCSLA] or with other Federal laws." "Other Federal laws" means, primarily, admiralty and maritime law

During the process of crafting and enacting OCSLA in 1953, Congress was excitedly thinking of the huge territory of the continental shelf as awaiting imminent colonization.[94] Warren Christopher, then a prominent energy-industry lawyer,[95] described the mood as follows:

> Large crews of men will work on the miraculous structures which will rise from the sea bed of the outer Continental Shelf. These men will die, leave wills, and pay taxes. They will fight, gamble, borrow money, and perhaps even kill. They will bargain over their working conditions and sometimes they will be injured on the job. Indeed, except for the anticipated absence of women, the whole circle of legal problems familiar to the upland could occur on these structures.
>
> It is possible that eventually women and children will make their homes on the structures. However, oil company officials who have had the most experience with these operations are inclined to doubt that this will occur in the near future. The common estimate during debate on the bill was that the absence of women would reduce the legal problems about 75 percent.[96]

What law was to govern all of these anticipated events and issues? This was a daunting question, not least because "[f]or the first time the United States would be establishing a body of law for an area in which it controls the sea bed and subsoil but not the superadjacent water and airspace."[97]

Everyone understood that the United States Code "was never designed to be a complete body of law in and of itself,"[98] and it seemed obvious that

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[92]Supra text at note 81.

[93]Russello v. United States, 464 U.S. 16, 23 (1983) (internal quotation marks and citation omitted).

[94]Cf. Copeland v. Gulf Oil Corp., 672 F.2d 867, 868 (11th Cir. 1982) (analogizing the perils of OCS work to "the dangers encountered by early settlers").

[95]He went on to become Secretary of State in the Clinton administration.

[96]Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L.REV. 23, 37 & n. 73 (1953).

[97]Id. at 37.

[98]Rodrigue v. Aetna Cas. & Sur. Co. , 395 U.S. 352, 358 (1969) (quoting Senator Guy Cordon [R.-Ore.], a principal architect of OCSLA, 99 CONG. REC. 6963 (1953)).

Congress could not feasibly enact an entire new code of laws for the anticipated new colony. The Interior Department suggested that perhaps the District of Columbia Code could be adopted by reference as the basic body of law for the people of the shelf, but the suggestion found little support in Congress.[99] Eventually Congress appeared to have settled on a provision "that all acts occurring and offenses committed on any structure located on the outer Shelf shall be deemed to have occurred or been committed aboard a vessel of the United States on the high seas and adjudicated or punished accordingly."[100] The effect of this provision would have been "to apply to the structures the admiralty and maritime laws applicable to vessels on the high seas."[101]

Meanwhile, senators and representatives from the Gulf coastal states were fighting hard for their states to get some part of the revenues from outer Shelf mineral operations.[102] As a part of that fight, the Gulf states resisted the extension of federal admiralty and maritime law to events on the contemplated artificial islands and platforms. Instead they urged that adjacent-state law—of its own force[103] —should apply

In executive hearings, the Senate Interior Committee rejected the Gulf states' efforts to have state law made applicable of its own force. But it also heeded the Gulf states' arguments that expanding admiralty and maritime law to cover artificial islands and fixed platforms was undesirable. Rejecting *both* the admiralty-expanding and state-law adopting approaches, the Senate Committee instead crafted a middle ground resulting in the "unique combination of federal and state laws"[104] reflected in §§ 1333(a)(1) and 1333(a)(2)(A). Here is the gist of the "unique combination":

- Section 1333(a)(1) precludes the application of state law of its own force by providing that the covered areas constitute "an area of exclusive Federal jurisdiction."[105]

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[99]Christopher, supra note 96, at 39 & n. 81.

[100]Id. at 40.

[101]Id.

[102]Id. at 40-41.

[103]Id. ("Senator Daniel pressed the point that excluding state law from the outer Shelf departed from our 'dual system of sovereignties'" (footnote omitted).

[104]Id. at 41.

[105]Occasional indications that state law might apply of its own force to matters covered by § 1333(a)(1) seem wrong. Such an indication might be read into David W. Robertson and Michael F. Sturley, *Recent Developments in Maritime Law at the National Level and in the Fifth and Eleventh* Circuits, 26 TUL. MAR. L.J. 193, 247 & n. 511 (2001) (terming the claim that state law cannot apply of its own force on the outer Shelf "a debatable viewpoint"). I no longer think it is legitimately debatable. I think the following cases are demonstrably wrong: Domingue v. Ocean Drilling and Exploration Co., 923 F.2d 393, 394, 398 (5th Cir. 1991), cert. denied, 502 U.S. 1033 (1992) (holding that the Louisiana Oilfield Indemnity Act governed a contract for wireline services on a movable jackup drilling rig); Thompson v. Teledyne Movible

- Section 1333(a)(2)(A) rejects the approach that would have extended admiralty jurisdiction over artificial islands and fixed platforms.

- Section 1333(a)(2)(A) instead adopts state law to control events on artificial islands and fixed platforms, but "only as surrogate federal law,"[106] "only to supplement federal law,"[107] and "only when no inconsistent federal law applies."[108]

- Section 1333(a)(2)(A) leaves admiralty and maritime law applicable to actual vessels and other matters falling within admiralty jurisdiction.[109] It does this in two ways: by covering only "artificial islands and fixed structures erected on the seabed" and thus not vessels of any type; and by precluding the adoption of state law as surrogate federal law when the state law is inconsistent with

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Offshore, Inc., 419 So.2d 822 (La. 1982), appeal dism'd for want of a substantial federal question, 464 U.S. 802 (1983) (applying Louisiana Worker's Compensation law to an injury on an immovable platform on the outer Shelf). That *Domingue* and *Thompson* were wrongly decided is shown by the language of § 1333(a)(1), which provides that the covered situses are to be treated like "an area of exclusive Federal jurisdiction located within a State," and by the following cases: Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 357 (1969) (emphasizing that under OCSLA § 1333(a)(2)(A) "state law is adopted only as surrogate federal law."); id at 358 (emphasizing that "state law should be applied only as federal law and then only when no inconsistent federal law applie[s]"); id. (emphasizing that state law applies as surrogate federal law only "where there is a void" in federal law and "only to supplement federal law"); Paul v. United States, 371 U.S. 245, 268 (1962) (stating that "a State may not legislate with respect to a federal enclave unless it reserved the right to do so when it gave its consent to the purchase by the United States"); Demette v. Falcon Drilling Co. , 280 F.3d 492, 499 (5th Cir. 2002) (stating that "the only way state law could have operated [respecting an event on a jacked-up rig on the OCS] was by incorporation [as surrogate] federal law under OCSLA [§ 1333(a)(2)(A)]"); Hufnagel v. Omega Service Industries, Inc., 182 F.3d 340, 349 (5th Cir. 1999) (stating that the only way Louisiana tort law could apply to an OCS fixed-platform accident would be as "surrogate federal law" via § 1333(a)(2)(A)); Hodgen v. Forest Oil Corp., 87 F.3d 1512, 1525-26 (5th Cir. 1996) (disapproving of suggestions that state law can apply of its own force to OCS situses); LeSassier v. Chevron USA, Inc., 776 F.2d 506, 508-09 (5th Cir. 1985) (holding that Thompson v. Teledyne, supra, was wrongly decided); Olsen v. Shell Oil Co., 708 F.2d 976, 980 n. 2 (5th Cir. 1983) ("The law governing all OCSLA cases is of course federal") (emphasis in original); Nations v. Morris, 483 F.2d 577, 582-83 (5th Cir. 1973) (indicating that OCSLA precludes the application of state law of its own force); Mater v. Holley, 200 F.2d 123, 124 (5th Cir. 1952) (holding that in an area ceded by a state to the United States so as to become a federal enclave, state sovereignty "cease[s] to exist").

[106]Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 357 (1969).

[107]Id. at 358.

[108]Id.

[109]A useful summary of the intent and meaning of § 1333(a)(2)(A) is provided in Gardes v. U.S. Turnkey Exploration Co., 98 F.3d 860, 865 (5th Cir. 1996):

> In its final form, the OCSLA deliberately eschewed the application of admiralty principles to controversies involving fixed platforms, for the reason that the maritime law was ultimately unsuited to the myriad of legal issues which might result. It was for this reason that the final bill allowed for the incorporation of the law of the adjacent state, to provide for a seamless web addressing every contingency. Nevertheless, in those situations where the maritime law would otherwise apply, it does apply.

Emphasis supplied; internal quotation marks and citation omitted. See also Tennessee Gas Pipeline v. Houston Cas. Ins. Co., 87 F.3d 150, 154 ("OCSLA . . . was not intended to displace general maritime law.")

the OCSLA or with "other Federal laws." The principal type of "other Federal laws" referred to by § 1333(a)(2)(A) is federal maritime law.[110]

7. Cases that are covered by § 1333(a)(1) but not by § 1333(a)(2)(A) are cases of admiralty jurisdiction that should be governed by federal maritime law.

As we just saw, § 1333(a)(2)(A)'s coverage boundary—"artificial islands and fixed structures erected" on the seabed—excludes the kinds of "devices . . . temporarily attached to the seabed" that are covered by § 1333(a)(1). The largest and most important group of these are "special-purpose movable drilling rigs."[111] These include jack-up rigs, submersible rigs, semi-submersible rigs, and drill ships.[112] It is "beyond dispute [that these devices] are vessels within the meaning of admiralty law."[113] In the

[110]See Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 220 (1986) (holding that the Death on the High Seas Act, 46 U.S.C. app. §§ 761-767—which is indisputably a part of federal maritime law—is "other Federal laws" within the meaning of § 1333(a)(2)(A); Chevron Oil Co. v. Huson, 404 U.S. 97, 100-01 (1971) indicating that the "other Federal laws" phrase in § 1333(a)(2)(A) refers to "comprehensive admiralty law"); Hodgen v. Forest Oil Corp., 87 F.3d 1512, 1526 & n. 10 (5th Cir. 1996) (interpreting Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969) as reading § 1333(a)(2)(A)'s "other Federal laws" phrase to mean federal maritime law); Laredo Offshore Constructors, Inc. v. Hunt Oil Co., 754 F.2d 1223, 1229 (5th Cir. 1985) (stating that "where admiralty and OCSLA [§ 1333(a)(2)(A)] jurisdiction overlap, the case is governed by maritime law" and that the applicability of maritime law in this situation "necessarily" stems from the "other Federal laws" phrase in § 1333(a)(2)(A)); Nations v. Morris, 483 F.2d 577, 585-86 (5th Cir. 1973)(holding that 33 U.S.C. § 933, which is a provision of federal maritime law that immunizes a workers'-compensation-covered injury victim's fellow employees from tort liability, was "other Federal laws" within the meaning of 43 U.S.C. § 1333(a)(2)(A), such that Louisiana's rule to the contrary could not apply as surrogate federal law); Kimble v. Noble Drilling Do., 416 F.2d 847, 850 (5th Cir. 1969) (stating that "admiralty law" constitutes the "other Federal laws" referred to in § 1333(a)(2)(A)); Pure Oil Co. v. Snipes, 293 F.2d 60, 64 (5th Cir. 1961) (stating that "other Federal laws" in § 1333(a)(2)(A) means "the pervasive maritime law of the United States"); Verrett v. Offshore Crews, Inc., 332 So.2d 292, 296-97 (La. App.), writ denied, 337 So.2d 519 La. 1976) (stating that "other Federal laws" in § 1333(a)(2)(A) refers to "laws . . . such as Jones Act claims and an employers general maritime right to indemnity").

[111]Demette v. Falcon Drilling Co., 280 F.3d 492, 498 n. 18 (5th Cir. 2002).

[112]See supra note 57.

[113]*Demette*, 280 F.3d at 498 n. 18 (citing cases). See also Holmes v. Atlantic Sounding Co., 437 F.3d 441, 448 (5th Cir. 2006) (noting that by adopting the broad definition of vessel laid down in 1 U.S.C. § 3, the Supreme Court's decision in Stewart v. Dutra Const. Co, 543 U.S. 481 (2005) "has significantly enlarged the set of unconventional watercraft that are vessels under the Jones Act and the LHWCA"); Houston Oil & Minerals Corp. v. American Int'l Tool Co., 827 F.2d 1049, 1052 (5th Cir. 1987) (discussing "submersible, semi-submersible, jackup, and other movable rigs" and stating that "[w]e take as a given that in this circuit, at least in the area of personal injury, admiralty jurisdiction and the applicability of maritime law to these Robison-defined special-purpose watercraft is unassailably established.") The reference is to Offshore Co. v. Robison, 266 F.2d 769, 780 (5th Cir. 1959), which was the first case recognizing that "the strange-looking specialized watercraft designed for oil operations offshore and in the shallow coastal waters of the Gulf of Mexico" are vessels for purposes of the Jones Act, 46 U.S.C. app. § 688(a).

OCS context, all tort actions involving vessels fall within admiralty jurisdiction.[114]

Moreover, there is plenty of jurisprudential support for the desirable conclusion that all contract actions that involve OCS activities on, with, by, or for vessels also fall within admiralty jurisdiction.[115] A contradictory line of cases—

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[114]In Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 543 n. 5 (1995), the Court declined to decide whether "the Extension of Admiralty Jurisdiction Act, 46 U.S.C. App. §740, provides an independent basis of [admiralty]jurisdiction." The Court instead used the Extension Act as part of a three-requirement test for admiralty jurisdiction in a tort case. (The *Grubart* three-requirement approach is explained and analyzed in David W. Robertson, *Admiralty Jurisdiction Over One Co-Tortfeasor Cannot Effectuate Admiralty Jurisdiction Over Another*, 37 J. MAR. L. & COM. 161, 165-67, 174-78 (2006).) The *Grubart* Court found that its approach readily established that admiralty jurisdiction existed over an action by flooded Chicago businesses against a vessel operator whose pile-driving activities in the Chicago River caused the collapse and flooding of a freight tunnel running beneath the river bed. The Court said that its test for tort jurisdiction means that while "[while not] every tort involving a vessel on navigable waters falls within the scope of admiralty jurisdiction no matter what, . . . ordinarily that will be so." Id. at 543.

Subsequent to *Grubart*, it is becoming recognized that the Extension Act is indeed a stand-alone basis for admiralty tort jurisdiction. See Tagliere v. Harrah's Illinois Corp., 445 F.3d 1012, 1013-14 (7th Cir. 2006) (Posner, J., for the Court, agreeing with David W. Robertson and Michael F. Sturley, *The Admiralty Extension Act Solution*, 34 J. MAR. L. & COM. 209 (2003), that the Extension Act itself confers admiralty jurisdiction). *Tagliere* asserts that the Eighth Circuit accepts the view that the Extension Act is a stand-alone basis for admiralty jurisdiction. 445 F.3d at 1014, citing St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir. 1979). *Tagliere* cites Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co., 644 F.2d 1132 (5th Cir. 1981), as a Fifth Circuit rejection of that proposition. But see Marathon Pipe Line Co. v. Drilling Rig Rowan/Odessa, 761 F.2d 229, 233 (5th Cir. 1985) (basing a finding of admiralty jurisdiction over a suit alleging damage to a pipeline by a jack-up rig under tow solely on the Extension Act). Even aside from the Extension Act, OCS cases involving the use of special purpose vessels as work sites fall under admiralty jurisdiction under the *Grubart* test because they occur on navigable waters and involve "traditional maritime tort[s]." Strong v. B.P. Exploration & Production, Inc., 440 F.3d 665, 669-70 (5th Cir. 2006). See also Smith v. Pan Air Corp., 684 F.2d 1102, 1111-12 (5th Cir. 1982) (holding that a helicopter's striking a fixed platform and falling into the Gulf was a maritime tort because the aircraft "was engaged in a maritime-type function, transporting persons over the sea" and the case therefore had "the essential maritime nexus").

[115]See, e.g., Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1123-24 (5th Cir. 1992) (holding that contracts for casing services on movable rigs are maritime because of the "vessel nature" of the situs); Corbitt v. Diamond M. Drilling Co., 654 F.2d 329, 332 (5th Cir. 1981) (same, stating that this is "beyond cavil"); Demette v. Falcon Drilling Co., 280 F.3d 492, 500-01 (5th Cir. 2002) (same, adding that "[e]ven a contract for offshore drilling services that does not mention any vessel is maritime if its execution requires the use of vessels," and that "[t]his is true for contracts that may also involve obligations performed on land") (footnotes omitted)); Theriot v. Bay Drilling Corp., 783 F.2d 527, 538-39 (5th Cir. 1986) (holding that contracts for oil and gas drilling from movable rig are maritime because "[o]il and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce"); Davis & Sons, Inc. v. Gulf Oil Corp., 919 F.2d 313, 317 (5th Cir. 1990) (holding that a contract to supply workers on self-propelled work barges used for maintenance and service work in an amphibious inshore oilfield was maritime because "[t]he work . . . was inextricably intertwined with maritime activities since it required the use of a vessel and its crew"); Diamond Offshore Co. v. A&B Builders, Inc., 302 F.3d 531, 549 (holding that contracts for repairs to movable rigs are maritime because "[c]ontracts for vessel repair services are traditionally treated as maritime); Dupont v. Sandefer Oil & Gas, Inc., 963 F.2d 60, 62 (5th Cir. 1992) (holding that "a contract for the supply and use of a vessel for drilling, completion, and workover services was maritime"); Halliburton Co. v. Norton Drilling Co., 302 F.2d 431, 437 (5th Cir. 1962) (assuming that all

rejecting admiralty jurisdiction over disputes respecting contracts involving OCS activities on vessels[116]—has been undercut by the Supreme Court's recent decision in *Norfolk Southern Ry. Co. v. Kirby*.[117] In *Lewis v. Glendel Drilling Co.*, the Fifth Circuit acknowledged that it might well be a desirable simplification of its OCS jurisprudence to "apply maritime law to all offshore mineral exploration contracts, save those [concerning solely artificial islands and fixed platforms and structures and thus] governed by the OCSLA."[118] The Supreme Court's *Kirby* decision does not require the Fifth Circuit to take this step, but it provides an additional and attractive basis for doing so.

There are several reasons why the Fifth Circuit needs to make it clear that all OCS tort and contract actions involving activities on, by, with, or for vessels fall within admiralty jurisdiction. The first is that the weight of the Court's copious OCS jurisprudence already supports this view, but the scattering of contrary cases guarantees much wasteful litigation. The second is

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contracts for oil and gas drilling from movable rigs are unquestionably maritime); cf. Fontenot v. AWI, Inc., 923 F.2d 1127, 1131 (5th Cir. 1991) (Wisdom, J., for the panel majority, stating that all "tasks undertaken to enable a ship to engage in maritime commerce" constitute "maritime employment"); id. at 1134 (Higginbotham, J., concurring, stating that "any work on a vessel in navigable waters in the course of employment is maritime employment; the character of the work is irrelevant"); Smith v. Penrod Drilling Corp., 960 F.2d 456, 459-60 (5th Cir. 1992) (indicating that a contract to furnish a vessel is necessarily maritime); See also Lewis v. Glendel Drilling Co., 898 F.2d 1083, 1087 (5th Cir. 1990) (remarking the Fifth Circuit's "reflexive invocation of admiralty jurisdiction to cover contracts involving movable offshore rigs"). For further decisions agreeing that contracts that concern OCS activities on, by, with, or for vessels are maritime, see Hoda v. Rowan Companies, Inc., 419 F.3d 379 (5th Cir. 2005); Dupre v. Penrod Drilling Corp., 993 F.2d 474 (5th Cir. 1993); Fontenot v. Mesa Petroleum Co., 791 F.2d 1207 (5th Cir. 1986); Lefler v. Atlantic Richfield Co., 785 F.2d 1341 (5th Cir. 1986); Fontenot v. Southwestern Offshore Corp., 771 So.2d 679 (La.App.), writ denied, 773 So.2d 144 (La. 2000).

[116]See, e.g., Hodgen v. Forest Oil Corp., 87 F.3d 1512 (5th Cir. 1996); Wagner v. McDermott, Inc., 79 F.3d 20 (5th Cir. 1996); Hollier v. Union Texas Petroleum Corp., 972 F.2d 662 (5th Cir. 1992); Domingue v. Ocean Drilling and Exploration Co., 923 F.2d 393 (5th Cir. 1991); Houston Oil & Minerals Corp. v. American Int'l Tool Co., 827 F.2d 1049 (5th Cir. 1987). Cf. Thurmond v. Delta Well Surveyors, 836 F. 2d 952 (5th Cir. 1988) (often-cited case arising in state waters).

[117]534 U.S. 14 (2004).The old "mixed contracts" doctrine lies at the heart of the dissonant line of cases mentioned supra note 116. See, e.g., Thurmond v. Delta Well Surveyors, 836 F.2d 952, 955-56(5th Cir. 1988) (relying heavily on the mixed contracts doctrine in support of holding that a contract to provide and use a self-propelled wireline barge was nonmaritime); Laredo Offshore Constructors, Inc. v. Hunt Oil Co., 754 F.2d 1223, 1231 (5th Cir. 1985) (holding that a contract for the construction of an OCS platform was not a maritime contract even though the contract "contemplated the hiring of vessels and seamen to build the structure" because "[i]t is fundamental that the mere inclusion of maritime obligations in a mixed contract does not, without more, bring nonmaritime obligations within the pale of admiralty law."); Heath v. Superior Oil Co., 617 F. Supp. 33, 35 (W.D. La. 1985) ("Maritime law applies to a contractual indemnity claim only if the indemnity obligation is contained within a maritime contract or arises out of the performance of a separable maritime obligation in a mixed contract.") The Supreme Court's *Kirby* decision, supra note 117, disapproves lower-court decisions using the mixed contracts doctrine in the intermodal transportation context and states that any contract the purpose of which is "to effectuate maritime commerce" is a maritime contract unless its maritime "components are insubstantial." 543 U.S. at 26-27.

[118]Lewis v. Glendel Drilling Co., 898 F.2d 1083, 1088 (5th Cir. 1990).

simply that the OCS vessel cases are admiralty cases in their nature: they involve the use of vessels in maritime commerce.

The third and most compelling reason for clarifying the existence of admiralty jurisdiction in all OCS litigation involving vessels is to provide and assure the availability of a stable source of substantive law for governing these cases. (It is a truism that "federal [court-made maritime law to apply . . . , the suit must . . . be sustainable under the admiralty jurisdiction."[119]) Most of these cases fall within the coverage of OCSLA § 1333(a)(1).[120] All of them fall outside the coverage of § 1333(a)(2)(A). If admiralty jurisdiction is denied in a case covered by § 1333(a)(1) but not by § 1333(a)(2), the case falls into a void in the substantive law.[121] Section 1333(a)(1)'s "exclusive Federal jurisdiction" provision puts the case beyond the reach of state law of its own force. Section 1333(a)(2)(A)'s limit to artificial islands and fixed structures means there is no basis for applying state law as surrogate federal law. And *Chevron Oil Co. v. Huson* forbids the creation of "new federal common law" for such a case.[122] Simply put, for such cases it's admiralty or nothing.

Occasionally litigation arises respecting a temporarily attached OCS device that does not qualify for vessel status.[123] These cases, too, must be treated as falling under admiralty jurisdiction for all of the reasons just noted.[124]

"With admiralty jurisdiction comes the application of substantive admiralty law."[125] This is another truism. But in non-OCS cases the Supreme Court has often hedged it by indicating that "admiralty courts sometimes do apply state law."[126] Cases falling within admiralty jurisdiction that are ulti-

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[119]Norfolk Southern Ry. Co. v. Kirby, 543 U.S. 14, 23 (2004).

[120]Vessel cases falling outside § 1333(a)(1)'s coverage (because the vessel is freely floating or in motion and hence in no way attached to or placed upon the seabed) are not problematic. Admiralty jurisdiction will generally be readily recognized and federal maritime law readily applied.

[121]Some Fifth Circuit panels have been steering cases out of this void by pretending that §§ 1333(a)(1) and 1333(a)(2)(A) have coextensive coverage. See infra Section III-B-1.

[122]404 U.S. 97, 104-05 (1971).

[123]See, e.g., Fields v. Pool Offshore, Inc., 182 F.3d 353. 355-56 (5th Cir. 1999) (upholding district court's grant of summary judgment denying vessel status to the "Neptune Spar," a huge device "akin to a giant buoy" that was "anchored above [a deep-water offshore oil] field's seven well heads by six wire lines which connect to six pilings" and intended to remain in place "for at least fifteen years;" in legal contemplation this device "was a fixed platform, not a vessel"); Fox v. Taylor Diving & Salvage Co., 694 F.2d 1349, 1351, 1353-54 (5th Cir. 1983) (holding that a "submarine pipe alignment rig" described as "a non-navigable chamber used to create an airtight environment in which [underwater] pipeline repairs can be performed" was not a vessel).

[124]Admiralty jurisdiction was not directly at issue but evidently assumed to exist in *Fields* and *Fox*, supra note 123.

[125]East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 864 (1986).

[126]Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 546 (1995). See generally David W. Robertson, *Displacement of State Law by Federal Maritime Law*, 26 J. MAR. L. & COM. 325 (1995).

mately governed by state law are sometimes described as "maritime but local"[127] cases. On the outer Continental Shelf within the coverage of OCS § 1333(a)(1), there are no "maritime but local" cases: The existence of admiralty jurisdiction in a § 1333(a)(1) case automatically entails the applicability of federal maritime law.[128]

8. Some cases that are within the coverage of § 1333(a)(2)(A) fall within admiralty jurisdiction. These cases should be governed by federal maritime law

Events confined to artificial islands and fixed platforms are generally outside admiralty jurisdiction. But if a worker is hurt on a fixed platform by activities on a nearby vessel, the case will probably fall under both admiralty jurisdiction and § 1333(a)(2)(A).[129] Because a holding against admiralty jurisdiction would not leave such a case in the substantive-law void described just above—§ 1333(a)(2)(A) would make adjacent-state law available— the argument for admiralty jurisdiction diminishes in force here. But admiralty jurisdiction should nevertheless be upheld, because doing otherwise would create dissonance (and therefore inevitable confusion) between the admiralty jurisdictional principles applicable in putative admiralty/§1333(a)(2)(A) overlap cases and other putative admiralty/§1333(a)(1) overlap cases.[130]

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[127]David W. Robertson, *The Applicability of State Law in Maritime Cases After Yamaha Motor Corp. v. Calhoun*, 21 TUL. MAR. L.J. 81, 85 (1996).

[128]Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 360 (1969), holds that the existence of admiralty jurisdiction in an OCS case will "oust" state law. See also Strong v. B.P. Exploration & Production, Inc., 440 F.3d 665, 670 (5th Cir. 2006) ("Because Strong has alleged a traditional maritime tort, federal maritime law applies of its own force, precluding incorporation of State law under OCSLA"); Demette v. Falcon Drilling co, 280 F.3d 492, 497n (5th Cir. 2002) ("the courts of this circuit have held that if the contract is a maritime contract, federal maritime law applies of its own force, and state law does not apply"); Hodgen v. Forest Oil Corp., 87 F.3d 1512 (5th Cir. 1996) (stating that "in the context of oilfield indemnity disputes in the OCSLA context," "whether a contract is maritime and whether maritime law applies of its own force [are] identical . . . inquiries"); Tennessee Gas Pipeline v. Houston Cas. Ins. Co., 87 F.3d 150, 153 (5th Cir. 1996)("this court has declared that where OCSLA and general maritime law both could apply, the case is to be governed by maritime law."); Theriot v. Bay Drilling Corp., 783 F.2d 527, 539 (5th Cir. 1986) ("Of course, the construction of a maritime contract is governed by federal, not state, law.") (quoting Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge, 424 F.2d 684, 691 (5th Cir. 1970)); Laredo Offshore Constructors, Inc. v. Hunt Oil Co., 754 F.2d 1223, 1229 (5th Cir. 1985) ("where admiralty and OCSLA jurisdiction overlap, the case is governed by maritime law"); Smith v. Penrod Drilling Corp., 960 F.2d 456, 459 (5th Cir. 1992) ("When an event occurs on an OCSLA situs but also is governed by maritime law, maritime law controls."); Smith v. Pan Air Corp., 684 F.2d 1102, 1109-10 (5th Cir. 1982) (reading *Rodrigue* to mean that on the OCS the existence of "admiralty jurisdiction entails the governance of admiralty substantive law").

[129]See, e.g., Dupre v. Penrod Drilling Corp., 993 F.2d 374 (5th Cir. 1993) (applying federal maritime law to a contract dispute arising from an injury to a movable rig worker hurt on an adjacent platform); Smith v. Penrod Drilling Corp., 960 F.2d 456 (5th Cir. 1992) (same).

[130]In *Dupre*, supra note 129, 993 F.2d at 477, and *Smith*, supra note 129, 960 F.2d at 459, the existence of admiralty jurisdiction was based on the contracts' significant involvement with the use of vessels.

9. Section 1333(b) adopts the Longshore and Harbor Workers' Compensation Act as the workers' compensation regime for injuries resulting from outer Shelf mineral operations. It substitutes its own coverage-delimiting provisions for those of the Longshore Act

43 U.S.C. § 1333(b)[131] provides as follows:

> With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act [LHWCA]. For the purposes of the extension of the provisions of the [LHWCA] under this section—
>
> (1) the term "employee' does not include a master or member of a crew of any vessel, or an officer or employee of the United States or of any agency or foreign government, or of any political subdivision thereof;
>
> (2) the term "employer" means an employer any of whose employees are employed in such operations; and
>
> (3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

This provision "adopts the entirety of the LHWCA"[132] aside from the LHWCA's coverage limits. Section 1333(b) sets forth its own coverage requirements. As is demonstrated in the two paragraphs just below, the "status" and "situs" requirements[133] that control the coverage of the LHWCA of its own force do not limit LHWCA coverage on the outer Continental Shelf.[134]

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[131]The 1978 amendments to OCSLA reworded and renumbered § 1333(b) without making any substantive change in it. See Wentz v. Kerr-McGee Corp., 784 F.2d 699, 700-701 (5th Cir. 1986) (using legislative history to show that the 1978 amendments made no substantive change in § 1333(b)). Previously the provision had been numbered as 43 U.S.C. § 1333(c). In this article we will refer to it by its present number regardless of the date of the case being discussed.

[132]Longmire v. Sea Drilling Corp., 610 F.2d 1342, 1352 (5th Cir. 1980).

[133]Northeast Marine Terminal Ins. Co. v. Caputo, 432 U.S. 249, 264-65 (1977) ("The 1972 Amendments [to the LHWCA] changed what had been essentially only a 'situs' test of eligibility for compensation to one looking to both the 'situs' of the injury and the 'status' of the injured.").

[134]The Fifth Circuit has not deviated from a correct understanding of OCSLA in this respect. See, e.g., Longmire v. Sea Drilling Corp., 610 F.2d 1342, 1352 n. 17 (5th Cir. 1980): "There is no need for a worker . . . to whom the OCSLA applies independently to satisfy the two-fold situs and status tests for LHWCA coverage . . . ."

The LHWCA's "status" provisions make the Act's coverage dependent on "maritime employment."[135] Section 1333(b) clearly signals its rejection of this requirement in two ways. First, its main paragraph extends LHWCA coverage to "any injury occurring as the result of [natural-resources-related[136]] operations conducted on the outer Continental Shelf." Section, subsection (2) extends LHWCA coverage to any employer with at least one worker "employed in [OCS natural-resources-related] operations."[137]

The LHWCA's "situs" provision says the LHWCA applies "only if the [employee's] disability or death results from an injury occurring upon the navigable waters of the United States [or upon an adjoining pier, etc.]."[138] 43 U.S.C. § 1333(b) clearly signals its rejection of this requirement in two ways. First, it contains "no situs requirement."[139] Second, it provides in subsection (3) that "the term 'United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures there-

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[135]33 U.S.C. §§ 902(3), 902(4), 904(a). The Supreme Court has analyzed the LHWCA's "maritime employment" requirement in Chesapeake and Ohio Railway Co. v. Schwalb, 493 U.S. 40 (1989); Herb's Welding, Inc. v. Gray, 470 U.S. 414 (1985); Director, OWCP v. Perini, 459 U.S. 297 (1983); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979); and Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977).

[136]The term "natural-resources-related operations" is shorthand for the broad statutory phrase "operations . . . for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf." Remember that 43 U.S.C. § 1331(l) defines development very broadly. Note also that the Submerged Lands Act provides an expansive definition of natural resources that leads off with the phrase "without limiting the generality thereof" and then goes on to include not only "oil, gas, and all other minerals" but also "fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life . . . ." 43 U.S.C. § 1301(e). This definition is not directly applicable to the OCSLA, but in the future it may well be viewed as a suitable analogy. Cf. Warren M. Christopher, *The Outer Continental Shelf Lands Act: A Key to a New Frontier*, 6 STAN. L.REV. 23, 25 (1953) ("The Continental Shelf promises enormous riches. An acre of ocean may produce more food than an acre of our best farm land. There is more animal life in the ocean than on land.").

[137]In *Herb's Welding*, supra note 135, 470 U.S. at 422 n. 8, the Supreme Court read 43 U.S.C. § 1333(b)(2) as rejecting the LHWCA's "maritime employment" requirement in favor of the "natural resources . . . operations" requirement.

[138]33 U.S.C. § 903(a) provides in full: "Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.)" The Supreme Court analyzed this provision in Caputo, supra note 133, 432 U.S. at 279-81.

[139]Stansbury v. Sikorski Aircraft, 681 F.2d 948, 951 n. 2 (5th Cir. 1982). See also Demette v. Falcon Drilling Co., 280 F.3d 492, 500 n. 29 (5th Cir. 2002) ("section 1333(b) contains only a status requirement"); Curtis v. Schlumberger Offshore Service, Inc., 849 F.2d 805, 809 (3d Cir. 1988) (stating that § 1333(b) includes no "situs or geographic restrictions"); Nations v. Morris, 483 F.2d 577, 584 (5th Cir. 1973) ("OCSLA, in its incorporation of L&H, . . . purposefully established a system that would apply without regard to physical location"). In Section II-C-10 infra we will see that the Fifth Circuit's en banc (9-5) decision in Mills v. Director, OWCP, 877 F.2d 356 (5th Cir. 1989) (en banc) reads a situs requirement into § 1333(b). We will also see that this was a highly debatable conclusion, and that it is in any event plain that the *Mills* Court did not limit § 1333(b)'s coverage to the physical locations listed in § 1333(a)(1).

on." Subsection 3's purpose (perhaps a superfluous one, given the clarity of § 1333(b)'s main paragraph) was to spell out OCSLA's rejection of the LHWCA's "navigable waters of the United States" coverage limitation.[140]

10. The coverage of § 1333(b) is not limited to the locations listed in § 1333(a)(1)[141]

For several decades the Circuit Courts of Appeals were in accord in treating § 1333(b) as imposing "no situs requirement."[142] The Supreme Court indicated obliquely that it agreed.[143] The Fifth Circuit then made a sharp departure, holding in its en banc decision in *Mills v. Director, OWCP*,[144] that § 1333(b) includes a situs requirement[145] that precluded coverage of injuries

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[140]The LHWCA provides that "[t]he term 'United States' when used in a geographical sense means the several States and Territories and the District of Columbia, including the territorial waters thereof." 33 U.S.C. § 902(9). The only "geographical sense" usages of "United States" in the LHWCA are in the provisions tying LHWCA coverage to the "navigable waters of the United States." W. Scott Hastings, *To Avoid Drowning in the Gaps of Workers' Compensation Coverage on the Outer Continental Shelf*, 35 J. MAR. L. & COM. 35, 44 n. 56 (2004) ("A review of the entire LHWCA shows that the term 'United States when used in a geographical sense is always used as part of the phrase 'upon the navigable waters of the United States.' See 33 U.S.C. §§ 902(4), 903(a), 903(d)(1)."). When the 1953 Congress wrote subsection (3) of 43 U.S.C. § 1333(b), it obviously followed the pattern of the LHWCA—i.e., it reworked 33 U.S.C. 902(9)—in order to set aside the "navigable waters of the United States" limitation in favor of the "result of [OCS natural-resources-related] operations" limitation stated in 1333(b)'s main paragraph.

[141]In Section III-B-2 below we will examine three Fifth Circuit panel decisions that wrongly tie § 1333(b)'s coverage to the coverage restrictions of § 1333(a)(1). This is perhaps the worst of the Fifth Circuit's OCSLA mistakes.

[142]See supra note 139. See also Curtis v. Schlumberger Offshore Service, Inc., 849 F.2d 805 (3d Cir. 1988) (holding that § 1333(b) covered injuries to an OCS worker performing duties while temporarily ashore); Mills v. Director, OWCP, 846 F.2d 1013 (5th Cir. 1988), vacated, 877 F.2d 356 (5th Cir. 1989) (en banc) (holding that § 1333(b) covered injuries to a welder who always worked on land and who was injured on land while engaged in the construction of a new platform destined for the OCS); Kerr-McGee Corp. v. Ma-Ju Marine Services, Inc., 830 F.2d 1332 (5th Cir. 1987) (assuming that § 1333(b) covered injuries on a boat transporting an OCS worker between platforms); Kaiser Steel Corp. v. Director, OWCP, 812 F.2d 518, 521 (9th Cir. 1987) (holding that § 1333(b) covered injuries sustained in constructing a new oil platform on the outer Shelf and stating that "section 1333(b) should be construed as extending Longshore Act coverage to all victims of disabling or fatal injuries sustained while working to develop the mineral wealth of the OCS."); Barger v. Petroleum Helicopters, Inc., 692 F.2d 337 (5th Cir. 1983) (holding that § 1333(b) covered fatal injuries in a helicopter crash into the sea beyond a marine league from shore); Stansbury v. Sikorski Aircraft, 681 F.2d 948 (5th Cir. 1982) (same); Billings v. Chevron, U.S.A., Inc., 618 F.2d 1108 (5th Cir. 1980) (assuming that § 1333(b) covered injuries on a floating vessel); Beard v. Shell Oil Co., 606 F.2d 515 (5th Cir. 1979) (same); Longmire v. Sea Drilling Corp., 610 F.2d 1342, 1347-53 (5th Cir. 1980) (same); Nations v. Morris, 483 F.2d 577, 584 (5th Cir. 1973) (stating that § 1333(b) [then numbered § 1333(c)] "applies without regard to physical location").

[143]See Tipton v. Socony Mobil Oil Co., 375 U.S. 34 (1963) (assuming that § 1333(b) covered an injury on a drilling barge at a time when 43 U.S.C. § 1331(a)(1) covered only "artificial islands and fixed structures").

[144]877 F.2d 356 (5th Cir. 1989) (en banc). The Court was divided 9-5.

[145]Id. at 357 ("OCSLA's provision adopting LHWCA includes a situs of injury requirement"), id. at 359 (stating that the word "operations" in § 1333(b) "requires that the relevant 'operations' out of which the injury arises occur on the OCS").

incurred by a welder who always worked on land and was injured on land while building a new platform destined for the OCS.

Mills has been criticized for finding a situs requirement in a provision that does not provide one.[146] The criticism seems well founded. However that may be, the most important thing to note about *Mills* is that it plainly did not find its situs requirement in § 1333(a)(1) of OCSLA but in § 1333(b) itself. This is shown by the court's reasoning[147] and by its summary of its holding:

> We hold that LHWCA coverage as extended under § 1333(b) applies to employees who (1) suffer injury or death on an OCS platform *or the waters above the OCS;* and (2) satisfy [§ 1333(b)'s status requirement].[148]

As we saw in Section II-C-3 above, § 1333(a)(1) does not cover injuries on water. The above-italicized phrase from *Mills* thus shows definitively that the *Mills* court did not tie § 1333(b)'s coverage to § 1331(a)'s.[149] And (aside from two recent Fifth Circuit panels[150]) no other court has ever done so. There is no statutory support for such a tie, and the Supreme Court has indicated, albeit indirectly, that no such tie is appropriate.[151]

11. Section 1349(b)(1) is a broad grant of federal-question subject matter jurisdiction to the federal district courts over cases involving OCS mineral operations

43 U.S.C. § 1349(b)(1)[152] provides in pertinent part:

> [T]he district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with . . . any operation conducted on the outer Continental Shelf which involves exploration, development,

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[146]See the opinion of three of the five *Mills* dissenters at 877 F.2d 362-64. See also W. Scott Hastings, *To Avoid Drowning in the Gaps of Workers' Compensation Coverage on the Outer Continental Shelf*, 35 J. MAR. L. & COM. 35 (2004).

[147]See supra note 145.

[148]877 F.2d at 362 (emphasis supplied).

[149]The Court itself provided a kind of emphasis to that phrase by explicitly approving the "holdings [of *Barger* and *Stansbury*, supra note 142] grant[ing] LHWCA benefits to oilfield workers injured on waters above the OCS." Id. at 361.

[150]Diamond Offshore Co. v. A&B Builders, 302 F.3d 531 (5th Cir. 2002), and Demette v. Falcon Drilling Co., 280 F.2d 492 (5th Cir. 2002), are analyzed infra Section III-B-2.

[151]See supra note 143.

[152]The 1978 amendments to OCSLA renumbered and reworked this provision without making any relevant substantive change in it. See Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 479 n. 5 (1981) ("Congress amended and recodified the jurisdictional provisions of OCSLA in 1978, without effecting any change that casts light on the issue of exclusive federal-court jurisdiction before us today . . . . The grant of jurisdiction to a federal district court is now codified at 43 U.S.C. § 1349(b)(1)."): Wentz v. Kerr-McGee Corp., 784 F.2d 699, 701 (5th Cir. 1986) (determining that the 1978 amendments did not change the provision's meaning respecting private civil litigation). Section 1349(b) was formerly numbered 43 U.S.C. § 1333(b). In this paper we will use the present number regardless of the date of the case being discussed.

> or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals . . . .

The Fifth Circuit has repeatedly noted that this is a "very broad"[153] grant of federal question jurisdiction.[154] Occasional suggestions that § 1349(b)(1)'s coverage is limited to the geographical areas listed in § 1333(a)(1) are obviously mistaken.[155] Unlike the mistakes catalogued in Section III below, this particular one can simply be disregarded: It is overwhelmed by the weight of the jurisprudence.[156]

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[153]Tennessee Gas Pipeline v. Houston Cas. Ins. Co., 87 F.3d 150, 154 (5th Cir. 1996). See also EP Operating Ltd. Partnership v. Placid Oil Co., 26 F.3d 563, 569 (5th Cir. 1994) (stating that § 1349(b)(1) is "undeniably broad"); Texaco Exploration & Production, Inc. v. AmClyde Engineered Products Co., 448 F.3d 760, 768-70 (5th Cir. 2006) (repeatedly characterizing the § 1349(b)(1) grant of jurisdiction as "broad," noting that it "covers a wide range of activity," and citing cases to emphasize that its breadth is well settled); Hodges v. Shell Oil Co., 1997 WL 473809 at *2 (E.D. La. 1997) ("To determine if plaintiff's claims 'arise out of, or in connection with' [mineral] operations on the outer Continental Shelf . . ., courts liberally apply a 'but for' test in order to give the statute's jurisdictional grant a broad reading."); *Tennessee Gas*, 87 F.3d at 154 ("Use of the but-for test implies a broad jurisdictional grant under § 1349"); Nase v. Teco Energy, Inc., 347 F. Supp. 2d 313, 317 (E.D. La. 2004) ("broad 'but for' test"); Smith v. Chevron USA, 2004 WL 1243681 at * 2 (E.D. La. 2004) (same); Theriot v. BP Corporation, 216 F. Supp. 2d 651, 653 (S.D. Tex. 2002) (same); Stevenson v. Point Marine, Inc., 697 F. Supp. 285, 287 (E.D. La. 1988) (same). Many of these cases rely on the broad statutory definitions of § 1349(b)(1)'s terms "exploration, development, or production" (see supra note 61), reasoning that these terms give broad scope to 1349(b)(1)'s term "operations." *EP Operating*, 26 F.3d at 568-69; *Tennessee Gas*, 87 F.3d at 154-55; Recar v. CNG Producing Co., 853 F.2d 367, 369 (5th Cir. 1988); *Amoco*, 844 F.2d at 1206.

[154]Texaco Exploration and Production, Inc. v. AmClyde Engineered Products Co., 448 F.3d 760, 766 (5th Cir. 2006) (characterizing plaintiff's complaint as "invoking federal question jurisdiction under the Outer Continental Shelf Lands Act"); Tennessee Gas Pipeline v. Houston Cas. Ins. Co., 87 F.3d 150, 150 (5th Cir. 1996) (affirming removal on the ground that the district court "had federal question jurisdiction because the case arose under the . . . OCSLA"); Recar v. CNG Producing Co., 853 F.2d 367, 369 (5th Cir. 1988) (discussing "federal question jurisdiction by virtue of OCSLA"); Broussard v. John E. Graham & Sons, 798 F. Supp. 370, 373 (M.D. La. 1992) (same).

[155]The panel in Demette v. Falcon Drilling Co., 280 F.3d 492, 496 (5th Cir. 2002), stated that "Section 1333(a)(1) describes the reach of the OCSLA . . . [and] creates a 'situs' requirement for the application of other sections of the OCSLA, including sections 1333(a)(2) and 1333(b)." The panel did not mention § 1349(b)(1) but might be read to have intended its inclusion. The implication is plainly wrong. For an even wronger case, see Holcomb v. ERA Helicopters, Inc., 618 F. Supp. 339, 342-43 (W.D. La. 1985), in which the court concluded that a case involving injuries to workers assigned to a movable drilling vessel did not fall under § 1349(b)(1) because it did not fall under § 1333(a)(1). This was wrong in two respects: Section 1349(b)(1) is not tied to § 1333(a)(1); and § 1333(a)(1) covers movable drilling vessels when they are "attached" (see supra Section II-C-3).

The cases presented supra note 153 and infra note 156 show that § 1349(b)(1)'s coverage is not limited by §1333(a)(1). See also Kenneth G. Engerrand, *Primer of Remedies on the Outer Continental Shelf*, 4 Loy. Mar. L.J. 19, 25 (2005) (asserting that § 1349(b)(1) 'is broad and independent of the sections of the OCSLA selecting the applicable law").

[156]See supra note 153. See also the following cases, in which § 1349(b)(1) was treated as covering situations outside the reach of § 1333(a)(1): Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981) (treating § 1349(b)(1) as covering an action for injuries sustained by an OCS worker aboard a moving vessel); Fogleman v. Tidewater Barges, Inc., 747 F. Supp. 348 (E.D. La. 1990) (same); Stevenson v. Point Marine, Inc., 697 F. Supp. 285 (E.D. La. 1988) (same); Hails v. Atlantic Richfield Co., 595 F. Supp. 948

Section 1349(b)(1) covers a wide range of activities, many of which will also fall within the coverage of the federal courts' admiralty jurisdiction under 28 U.S.C. § 1333.[157] "[W]here admiralty and [§ 1349(b)(1)] jurisdiction overlap, the case is governed by maritime law."[158]

12. State courts have concurrent jurisdiction in cases covered by § 1349(b)(1)

The federal courts' § 1349(b)(1) jurisdiction is not exclusive. In *Gulf Offshore Co. v. Mobil Oil Corp.* the Supreme Court held that § 1349(b)(1) does not prevent state courts from exercising jurisdiction in "actions based on [OCSLA § 1333(a)(2)(a)] incorporated state law."[159]

The *Gulf Offshore* Court caveated its holding as follows:

> It should be emphasized that this case only involves state-court jurisdiction over actions based on incorporated state law. We express no opinion on

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(W.D. La. 1984) (same); Texaco Exploration and Production, Inc. v. AmClyde Engineered Products Co., 448 F.3d 760 (5th Cir. 2006) (asserting § 1349(b)(1) coverage over an accident in which a crane on a derrick barge dropped valuable equipment into the sea); Recar v. CNG Producing Co., 853 F.3d 367, 369 (5th Cir. 1988) (asserting that Barger v. Petroleum Helicopters, Inc., 692 F. 2d 337 (5th Cir. 1982)—a case involving a helicopter crash on the high seas many miles from any platform—fell within § 1349(b)(1)); Walsh v. Seagull Energy Corp., 836 F. Supp. 411, 417 (S.D. Tex. 1993) (stating that there can be "no dispute" that "the jurisdictional grant of OCSLA [i.e., § 1349(b)(1)] is more broad than [the coverage of OCSLA § 1333(a)(1)]").

[157]See, e.g., Recar v. CNG Producing Co., 853 F.2d 367, 369 (5th Cir. 1988) ("The district court may well have both admiralty jurisdiction under the general maritime law and federal question jurisdiction by virtue of OCSLA."); Texaco Exploration and Production, Inc. v. AmClyde Engineered Products Co., 448 F.3d 760, 768 (5th Cir. 2006) ("federal question jurisdiction under OCSLA is . . . independent of any additional maritime basis for federal jurisdiction"); Strong v. B.P. Exploration & Production, Inc., 440 F.3d 665 (5th Cir. 2006) (holding that the plaintiff properly pleaded jurisdiction under § 1349(b)(1) but that the case also fell with admiralty jurisdiction and was therefore governed by federal maritime law); Tennessee Gas Pipeline v. Houston Cas. Ins. Co., 87 F.3d 150, 155 (5th Cir. 1996) ("Our conclusion that OCSLA confers original jurisdiction over this suit is unaffected by the maritime nature of the underlying claim. . . . [T]he district court may have both admiralty and OCSLA jurisdiction.")

[158]Laredo Offshore Constructors, Inc. v. Hunt Oil Co., 754 F.2d 1223, 1229 (5th Cir. 1985); Recar v. CNG Producing Co., 853 F.2d 367, 369 (5th Cir. 1988) (same, quoting *Laredo*). See also Strong v. B.P. Exploration & Production, Inc., 440 F.3d 665, 670 (5th Cir. 2006) (holding that in a case involving a "traditional maritime tort [that also fell under the coverage of § 1349(b)(1)], federal maritime law applies of its own force, precluding incorporation of state law under OCSLA [§ 1333(a)(2)(A)]"); Hufnagel v. Omega Service Industries, Inc., 182 F.3d 340, 350 (5th Cir. 1999) ("Because OCSLA does not displace general maritime law, substantive maritime law continues to govern where both OCSLA and general maritime law could apply."); Tennessee Gas Pipeline v. Houston Cas. Ins. Co., 87 F.3d 150, 154 (5th Cir. 1996) ("where OCSLA and general maritime law both could apply, the case is to be governed by maritime law"); Smith v. Penrod Drilling Co., 960 F.2d 456, 459 (5th Cir. 1992) ("When an event occurs on an OCSLA situs but also is governed by maritime law, maritime law controls."); Ausama v. Tetra Applied Technologies, LP, 2006 WL 1968858 at *5 (E.D. La. 6/1/2006) ("OCSLA does not displace general maritime law, therefore substantive maritime law governs where both OCSLA and general maritime law could apply.").

[159]453 U.S. 473, 479 n. 7 (1981).

whether state courts enjoy concurrent jurisdiction over actions based on the substantive provisions of OCSLA.[160]

This caveat does not seem to have been discussed in any published source. It is potentially troublesome. In cases arising from OCS activities, plaintiffs typically allege a melange of rights including rights based on incorporated state law, substantive OCSLA law, and federal maritime law.[161] In such a case, the question of which body of law the matter will ultimately turn out to be "based on" can often be far too complex for principled disposition at the pleadings stage. Yet the first thing a court must do is satisfy itself that it has subject matter jurisdiction. It follows that a conscientious state court might well be led by the *Gulf Offshore* caveat into a complicated struggle—at the very threshold of the case—into what the ultimate governing law will turn out to be. No such struggles appear in the published jurisprudence; it appears that the state courts are dealing with the *Gulf Offshore* caveat by ignoring it.[162]

13. Removal of OCS cases

Many OCS cases will be cognizable in federal court on the basis of diversity jurisdiction. The requirements for original and removal jurisdiction on the basis of diversity are reasonably well understood and do not call for treatment here. The discussion in this subsection assumes that diversity of citizenship is not a factor in the cases being treated here. Accordingly, we will look at (a) cases in which admiralty is the only basis for federal-court jurisdiction; (b) cases in which OCSLA § 1349(b)(1) is the only basis for federal-court jurisdiction; and (c) cases falling under both admiralty jurisdiction and OCSLA § 1349(b)(1).

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[160]Id.

[161]See, e.g., Copeland v. Gulf Oil Corp., 672 F.2d 867, 868-69 (11th Cir. 1982) (describing a lawsuit based on Louisiana law and on the OCSLA provision, 43 U.S.C. § 1348, setting forth leaseholders' safety obligations); Nase v. Teco Energy, Inc., 347 F. Supp. 313, 316 (E.D. La. 2004) (describing a state-court action in which "plaintiffs allege causes of action under Louisiana law [incorporated as federal law by 43 U.S.C. § 1333)(a)(2)(A)], the Jones Act [46 U.S.C. §30104, (formerly app. § 688(a))], LHWCA [as extended and incorporated by 43 U.S.C. § 1333(b)], and general maritime law"); Lopez v. Air Logistics, LLC, 2002 WL 356305 at *3 (E.D. La. 3/5/02) (noting that plaintiff' state-court complaint asserted both "maritime tort" and "Louisiana state claims, which would apply as surrogate federal law under section 1333(a)(2).").

[162]See Fontenot v. Southwestern Offshore Corp., 771 So.2d 679 (La. App.), writ denied, 773 So.2d 144 (La. 2000) (adjudicating a case involving claims under 43 U.S.C. § 1333(b)); Lewis v. Diamond Services Corp., 637 So.2d 825 (La. App. 1994) (same); Teledyne Movible Offshore, Inc. v. Leasco Fleeting & Barge Service, Inc., 827 S.W.2d 633 (Tex. App. 1992) (same).

a. Admiralty jurisdiction alone

Some cases arising in the geographical area of the OCS will turn out to be outside the coverage of OCSLA.[163] Probably all such cases will satisfy the criteria laid down by Congress and the Supreme Court for the existence of admiralty jurisdiction.[164] The presence of admiralty jurisdiction will typically involve three consequences: (a) the availability of a federal forum under 28 U.S.C. § 1333(1) and/or the Admiralty Extension Act;[165] (b) the applicability of substantive federal maritime law; and (c) the availability of a state forum under the saving-to-suitors clause of 28 U.S.C. § 1333(1).[166]

Romero v. International Terminal Operating Co. holds that maritime cases brought in state court pursuant to the saving-to-suitors clause cannot be removed to federal court.[167] The basic removal statute reflects the *Romero* rule in 28 U.S.C. § 1441(a), which provides in pertinent part:

> *Except as otherwise expressly provided by Act of Congress*, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.[168]

It is black-letter law that the saving-to-suitors clause is an "express[]" provision of Congress against the removability of state-court maritime cases.[169]

b. § 1349(b)(1) jurisdiction alone

Many OCS cases will not fall within admiralty jurisdiction. Section 1349(b)(1) affords defendants a basis for removing cases from state to federal court.[170] Plaintiffs cannot plead around this rule: If the plaintiff's state-

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[163]See infra Section II-D-5.

[164]See generally David W. Robertson and Michael F. Sturley, *The Admiralty Extension Act Solution*, 34 J. MAR. L. & COM. 209 (2003).

[165]The long-familiar citation to the Admiralty Extension Act was 46 U.S.C. app. § 740. The "app." in the familiar citation refers to an appendix to U.S. Code Title 46, which contained almost all of the important admiralty statutes. In late 2006, Congress moved all of these provisions into the body of Title 46, provided new section numbers, and reworded the provisions. The Admiralty Extension Act is now 46 U .S.C. § 30101.

[166]28 U.S.C. § 1333(1) provides: The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

[167]358 U.S. 354, 363 & n. 16 (1959).

[168]28 U.S.C. § 1441(a) (emphasis supplied).

[169]CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS, 228 & n. 33 (5th ed. 1994).

[170]Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 483 & n. 12 (1981) (indicating that § 1349(b)(1) affords a basis for removal); Morris v. T E Marine Corp., 344 F.3d 439, 443-44 (5th Cir. 2003) (upholding removal of case covered by § 1349(b)(1)); Hufnagel v. Omega Service Industries, Inc., 182 F.3d 340, 348-51 (5th Cir. 1999) (same); Tennessee Gas Pipeline v. Houston Cas. & Sur. Ins. Co., 87 F.3d 150, 155-56 (5th Cir. 1996) (same).

court pleadings assert facts falling within § 1349(b)(1)'s coverage, the case falls under § 1349(b)(1) for removal purposes, regardless of plaintiff's efforts to avoid that characterization.[171]

Because of the widespread acceptance that § 1349(b)(1) is a grant of federal question jurisdiction, some have argued that it ought to support removal regardless of the citizenship of the parties.[172] The argument for this position is a simple statutory-text argument. 28 U.S.C. § 1441 provides in pertinent part:

> (a) Except as otherwise provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . . .
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

There is no dispute that § 1349(b)(1) is a grant of original jurisdiction that satisfies 28 U.S.C. § 1441(a). And it is easily arguable that, because it is federal question jurisdiction, § 1349(b)(1) is the "law[] of the United States" under which the case arises for purposes of the first sentence of 28 U.S.C. § 1441(b).[173]

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[171]Hufnagel v. Omega Service Industries, Inc., 182 F.3d 340, 349-50 (5th Cir. 1999) (stating that a state-court petition that did "not plead OCSLA eo nomine" was nevertheless to be treated as implicating § 1349(b)(1) because it pleaded facts falling under that provision's coverage); Tennessee Gas Pipeline v. Houston Cas. Ins. Co., 87 F.3d 150, 152 (5th Cir. 1996) (holding that a plaintiff's efforts to avoid removal by "purposely choosing not to assert a claim under OCSLA" did not prevent removal); Amoco Production Co. v. Sea Robin Pipeline Co., 844 F.2d 1202, 1205 (5th Cir. 1988) ("In determining federal court [removal] jurisdiction, we need not traverse the Serbonian Bog of the well pleaded complaint rule . . . because [§ 1349(b)(1)] expressly invests jurisdiction in the United States District Courts."); Nase v. Teco Energy, Inc., 347 F. Supp. 2d 313, 316 (E.D. La. 2004) ("For OCSLA [§ 1349(b)(1)] to apply to an action [for purposes of removal jurisdiction], the plaintiff need not specifically assert any claims under OCSLA in the complaint. OCSLA governs if the complaint satisfies its statutory requirements.") (citations omitted); Holcomb v. ER Helicopters, Inc., 618 F. Supp. 339, 341-42 (W.D. La. 1985) ("In considering whether the character of the allegations set forth in plaintiffs' [state-court] complaints present a substantial federal question, the fact that plaintiffs may have failed to reference federal law is not determinative. This Court may appropriately consider factual allegations asserted in the complaints in determining whether they bring forth a claim or right arising under the Constitution, treaties or laws of the United States.") (emphasis in original).

[172]See Tennessee Gas Pipeline v. Houston Cas. Ins. Co., 87 F.3d 150, 155-56 (5th Cir. 1996), where the Court discusses but neither accepts nor rejects the argument.

[173]For a somewhat different argument that § 1349(b)(1) cases should be freely removable regardless of the existence of admiralty jurisdiction and without reference to the defendants' citizenship, see Kenneth G. Engerrand, *Primer of Remedies on the Outer Continental Shelf*, 4 LOY. MAR. L.J. 19, 32-33 (2005).

The foregoing argument does no great violence to the language of 28 U.S.C. § 1441(b), and it is attractive because it would simplify the OCS jurisprudence. But the majority view among the jurists who have expressed themselves on the matter is to the contrary. Here is that view:

- All case falling under OCSLA § 1349(b)(1) are potentially removable by virtue of 28 U.S.C. § 1441(a).

- An OCSLA § 1349(b)(1) case calling for the application of a substantive OCSLA provision[174] arises under federal law for purposes of the first sentence of 28 U.S.C. § 1441(b) and is therefore removable without regard to the citizenship of the defendants.

- An OCSLA § 1349(b)(1) case calling for the application of adjacent-state law made surrogate federal law by OCSLA § 1333(a)(2)(A) is also removable without regard to the citizenship of the defendants.[175] But this does not mean that OCSLA § 1349(b)(1) is the "law[] of the United States" under which the case arises for purposes of the first sentence of 28 U.S.C. § 1449(b)(1). To the contrary, the "law[] of the United States" under which such a case arises is OCSLA § 1333(a)(2)(A).[176]

c. Overlapping admiralty and § 1349(b)(1) jurisdiction

Generally federal maritime law will apply in cases of admiralty jurisdiction. The rule of *Romero* is that federal maritime law is not "laws of the United States" within the meaning of the first sentence of 28 U.S.C. § 1441(b).[177] Therefore, these overlap cases are removable only under the con-

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[174]The distinction between "substantive" OCSLA provisions (e.g., 43 U.S.C . §§ 1333(b), 1348) and the provision incorporating adjacent-state law as surrogate federal law (43 U.S.C. § 1333(a)(2)(A) comes from the Supreme Court's opinion in *Gulf Offshore*, supra note 160.

[175]Hufnagel v. Omega Service Industries, Inc., 182 F.3d 340, 353 (5th Cir. 1999) ("Hufnagel's claims are nonmaritime ones 'arising under' and governed [only] by OCSLA. Accordingly, the case may be removed without regard to the citizenship of the parties."); Smith v. Chevron USA, 2004 WL 1243681 at * 2 (E.D. La. 6/4/2004) ("Plaintiff's claims are non-maritime in nature and the case was [thus] removable without regard to the citizenship of the parties."); Hodges v. Shell Oil Co., 1997 WL 473809 at * 4-5 (E.D. La. 8/19/1997) (noting that "federal maritime law is neither alleged nor implicated" and "therefore the action can be removed to federal court regardless of the citizenship of the parties, pursuant to the first sentence of [28 U.S.C.] § 1441(b).")

[176]See Ten Taxpayer Citizens Group v. Cape Wind Associates, 373 F.3d 193 (1st Cir. 2004) (stating that such a case is removable "because the plaintiff's [state-law] claim was incorporated as federal law under the OCSLA"); Walsh v. Seagull Energy Corp., 836 F. Supp. 411, 417 (S.D. Tex. 1993) (citing Fogleman v. Tidewater Barges, Inc., 747 F. Supp. 348, 355 (E.D. La. 1990) for the proposition that for purposes of the first sentence of 28 U.S.C. § 1441(b), a case arises under "the substantive law to be applied, i.e., the remedy [sought by plaintiff]").

[177]*Romero*, 358 U.S. at 363 & n. 16, 378.

straint of the second sentence of § 1441(b): no defendant can be a citizen of the forum state.[178]

This removal rule is more complicated than is desirable. But it necessarily flows from the premises of *Romero*, which stressed that admiralty cases must not become freely removable[179] because of the policies served by the saving-to-suitors clause in 28 U.S.C. § 1333.[180]

14. When federal-court jurisdiction is based on § 1349(b)(1), both parties have the right to a jury trial unless the complaint seeks only equitable relief

The Seventh Amendment provides in pertinent part that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." Federal Rule of Civil Procedure 38(a) provides that "[the] right of trial by jury as declared by the Seventh Amendment or as given by a statute of the United States shall be preserved to the parties inviolate." *Curtis v. Loether* holds that any action in which the plaintiff asserts legal rights and seeks legal (as opposed to purely equitable) relief is a "suit at common law" for Seventh Amendment purposes.[181]

It follows from the foregoing precepts that if the plaintiff in an OCS case asserts federal-court jurisdiction on the basis of § 1349(b)(1) and seeks legal relief (e.g., damages), the case indisputably falls under the Seventh

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[178]See, e.g., Morris v. T E Marine Corp., 3444 F.3d 439, 444 (5th Cir. 2003).

[179]The *Romero* Court acknowledged that state-court maritime cases are removable on the basis of diversity. 358 U.S. at 363: "Except in diversity cases, maritime litigation brought in state courts could not be removed to the federal courts."

[180]28 U.S.C. § 1333 grants the federal district courts "exclusive" original jurisdiction in admiralty cases but adds the proviso "saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333 is the present-day version of § 9 of the First Judiciary Act, 1 Stat. 76, in which the saving-to-suitors clause read "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." The change in wording worked no change in the meaning of the saving clause. GRANT GILMORE AND CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 397 & n. 130 (2d ed. 1975) (citing Madruga v. Superior Court, 346 U.S. 556, 560 n. 12 (1954)).

The purpose of the saving clause was to allow "a maritime suitor [plaintiff] pursuing a common-law remedy to select his forum, state or federal." *Romero*, 358 U.S. at 371. If admiralty cases were characterized as cases arising under federal law for the purposes of federal-court subject matter jurisdiction, this "historic option . . . would be taken away . . . , since saving-clause actions would then be freely removable." Id. at 371-72. This would "have consequences more deeply felt than the elimination of a suitor's traditional choice of forum. By making cases removable to the federal courts it would make considerable inroads into the traditionally exercised concurrent jurisdiction of the state courts in admiralty matters—a jurisdiction which it was the unquestioned aim of the saving clause of 1789 to preserve . . . . The role of the States in the development of maritime law is a role whose significance is rooted in the Judiciary Act of 1789 and the decisions of this Court." Id. at 372.

[181]415 U.S. 189, 194-96 (1974).

Amendment.[182] The same is true of a case that is removed to federal court on the basis of § 1349(b)(1).[183] The Seventh Amendment gives both parties the right to demand a jury trial.[184]

The courts have had little difficulty in understanding and applying the foregoing simple Seventh Amendment precepts in § 1349(b)(1) cases in which there is no admiralty jurisdiction. But some of them have developed the view that the presence of admiralty jurisdiction radically alters the picture, so that in a case falling within the coverage of § 1349(b)(1) and also within admiralty jurisdiction, there may be no right to a jury if the case will be governed by federal maritime law.[185]

This mistake is based on a fundamental misunderstanding of *Romero*.[186] And, it is terribly wasteful. It has led some courts to lengthy choice-of-law discussions in cases in which the only issue was whether the case should be tried to the jury.[187] It has led others to cumbersome hybridized trial proceedings in which some defendants are being tried to the jury and others to the same body sitting as an advisory jury.[188]

None of that is necessary. With respect to the jury trial issue, a case in which there is both admiralty jurisdiction and OCSLA § 1349(b)(1) jurisdic-

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[182]See, e.g., Ausama v. Tetra Applied Technologies, 2006 WL 1968858 at *6 (E.D. La. 6/1/2006) (holding that in the absence of admiralty jurisdiction, a damages suit initiated in federal court on the basis of OCSLA § 1349(b)(1) entitles defendant to a jury trial); Theriot v. BP Corporation North America Inc., 216 F. Supp. 2d 651, 654-55 (S.D. Tex. 2002) (same).

[183]See Dahlen v. Gulf Crews, Inc., 281 F.3d 487 (5th Cir. 2002) (assuming that jury trial was proper in a nonmaritime case removed to federal court on the basis of OCSLA § 1349(b)(1)).

[184]See Rachal v. Ingram Corp., 795 F.2d 12310, 1216 (5th Cir. 1986) (stating that in federal-court diversity actions, "either party may demand a jury trial") (emphasis and internal quotation marks omitted).

[185]See, Texaco Exploration and Production, Inc. v. AmClyde Engineered Products Co., 448 F.3d 760, 771 (5th Cir. 2006) (stating that in a case covered by OCSLA § 1349(b)(1) that may also fall within admiralty jurisdiction, "we must determine the applicable substantive law in order to address whether the denial of jury trial was reversible error."); Dozier v. Rowan Drilling Co., 397 F. Supp. 2d 837, 855 (S.D. Tex. 2005) (correctly denying defendants' motion to strike plaintiffs' jury demand but only after an excursus into whether "the OCSLA requires that Louisiana law [rather than federal maritime law] govern Plaintiffs' negligence suit").

[186]The culprit may be *Romero* itself; it is not clearly written. But a few hours' study reveals that the prevailing law is as follows: An admiralty case is a case in federal court in which subject matter jurisdiction is founded solely on admiralty jurisdiction ("solely" because the plaintiff has pleaded Fed. R. Civ. P. 9(h) or "solely" because there is no other basis for federal jurisdiction). Such a case does not fall under the Seventh Amendment or Rule 38(a). All other cases falling within the admiralty and maritime jurisdiction are maritime cases. Maritime cases in which legal relief is sought are "suits at common law" and fall under the Seventh Amendment.

[187]See, e.g., *Texaco Exploration*, supra note 185; *Dozier*, supra note 185.

[188]See Solet v. CNG Producing Co., 908 F. Supp. 375, 378 (E.D. La. 1995) (holding that an injured OCS worker's case against a platform defendant must be jury tried while the case against two vessel defendants would be bench tried with the jury as advisory). A proper understanding that § 1349(b)(1) jurisdiction is exactly like diversity jurisdiction for present purposes would have led the *Solet* court to the conclusion that the entire case was a "suit at common law" for Seventh Amendment purposes.

tion cannot meaningfully be distinguished from one in which there is both admiralty jurisdiction and diversity jurisdiction. In the latter situation, the law on jury trial is settled: Either party has a right to jury trial[189] except when the plaintiff has exercised the right granted by Federal Rule of Civil Procedure 9(h) to institute the action as an admiralty action in federal court.[190] (Even there, there may be a jury trial right if the admiralty action becomes a "hybrid" because of the existence of non-maritime claims or parties.[191])

Section 1349(b)(1) admiralty cases should be treated exactly the same as diversity/admiralty cases respecting the right to a jury. The proper regime is as follows:

- The plaintiff can secure a bench trial only by bringing the case to federal court and using Federal Rule of Civil Procedure 9(h) to designate admiralty as the basis for subject matter jurisdiction.[192]
- If the plaintiff pleads in such a way as to permit the federal court to construe the pleading as basing subject matter jurisdiction on § 1349(b)(1), the defendant has a right to a jury trial.[193]

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[189]See Kermarec v. Compagnie General Transatlantique, 358 U.S. 625, 628 (1959) (stating that in an admiralty case in which "the plaintiff exercises the right conferred by diversity of citizenship to choose a federal forum" there is a "right to a jury trial"); Rachal v. Ingram Corp., 795 F.2d 1210, 1216 (5th Cir. 1986) (stating that in maritime cases brought to federal court on the basis of diversity jurisdiction, either party may demand a jury trial); Fogleman v. Tidewater Barges, Inc., 747 F. Supp. 348, 355 (E.D. La. 1990) (stating that when a maritime case brought in state court is removed on the basis of diversity jurisdiction, "the right to a jury trial" is "preserved").

[190]Fed. R. Civ. P. 9(h) provides that "[a] pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rule[] 38(e) . . . ." Rule 38(e) provides: "These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h)." The effect of these two rules is to give the maritime plaintiff an indefeasible right to bench trial. These provisions do not violate the Seventh Amendment because federal-court actions based on admiralty jurisdiction are not regarded as "suits at common law" for Seventh Amendment purposes. See City of Monterey v. Del Monte Dunes, 526 U.S. 687, 709 (1999) (stating it as a truism that admiralty cases are not common-law causes of action for Seventh Amendment purposes). See generally David W. Robertson and Michael F. Sturley, *The Right to a Jury Trial in Jones Act Cases: Choosing the Forum Versus Choosing the Procedure*, 30 J. MAR. L. & COM. 649 (1999).

[191]See Billy Coe Dyer, *Note, The Jury on the Quarterdeck: The Effect of Pleading Admiralty Jurisdiction When a Proceeding Turns Hybrid*, 63 TEX. L. REV. 533 (1984) (arguing persuasively that when the maritime plaintiff's Rule 9(h) right clashes with a nonmaritime defendant's Seventh Amendment right, the Seventh Amendment must prevail).

[192]See Hails v. Atlantic Richfield Co., 595 F. Supp. 948, 951-52 (W.D. La. 1984) (holding that when plaintiff invoked Fed. R. Civ. P. 9(h) in a case in which there was both admiralty jurisdiction and OCSLA § 1349(b)(1) jurisdiction, the defendant had no right to a jury). Cf. Debellefeuille v. Vastar Offshore, Inc., 139 F. Supp. 2d 821 (S.D. Tex. 2001) (holding in a multiple-defendant case of overlapping admiralty jurisdiction and OCSLA § 1349(b)(1) coverage that a defendant not falling under admiralty jurisdiction had a Seventh Amendment right to demand a jury, and that this meant the entire case should be tried to the jury).

[193]This necessarily follows from the lack of any meaningful distinction between diversity jurisdiction and OCSLA § 1349(b)(1) jurisdiction.

- If the defendant removes the case from state to federal court (admiralty itself being no basis for removal), both parties have a right to jury trial.

D. The key to understanding ocsla: A good map

Fifth Circuit panels and district courts often speak of "OCS situses" or "OCSLA situses"without being clear what is meant.[194] The analysis presented above in Section II-C shows that the term "an OCSLA situs" has five possible meanings.[195]

1. OCSLA Zone 1: Matters covered by § 1333(a)(2(A)

The narrowest of the relevant OCSLA provisions is § 1333(a)(2)(A), which selectively adopts adjacent-state law as surrogate federal law for "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon."[196] Section 1333(a)(2)(A) precludes the adoption of adjacent-state law that is inconsistent with OCSLA or with "other Federal laws." The most important type of "other Federal laws" is federal maritime law, which is applicable (to the exclusion of any inconsistent adjacent-state law) to all cases of admiralty and maritime jurisdiction arising within this zone.[197]

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[194]E.g., Diamond Offshore Co. v. A&B Builders, Inc., 302 F.3d 531, 549 (5th Cir. 2002); Demette v. Falcon Drilling Co., 280 F.3d 492, 497 (5th Cir. 2002); Whitsline v. Basin Exploration, Inc., 2001 WL 812078 at * 2 (E.D. La. 2002).

[195]In the interest of minimizing clutter, this subsection will not be extensively footnoted. All of the assertions here refer back to the analysis in Section II-C.

[196]Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969), exemplifies a § 1333(a)(2)(A) case not falling within admiralty jurisdiction. It involved the deaths of two platform workers, Rodrigue and Dore. Rodrigue died from a fall from high on a derrick to the platform floor. Dore died when the platform crane he was working on fell with him onto the deck of an adjacent barge. Neither injury satisfied the locality requirement for admiralty jurisdiction: The Rodrigue event occurred entirely on the platform, which, as an artificial island, is deemed land. Respecting the Dore event, T. Smith & Son, Inc. v. Taylor, 276 U.S. 179 (1928), stands for the proposition that injuries incurred from being knocked from a pier into the water occurred on the pier (land) for purposes of determining admiralty tort jurisdiction. After finding that there was no admiralty jurisdiction (see 395 U.S. at 360), the Supreme Court held that the plaintiffs in Rodrigue were entitled to recovery under Louisiana's fatal-injury statutes made surrogate federal law by § 1333(a)(2)(A).

[197]Dupre v. Penrod Drilling Corp., 993 F.2d 474 (5th Cir. 1993), is an example of a case covered by both § 1333(a)(2)(A) and admiralty jurisdiction. It involved injuries to a platform worker who was hurt on the platform by slipping in drilling mud discharged from an adjacent jack-up rig. The worker sued the jack-up operator, which sought contractual indemnity from the platform operator. The incident in suit fell within § 1333(a)(2)(A)'s coverage because it happened on the platform. It also fell within admiralty jurisdiction because it satisfied the *Grubart* three-requirement test (see supra note 114): It was caused by a vessel (the jack-up rig); it was the type of event having the potential to disrupt maritime commerce (by potentially requiring rescue operations and otherwise potentially interrupting the jack-up's work); and the defendant's activity—operating a vessel on navigable waters—bore a significant relationship to traditional maritime activity. The court held that the contractual indemnity dispute was governed by federal maritime law to the exclusion of inconsistent adjacent-state law.

2. OCSLA Zone 2: Matters covered by § 1333(a)(1)

The next narrowest of the relevant OCSLA provisions is § 1333(a)(1), which establishes an "area of exclusive Federal jurisdiction" that includes:

> (1) "[T]he subsoil and seabed of the outer Continental shelf" and
>
> (2) [A]ll artificial islands, and other installations and other devices permanently or temporarily attached to the seabed, which may be erected [placed] thereon for the purpose of exploring for, developing, or producing resources therefrom," and
>
> (3) "[A]ny such installation or other device (other than a ship or vessel) for the purpose of transporting such resources."

This zone embraces Zone 1. It is broader than Zone 1 in its inclusion of "temporarily attached" apparatus. All "temporarily attached" apparatus cases fall within admiralty and maritime jurisdiction and are governed by the federal maritime law.[198] This is necessarily the case: Otherwise, there would be no law to govern them.[199]

The outer limit of Zone 2 is debatable. Some decisions suggest that § 1333(a)(1) can sensibly be construed to cover ships and waters in the near-vicinity of the platforms and apparatus explicitly covered by § 1333(a)(1) provided the incident in suit is intimately involved with the work of the § 1333(a)(1) platform or apparatus.[200] The Supreme Court has hinted that this extension may be incorrect.[201] In any event, it is clear that § 1333(a)(1) does not cover injuries on or in OCS waters generally.[202]

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[198]See, e.g., Demette v. Falcon Drilling Co., Inc., 280 F.3d 492 (5th Cir. 2002) (holding that contractual indemnity issues arising from injuries to an OCS worker on a jack-up rig were governed by federal maritime law).

[199]As is detailed supra at notes 119-122, state law would not apply of its own force because § 1333(a)(1) calls for "exclusive Federal jurisdiction." State law would not apply as surrogate federal law because § 1333(a)(2)(A), the only authorization for thus creating surrogate federal law, does not apply to temporarily attached apparatus.

[200]Section 1333(a)(1) coverage of an injury to an OCS platform worker on a vessel adjacent to the platform was assumed without any discussion in Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981). The worker was on the vessel awaiting evacuation from the path of a hurricane. In re Dearborn Marine Service, Inc., 499 F.2d 263, 273 (5th Cir. 1974), indicates that the coverage of § 1333(a)(1) extends beyond the platforms and temporarily attached apparatus explicitly covered by the provision "to accidents fortuitously consummated in the surrounding sea."

[201]Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 219 (1986) (noting that OCSLA coverage was "presumed" in *Gulf Offshore* and implicitly questioning the assumption). See also Green v. Industrial Helicopters, Inc., 593 So.2d 634, 639(La. 1992) ("It appears that OCSLA is not applicable to accidents occurring near a structure located on the outer Continental Shelf. The U.S. Supreme Court has said as much in . . . *Tallentire*.").

[202]Tallentire, supra note 201, was an action by the families of OCS workers killed in a helicopter crash in the waters over the outer Shelf against the helicopter service that was ferrying the men to or from work on an outer Shelf platform. The crash occurred "miles away from the platform." 477 U.S. at 219. The Court concluded that applying § 1333(a)(1) to this event would extend it "far beyond its intended locale." Id. at 218.

3. OCSLA Zone 3: Matters covered by § 1333(b)

Section 1333(b) excludes seamen and government workers (federal and foreign) from its coverage. With respect to all other OCS workers who sustain injury from OCS mineral-exploitation operations, it adopts the LHWCA as the workers' compensation regime regulating the workers' rights against their employers and against non-employer vessels and vessel operators. The regime also regulates the contribution and indemnity rights of employers and non-employer vessels and vessel operators against one another.

Section 1333(b)'s geographical coverage includes everything in Zone 2 and Zone 1. It also extends beyond Zone 2. By its literal terms and in the Third Circuit,[203] § 1333(b) has no geographical limit. Under the Fifth Circuit's narrower view as expressed in the en banc decision in *Mills*, §1333(b) covers injuries "on an OCS platform or the waters above the OCS."[204] Thus even on a relatively narrow view of its coverage, § 1333(b)'s geographical reach is broader than that of § 1333(a)(1).

Virtually all of the matters falling within Zone 3 are governed by specific provisions of the LHWCA as adopted by § 1333(b).[205] In the rare instance in which the LHWCA does not provide for a matter falling within this zone, the matter is controlled by federal maritime law if there is admiralty jurisdiction[206] and by state law if there is not.[207]

4. OCSLA Zone 4: Matters covered by § 1349(b)(1)

The broadest of the relevant OCSLA provisions is § 1349(b)(1). It gives federal district courts subject matter jurisdiction over all cases that (a) arise

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[203]Curtis v. Schlumberger Offshore Service, Inc., 849 F.2d 805 (3d Cir. 1988), held that § 1333(b) covered injuries to an OCS worker temporarily working on land.

[204]Mills v. Director, OWCP, 877 F.2d 356, 362 (5th Cir. 1989) (en banc).

[205]The bulk of the LHWCA, 33 U.S.C. §§ 901-950, regulates employees' workers' compensation rights against employers. These matters are handled by the Labor Department's administrative law judges and Benefits Review Board. Absent exceptional circumstances, the role of the judiciary here is limited to the courts of appeals' review of Benefits Review Board adjudications. Employees' tort rights against vessels and vessel operators are regulated by 33 U.S.C. §§ 902(21), 905(b), and 933. Contribution and indemnity disputes between employers and vessels/vessel operators are regulated by 33 U.S.C. §§ 905(b), 905(c), and 933.

[206]See, e.g., Federal Maritime Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969) (holding in a case arising from an injury to a longshoreman on a floating ship that the victim's employer had a federal maritime law cause of action against the shipowner for indemnification over and above the employer's LHWCA rights).

[207]In Olsen v. Shell Oil Co., 708 F.2d 976 (5th Cir. 1983), an OCS worker was hurt on an OCS platform. The court held that the worker's employer had a cause of action against the platform operator for indemnification. As was the case in *Burnside*, supra note 207, this cause of action was extrinsic to the LHWCA. The *Olsen* court noted that in *Burnside*, the cause of action arose under federal maritime law. In *Olsen*—where there was no admiralty jurisdiction, the injury having occurred on a platform and without any vessel involvement—the cause of action arose under adjacent-law made surrogate federal law by § 1333(a)(2)(A). Id. at 981 n. 3.

out of or are connected with OCS mineral-exploitation operations or (b) involve the rights to OCS minerals. Section 1349(b)(1) thus embraces the coverages of Zones 1, 2, and 3 and goes beyond them. By including no direct geographic limitation, § 1349(b)(1) describes a broader coverage than Zone 2.[208] By virtue of its subject-matter sweep, § 1349(b)(1) covers a broader range of matters than Zone 3.

There is no OCS substantive law for cases falling within Zone 4 but outside Zones 1, 2, and 3. Many such cases will be admiralty cases governed by federal maritime law.[209] Others may be regulated by some feature of non-maritime federal law. The rest will necessarily be governed by state or foreign law applicable of its own force.[210]

5. OCSLA Zone 5: Matters falling outside the coverage of OCSLA

Many litigation-producing occurrences in state territorial waters have no meaningful connection with OCS resources-exploiting operations.[211] Many

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[208]There seems to be no reported decision exploring the geographical limits on § 1349(b)(1)'s coverage. A few district courts have rejected § 1349(b)(1) coverage on concluding that the matters alleged bore an insufficiently close relationship to offshore mineral operations. See, e.g., Sea Robin Pipeline Co. v. New Medico Head Clinic Facility, 1996 WL 84441 (E.D. La. Feb. 26, 1996) (rejecting jurisdiction over an action by an OCS company alleging that a shorebased medical facility exacerbated an OCS worker's injuries and thereby increased the company's liabilities). Such decisions are questionable: As we saw in Section II-C-11 supra, the Fifth Circuit has repeatedly emphasized § 1349(b)(1)'s breadth. The relevant statutory language is this: "cases and controversies *arising out of, or in connection with . . . any operation* conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals." The italicized language suggests that Congress wanted to eschew any close-connection requirement. And remember that each of the terms exploration, development, and production" has a broad statutory definition. See supra note 61.

[209]Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986), involved two fatal-injuries actions by the families of OCS workers against the operator of a helicopter that crashed in OCS waters while ferrying the men to or from work on a fixed platform. The case fell outside Zones 1 and 2 because the crash occurred "miles away from the platform" where the men worked. Id. at 219. It fell outside Zone 3 because neither an employer nor a third-party vessel operator was a defendant. Id. at 219 n. 2. Because of the existence of admiralty jurisdiction, federal maritime law governed the case. The plaintiffs based subject matter jurisdiction in the district court on admiralty, but there is no reason to suppose they could not have sought a federal-court jury by predicating jurisdiction on § 1349(b)(1) had they so chosen.

Green v. Industrial Helicopters, Inc., 593 So.2d 634 (La. 1992), was a state-court action involving facts functionally identical to *Tallentire*'s except that the worker's injuries in *Green* were not fatal. The Louisiana Supreme Court held that the case was governed by federal maritime law supplemented by a Louisiana strict liability doctrine applied of its own force. Defendant argued that the governing law should be only the federal maritime law of negligence. This argument might have enjoyed more success in federal court. The case fell within § 1349(b)(1)'s coverage. Probably the defendant did not try to remove the case on the basis of § 1349(b)(1) on the view that the second sentence of 28 U.S.C. § 1441(b) precluded removal. See supra Section II-C-13.

[210]Cf. Green, supra note 209 (applying Louisiana law of its own force in a case covered by OCSLA 1349(b)(1) but not by OCSLA § 1333(a)(1) or § 1333(a)(2)(A)).

[211]In Herb's Welding v. Gray, 766 F.2d 898 (5th Cir. 1985), a welder who was hurt on a fixed platform in Louisiana waters argued that he was entitled to invoke OCSLA § 1333(b) because the Louisiana platform

things happen on and to ships and aircraft traversing the waters and airspace over the outer Continental Shelf that have no meaningful connection with OCS resources-exploiting operations.[212] OCSLA has nothing to say about any of these.

6. The visual image is a dart board

The five-zone map is conceptual; it cannot usefully be superimposed upon an actual map of the Gulf of Mexico. But it can be usefully drawn or imagined as a dart board. Zone 1 is the bullseye. Zone 2 encircles and embraces Zone 1. Zone 3 encircles the inner two zones and embraces the parts of them that relate to worker-injury issues. Zone 4 encircles and embraces the inner three zones. Zone 5 is off the board.

III
A CATALOGUE OF FIFTH CIRCUIT MISTAKES

A. Misreading Rodrigue

Rodrigue v. Aetna Cas. & Sur. Co.[213] involved the deaths of two workers on OCS fixed platforms,[214] Rodrigue and Dore. Rodrigue died from a fall from high on a derrick to the platform floor. His family sued the owner of the drill

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was part of an oil field extending on both sides of the three-mile line and was connected by a flow line to an OCS platform. The Fifth Circuit rejected the welder's argument, holding that his injury was not "the result of operations conducted on the outer Continental Shelf" for purposes of § 1333(b). Id. at 900. Subsequently the Fifth Circuit held that § 1333(b)'s coverage is further restricted to injuries occurring on the outer Continental Shelf. Mills v. Director, OWCP, 877 F.2d 356 (5th Cir. 1989) (en banc).

[212]See, e.g., East River Steamship Corp. v. Transamerica Delaval, 476 U.S. 858 (1986) (products liability action against manufacturer of four ships' engines, two of which malfunctioned while ships were traversing the OCS; OCSLA not mentioned). See also EEX Corp. v. ABB Vetco Gray, Inc., 161 F. Supp. 2d 747, 759 (S.D. Tex. 2001) ("If lightning strikes a Morocco-bound cargo ship sailing over the shelf, or if a survey ship smashes against a rock jutting out from the shelf, the [OCSLA] does not apply because the ships were merely traveling over the shelf, not conducting activities on it.").

[213]395 U.S. 352 (1969).

[214]Rodrigue v. Aetna Cas. & Sur. Co., 395 F.2d 216, 216 (5th Cir. 1968), rev'd, 395 U.S. 352 (1969), states that Rodrigue's death occurred "on a fixed structure." Dore v. Link Belt Co., 391 F.2d 671, 672 (5th Cir. 1968), rev'd sub nom. Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969), says that Dore's death "occurred in a stationary offshore drilling platform." Throughout the Supreme Court's opinion, these platforms are referred to as "artificial islands." This was technically inaccurate. The offshore drilling industry draws a distinction between artificial islands and fixed platforms. See *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings on S. 2318, S. 525, and S. 1547 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare* 480, 485 (1972) (diagrams submitted by the International Association of Drilling Contractors of "fixed platform with tender" and "man made island").

rig and the owner of the platform. Dore died when the platform crane he was operating collapsed and fell onto the deck of an adjacent barge. His family sued the companies that manufactured, installed, and serviced the crane.[215]

Neither injury satisfied the locality requirement for admiralty jurisdiction.[216] The Rodrigue event occurred entirely on the platform, which, as an artificial island, is deemed land. Respecting the Dore event, *T. Smith & Son, Inc. v. Taylor*[217] stands for the proposition that injuries incurred from being knocked from a pier (deemed land) into the water occurred on the pier for purposes of determining admiralty tort jurisdiction.

The Supreme Court held that the cases were governed by Louisiana's fatal-injury laws made applicable as "surrogate federal law"[218] by OCSLA § 1333(a)(2)(A). There were three main steps in the Court's chain of reasoning. First, the Court said that if federal maritime law were applicable, its application would be "exclusive" of any adjacent-state law.[219] This was true because OCSLA § 1333(a)(2)(A) precludes the adoption of adjacent-state law that is inconsistent with "other Federal laws," and the federal maritime law differed markedly from adjacent-state law on the categories of damages available to the families of fatally injured workers. Second, the Court said that federal maritime law did not apply because the cases did not fall within admiralty jurisdiction:

> The accidents in question here involved no collision with a vessel,[220] and the structures were not navigational aids.[221] They were islands, albeit artificial ones, . . . and the accidents had no more connection with the ordinary stuff of admiralty than do accidents on piers . . . . [Federal maritime law] clearly would not apply under conventional admiralty principles . . . .[222]

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[215]Note that the workers' employers were not sued. Had they been, the cases would clearly have been controlled by 43 U.S.C. § 1333(b). It can be assumed that the workers' employers paid LHWCA fatal injury benefits as directed by § 1333(b).

[216]See Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 253 (1972) ("Determination of the question whether a tort is 'maritime' and thus within the admiralty jurisdiction of the federal courts has traditionally depended upon the locality of the wrong. If the wrong occurred on navigable waters, the action is within admiralty jurisdiction; if the wrong occurred on land, it is not.").

[217]276 U.S. 179 (1928). The *Rodrigue* Court cited *Taylor* for the proposition that "[a]dmiralty jurisdiction has not been construed to extend to accidents on piers . . . ." 395 U.S. at 360 & n. 6.

[218]395 U.S. at 357.

[219]Id. at 359.

[220]The Court said that injuries on a fixed platform caused by a vessel colliding with the platform would fall within admiralty jurisdiction by virtue of the Admiralty Extension Act. 395 U.S. at 360 & n. 8.

[221]The Court cited *The Blackheath*, 195 U.S. 361 (1904), and several other cases holding that events on fixed structures serving as navigational aids fall under admiralty jurisdiction. 395 U.S. at 360 n. 7.

[222]Id. at 360-61.

Third, the Court recounted OCSLA's legislative history—the same history set forth in Section II-B above—to show that in enacting OCSLA Congress did not intend to extend admiralty jurisdiction[223] to cover OCS platforms:

> Congress decided that these artificial islands, though surrounded by the high seas, were not themselves to be considered within admiralty jurisdiction. Thus, [federal maritime law] no more applies to these accidents actually occurring on the islands than it would to accidents occurring in an upland federal enclave or on a natural island to which admiralty jurisdiction had not been specifically extended.[224]

There is nothing in *Rodrigue* suggesting that OCSLA cuts back on admiralty jurisdiction. Yet several Fifth Circuit panels have read *Rodrigue* to mean that the OCSLA narrowed the federal courts' admiralty and maritime jurisdiction and hence the applicability of federal maritime law.[225] This is a mistaken reading. The legislative history recounted above in Section II-B (and in the *Rodrigue* opinion[226]) shows that at the eleventh hour Congress turned away from a plan to *extend* admiralty jurisdiction over fixed platforms and decided to leave admiralty jurisdiction alone. The only provision in OCSLA that could affect admiralty jurisdiction is § 1333(a)(2)(A), which adopts adjacent-state law as surrogate federal law only when such law is not inconsistent with "other Federal laws," meaning admiralty and maritime

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[223]See id. at 361: "In these circumstances, the [Death on the High] Seas Act—which provides an action in admiralty—clearly would not apply under conventional admiralty principles and, since the [OCSLA] provides an alternative federal remedy through adopted state law, there is no reason to assume that Congress intended to extent [sic] those principles to create an admiralty remedy here."

[224]395 U.S. at 365-66.

[225]See Laredo Offshore Constructors, Inc. v. Hunt Oil Co., 754 F.2d 1223, 1232 (5th Cir. 1985) (stating that "[v]iewed in [the] light [of *Rodrigue*], the OCSLA can only be regarded as a substantive restriction of the district court's admiralty jurisdiction"); id. at 1233 (referring to "cases exploring the scope of the OCSLA's restriction on admiralty jurisdiction"); Thurmond v. Delta Well Surveyors, 836 F.2d 952, 957 (5th Cir. 1988) (Garwood, J., concurring, agreeing with *Laredo* that OCSLA restricts admiralty jurisdiction). See also Barger v. Petroleum Helicopters, Inc., 692 F.2d 337, 338-39 (5th Cir. 1983) (indicating that in some circumstances the effect of OCSLA is "to oust admiralty jurisdiction"); Smith v. Pan Air Corp., 684 F.2d 1102, 1111 n. 32 (5th Cir. 1982) (same, quoting Kimble v. Noble Drilling Corp., 416 F.2d 847, 850 (5th Cir. 1969).

The idea that OCSLA sometimes "ousts" admiralty and maritime law derives no support from *Rodrigue*, which uses the term in an opposite sense: "[F]or federal [maritime] law to oust adopted state law federal law must first apply." 395 U.S. at 359. And it derives little legitimate support from Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), which in its text correctly characterizes *Rodrigue* as having "established that [OCSLA] does not make admiralty law applicable to actions [arising from accidents on fixed platforms]", id. at 99. However, in an unfortunate footnote the *Chevron* Court then states that with respect to platform accidents OCSLA "ousts admiralty law and specifically directs that state law shall be adopted as federal law." id. at 105 n. 8. In order to reconcile *Chevron*'s text with its footnote, one must read the word "oust" in the footnote to mean to decline to bring in rather than in the usual sense of to throw out.

[226]395 U.S. at 357-59.

law. What *Rodrigue* teaches is that the language of OCSLA and OCSLA's legislative history should be heeded: Federal maritime law applies to the exclusion of inconsistent adjacent-state law to OCS cases falling within admiralty jurisdiction. Cases involving artificial islands and fixed platforms do not fall within admiralty jurisdiction unless a vessel is involved in the event in suit.

B. Ignoring Explicit Statutory Language

1. Erroneous assertions that OCSLA § 1333(a)(2)(A) covers temporarily-attached apparatus

It has been emphasized throughout this article that when the 1978 Congress expanded § 1333(a)(1) to bring movable drilling rigs and other devices temporarily attached to the seabed into OCSLA's coverage, it purposefully declined to expand § 1333(a)(2)(A). Section 1333(a)(2)(A) provides for the application of adjacent-state law only for "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon." It plainly does not authorize the application of adjacent-state law to temporarily-attached apparatus.

However, since 1990 Fifth Circuit panels have been routinely asserting that § 1333(a)(2)(A) *does* authorize the application of adjacent-state law to movable drilling rigs.[227] This is insupportable. These panels have either read

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[227]One of the issues in Union Texas Pet. Corp. v. PLT Engineering, Inc., 895 F.2d 1043 (5th Cir. 1990), (hereafter "*PLT*") was whether adjacent-state law applied as surrogate federal law via OCSLA § 1333(a)(2)(A) to a dispute involving a contract for the construction of a pipeline on the OCS seabed. The trial court and the Fifth Circuit both held yes. This seems plainly correct: The only "other Federal laws" that might have stood in the way of adopting adjacent-state law was federal maritime law, and it would have been a stretch to bring a pipeline construction contract under admiralty jurisdiction. In the course of reaching that conclusion, the *PLT* panel came up with the following formulation:

[F]or adjacent state law to apply as surrogate federal law under OCSLA, three conditions are significant. (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 with Federal law.

Id. at 1047. The *PLT* panel cited nothing in support of the formula, and the word "temporarily" in the formula's first element is a clear mistake: § 1333(a)(2)(A) is the only OCSLA provision relating to the adoption of adjacent-state law, and it does not cover temporarily attached structures. Nevertheless, subsequent panels have routinely invoked the formula. Proceeding in chronological order, see Smith v. Penrod Drilling Corp., 960 F.2d 436, 459 (5th Cir. 1992) (quoting *PLT*); Dupont v. Sandefer Oil & Gas, Inc., 963 F.2d 60, 61 (5th Cir. 1992) (same); Hollier v. Union Texas Pet. Corp., 972 F.2d 662, 664 (5th Cir. 1992) (same); Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1120 (5th Cir. 1992) (same); Dupre v. Penrod Drilling Corp., 993 F.2d 474, 476 (5th Cir. 1993) (same); Hodgen v. Forest Oil Corp., 87 F.2d 1512, 1525 (5th Cir. 1996) (quoting *PLT* and stating that "the *PLT* test was first announced in that case in 1990 without relevant citation"); Gardes Directional Drilling v. U.S. Turnkey Exp. Co., 98 F.2d 860, 856

§ 1333(a)(2)(A) too hastily; or (perhaps more likely) they have decided without saying so that the 1978 Congress made a mistake that demands covert judicial correction. In most of these cases, the panels' erroneous reading of § 1333(a)(2)(A) did not lead to a wrong result, because the courts used the portion of § 1333(a)(2)(A) precluding the adoption of adjacent-state law that is inconsistent with "other Federal laws" to conclude that federal maritime law governed the case—the same result that would have obtained on the much simpler ground that temporarily-attached apparatus do not fall under § 1333(a)(2)(A) at all.[228] But there have been a few wrong or at least dubious results.[229] And the mistaken reading of § 1333(a)(2)(A) has caused much confused and wasteful litigation[230] and spawned several related mistakes.

(5th Cir. 1996) (quoting *PLT*); Demette v. Falcon Drilling Co., 280 F.3d 492, 497 (5th Cir. 2002) (same); Dahlen v. Gulf Crews, Inc., 281 F.3d 487, 492 (5th Cir. 2002) (same); Strong v. B.P. Exp. & Prod., Inc., 440 F.3d 665, 668 (5th Cir. 2006 (same); Texaco Exp. and Prod., Inc., 448 F.3d 760, 774 (5th Cir. 2006) (same).

Two recent panels have put the assertion that § 1333(a)(2)(A) covers temporarily-attached apparatus in a different form. See Diamond Offshore Co. v. A&B Builders, Inc., 302 F.3d 531, 549 (5th Cir. 2002) (purporting to quote § 1333(a)(2)(A) as covering "OCS situses as defined by section 1333(a)(1)"); Demette, 280 F. 3d at 497 (same). For criticism of this feature of *Diamond* and *Demette*, see David W. Robertson and Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 27 TUL. MAR. L.J. 495, 574-75 (2003); David W. Robertson and Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 26 TUL. MAR. L.J. 193, 244-47 (2001).

[228]See, e.g., Strong v. B.P. Exp. & Prod., Inc., 440 F.3d 665, 669-70 (5th Cir. 2006) (assuming in light of the first *PLT* factor, supra note 227, that adjacent-state tort law could potentially apply to an injury on a liftboat jacked up next to a platform but then concluding that the case fell under admiralty jurisdiction and was therefore governed by federal maritime law);Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1120-24 (5th Cir. 1992) (assuming in light of the first *PLT* factor that adjacent-state law was potentially applicable to a contractual indemnity dispute arising from injury to a drilling vessel worker hurt transferring from a ship to the drilling vessel but then finding admiralty jurisdiction over the matter and holding that it was accordingly governed by federal maritime law); Dupont v. Sandefer Oil & Gas, Inc., 963 F.3d 60, 61-63 (5th Cir. 1992) (assuming in light of the first *PLT* factor that state law might apply to a contractual indemnity dispute arising from injury to a jack-up rig worker on the jack-up rig but then concluding that the case fell within admiralty jurisdiction and was governed by federal maritime law).

[229]See, e.g., Texaco Exp. & Prod., Inc. v. AmClyde Engineered Products Co., 448 F.3d 760, 774-75 (5th Cir. 2006) (using the *PLT* factors in support of concluding that adjacent-state-tort law governed a products liability action against the manufacturer of a crane that, while operating upon a barge, dropped a valuable piece of property into the ocean during the construction of a deep-water platform). The accident in Texaco Exp. closely resembles the one in suit in McDermott, Inc. v. AmClyde, 511 U.S. 202 (1994), where the Court applied federal maritime law. The Texaco Exp. opinion does not mention the Supreme Court's *AmClyde* decision. See also Theriot v. BP Corp. 216 F. Supp. 2d 651, 653-55 (S.D. Tex. 2002) (reading *Demette*, supra note 227, to mean that a jack-up rig should be deemed a fixed platform so that a tort case arising on it must be governed by adjacent-state law). Cf. Domingue v. Ocean Drilling and Exp. Co., 923 F.2d 393, 396-98 & n. 6 (5th Cir. 1991) (citing *PLT* in passing in the course of holding that state law governed a contractual indemnity dispute arising from injury to a worker on a jack-up rig on the OCS).

[230]The word "temporary" in the first *PLT* element, supra note 227, erroneously brings movable rig cases under § 1333(a)(2)(A)'s potential application of state law. The second and third PLT elements then tend, quite laboriously, to keep state law from applying. See supra note 228.

2. Erroneous assertions that the coverage of § 1333(b) is limited to the situses covered by § 1333(a)(1).

Section 1333(b)—adopting the LHWCA as the workers' compensation regime for injuries to nonseamen working on the OCS—covers "any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf." The 1978 amendments to OCSLA did not alter § 1333(b)'s coverage.[231] Section 1333(b)'s coverage was not tied to that of § 1333(a)(1) in the 1953 OCSLA,[232] and the 1978 amendments did not change that.

Nevertheless, three Fifth Circuit panels have assumed or asserted that § 1333(b) does not apply to situses not covered by § 1333(a)(1). These cases are treated in the subsections just below.

a. Bridges

The panel in *Bridges v. Penrod Drilling Co.* offered no authority or reasoning in support of its assertion that "[i]t was not until the . . . 1978 amendments to [OCSLA] that coverage of the LHWCA was extended to [semi-submersible] rigs."[233] The quoted statement is demonstrably untrue,[234] and the assumption on which it is based—that the coverage of § 1333(b) is limited by that of § 1333(a)(1)—is also untrue.[235]

b. Demette

The panel in *Demette v. Falcon Drilling Co.* stated that "[t]he Supreme Court and the Fifth Circuit have held that [§ 1333(a)(1)] creates a 'situs' requirement for the application of other sections of the OCSLA, including section[] . . . 1333(b)."[236] In ostensible support of this statement the *Demette*

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[231]Wentz v. Kerr-McGee Corp., 784 F.2d 699, 700 (5th Cir. 1986) (quoting legislative history indicating that the 1978 amendments made "no change" to § 1333(b)); Longmire v. Sea Drilling Corp., 610 F. 2d 1342. 1347 n. 7 (5th Cir. 1980) (stating that the 1978 amendments "worked no substantive change" in § 1333(b)).

[232]The pre-1978 § 1333(a)(1) covered only the subsoil and seabed and artificial islands and fixed structures, yet many pre-1978 cases held that § 1333(b) covered non-seamen working on movable drilling rigs. See David W. Robertson, *A New Approach to Determining Seaman Status*, 64 TEX. L.REV. 79, 104 & n. 139 (1985); David W. Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 TEX. L. REV. 973, 986 & nn. 93-94 (1977).

[233]740 F.3d 361, 362 (5th Cir. 1984).

[234]See supra notes 231-232.

[235]For criticism of the *Bridges* assertion and apparent reasoning, see David W. Robertson, *Current Problems in Seamen's Remedies: Seaman Status, Relationship Between Jones Act and LHWCA, and Unseaworthiness Actions by Workers Not Covered by LHWCA*, 45 LA. L. REV. 875, 906 n. 200 (1985).

[236]280 F.3d 492, 496 (5th Cir. 2002).

panel cited the Supreme Court's decision in *Offshore Logistics Inc. v. Tallentire*[237] and the Fifth Circuit's en banc decision in *Mills v. Director, OWCP*.[238] The cited authorities will not bear the weight.

The relevant holding of *Tallentire* is that OCSLA § 1333(a)(2)(A) does not make adjacent-state law applicable to the crash of a helicopter "miles away from the platform" to or from which it was ferrying OCS platform workers.[239] The workers' families were not proceeding against an employer, vessel, or vessel operator, so that § 1333(b) was not involved in the case. The *Tallentire* Court gave § 1333(b) only passing mention in a footnote as follows:

> Only one provision of OCSLA superimposes a status requirement on the otherwise determinative situs requirement. § 1333(b) makes compensation for the death or injury of an "employee" resulting from certain operations on the outer Continental Shelf payable under the Longshoremen's and Harbor Workers' Compensation Act. We note that because this case does not involve a suit by an injured employee against his employer pursuant to § 1333(b), this provision has no bearing on this case.[240]

This footnote is admittedly puzzling,[241] because there is demonstrably no single "determinative situs requirement" for the entire OCSLA.[242] But whatever it may mean,[243] the *Tallentire* footnote cannot support a coverage

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[237]477 U.S. 207, 217-20 & 220 n. 2 (1986).

[238]877 F.2d 356, 361-62 (5th Cir. 1989) (en banc).

[239]477 U.S. at 219.

[240]Id. at 220 n. 2.

[241]The *Demette* panel did not treat the footnote completely seriously. In the sense in which *Demette* relies upon the footnote, it would have tied the coverage of § 1333(b) to that of § 1333(a)(2)(A). Yet *Demette* cites it for tying § 1333(b)'s coverage to that of § 1333(a)(1).

[242]See supra Sections II-C3, II-C-4, II-C-5, II-C-9, II-C-10, and II-C-11 (showing that the each of §§ 1333(a)(1), 1333a(2)(A), 1333(b), and 1349(b)(1) spells out its own unique coverage requirements). The *Tallentire* Court was not thinking about § 1349(b)(1). It said that § 1333(b) was an exception of some sort to the perceived "otherwise determinative situs requirement." And it may have thought that §§ 1333(a)(1) and 1333(a)(2) had the same situs requirement. This would have been true before 1978. The *Tallentire* Court's unawareness of the 1978 amendment, broadening § 1333(a)(1)'s coverage beyond that of § 1333(a)(2)(A), is suggested by its use of the term "Longshoremen's" in the above-quoted footnote. The 1978 amendment to § 1333(b) changed this to "Longshore."

[243]One could strive to make sense of the footnote by arguing that "superimpose on" can sometimes mean "replace with," or by arguing that "requirement" sometimes means "criterion." But to be realistic, it is better to say that the *Tallentire* footnote first misspoke about § 1333(b)'s coverage and then disavowed any intention of addressing that matter.

restriction that is both demonstrably unwise[244] and negated by the language of OCSLA.[245]

The *Demette* panel's reliance on the Fifth Circuit's en banc decision in *Mills* is even less plausible than its use of *Tallentire*. The *Mills* opinion shows on its face that the coverage of § 1333(b) is not tied to that of § 1333(a)(1). It does this in the following ways:

- The *Mills* opinion states that the "situs-of-injury" requirement applicable to § 1333(b) comes from § 1333(b) itself.[246] In no way does it suggest that the Court's newly-discovered situs requirement is coming from § 1333(a)(1).

- *Mills* specifically approves two decisions holding that § 1333(b) covers helicopter crashes into OCS waters far from any platform and thus from any arguable reach of § 1333(a)(1).[247]

- In its summary of its holding, the *Mills* Court states that any injury on "the waters of the OCS" satisfies § 1333(b)'s situs requirement.[248] This brings under § 1333(b) a broad range of situations not reached by even the most expansive view of § 1333(a)(1), including not just helicopter crash injuries but also injuries on vessels freely afloat and not adjacent to any apparatus attached to the seabed.[249]

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[244]If § 1333(a)(1) limits § 1333(b)'s coverage, then OCS platform workers injured in helicopter mishaps while traveling to and from the platforms will have no access to LHWCA benefits. They will not qualify under the OCSLA adoption of LHWCA because § 1333(a)(1) (and thus by erroneous hypothesis § 1333(b)) clearly does not cover any waters except perhaps those immediately adjacent to the platforms. They will not qualify under the LHWCA of its own force because Herb's Welding, Inc. v. Gray, 470 U.S. 414 (1985), and Director, OWCP v. Perini North River Associates, 459 U.S. 297 (1983), taken together mean that the only platform workers who can satisfy the LHWCA's status requirement are those hurt working on "actual navigable waters," i.e., on a floating vessel. 459 U.S. at 324.

Some OCS workers injured on freely floating vessels on the OCS would also be adversely affected by tying § 1333(b)'s coverage to § 1333(a)(1)'s. Many of these workers are seamen who would not be adversely affected. Many others would be able to qualify for LHWCA benefits under *Perini*'s holding that a worker injured on "actual navigable water" virtually automatically satisfies the LHWCA status requirement. But a few would run afoul of a caveat in *Perini* that injury to a worker while he is "transiently or fortuitously upon actual navigable waters" may not lead to LHWCA status. 459 U.S. at 324. And even if the *Perini* caveat ultimately excluded no one from LHWCA coverage, it is an extremely nasty little litigation point.

[245]See supra Section II-C-10.

[246]877 F.2d at 357. ("OCSLA's provision adopting LHWCA includes a situs of injury requirement"); id. at 359 (reading the term "operations" in § 1333(b) to mean "(1) [operations] related to OCS development; and (2) conducted on the OCS.")

[247]Id. at 361 (approving the results in Barger v. Petroleum Helicopters, Inc., 692 F.3d 337 (5th Cir. 1982), and Stansbury v. Sikorski Aircraft, 681 F.2d 948 (5th Cir. 1982)).

[248]Id. at 362.

[249]See Bienvenu v. Texaco, Inc., 164 F.3d 901, 909 (5th Cir. 1999) (en banc) (taking it as undebatable that an OCS worker injured while traveling by boat among OCS platforms would be entitled to the benefits of the LHWCA as "extended by" OCS § 1333(b)).

c. Diamond

The *Demette* panel's mistaken assertion that § 1333(a)(1) limits the coverage of § 1333(b) did not lead to an erroneous result in that case (because the court went on to hold that the vessel status of the jacked-up rig on which the injury in suit occurred did not keep the rig from being covered by § 1333(a)(1) and hence by § 1333(b)).[250] But in *Diamond Offshore Co. v. A&B Builders, Inc.*,[251] the panel's effort to follow *Demette*'s teaching produced a deplorable result.

In *Diamond*, a repairman employed by A&B Builders was injured aboard a semi-submersible drilling rig operated by Diamond Offshore on the OCS. The injured worker sued Diamond, which then sought contractual indemnity from A&B. The principal issue before the Fifth Circuit was the validity of the indemnity contract. In the court's view,[252] this depended on whether the case was within the coverage of § 1333(b). If yes, the contract was valid. If no, the contract was invalid.

Ultimately the *Diamond* panel concluded that it could not tell whether § 1333(b) covered the case. This uncertainty resulted from *Demette*'s tying of § 1333(b)'s coverage to § 1333(a)(1)'s.[253] The *Diamond* panel noted that § 1333(a)(1)—and hence under *Demette* § 1333(b)—covers movable drilling rigs only while they are " 'attached to' and 'erected on' the seabed of the OCS."[254] Thus if the semisubmersible in *Diamond* was en route to a drilling location and not yet attached to the seabed at the time of the injury in suit, § 1333(a)(1) (and thus § 1333(b)) would not apply and the contract would be invalid. If the semisubmersible was secured at the time of the injury, the contract would be valid. Since the record did not show which was true, the case had to be remanded to determine "whether at the time of McMillon's alleged injury, the *Ocean Concorde* was 'temporarily attached to the seabed of the OCS' and "erected on the seabed of the OCS.'"[255]

The Fifth Circuit's present Chief Judge has cautioned the Court to guard against interpreting OCSLA in such a way as to "upset stable commercial expectations."[256] The *Diamond* panel violated that caution. Under its rule, an indemnity contract respecting injuries to OCS semisubmersible rig workers floats along in a state of probable invalidity until the rig is secured for drilling. The contract then becomes valid. The rule seems to exemplify instability.

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[250]See infra Section IV-A-2 for the explanation why the *Demette* panel got the right result.

[251]302 F.3d 531 (5th Cir. 2002).

[252]We will explore the correctness of this view infra Section IV-B-2.

[253]The *Diamond* panel said this tie was "a significantly different rule" than previous jurisprudence, 302 F.3d at 546, and indicated that it was obliged to follow it. Id. at 543 & n. 1.

[254]Id. at 544.

[255]Id. at 546.

[256]Lewis v. Glendel Drilling Co., 898 F.2d 1083, 107 (5th Cir. 1990 (Jones, J., for the panel).

3. Erroneous assumptions that § 1333(a)(1) permits the application of state law of its own force

Section II-C-6 above demonstrates that § 1333(a)(1) leaves no room for the application of state law of its own force to actions falling under that provision's coverage. At least three courts in the Fifth Circuit have held otherwise.[257] These courts either overlooked § 1333(a)(1)'s provision for "exclusive Federal jurisdiction" or misunderstood that provision's meaning.

C. Inattention to the Requirements for and Ramifications of Admiralty Jurisdiction

1. Failing to realize that denying admiralty jurisdiction over cases involving temporarily attached apparatus—i.e. ,cases falling under § 1333(a)(1) but outside § 1333(a)(2)(A)— places the cases in a substantive-law void

As was demonstrated in Sections II-C-5, II-C-6, and II-C-7, in cases arising on the temporarily attached apparatus covered by § 1333(a)(1) state law as such is inapplicable, and state law as surrogate federal law is unavailable. If such a case is deemed outside admiralty jurisdiction, federal maritime law is also unavailable, placing the case in a substantive-law void. Therefore, whenever admiralty jurisdictional principles permit it, such cases should be found to be within admiralty jurisdiction. Several Fifth Circuit panels have failed to understand this.[258] Regardless of whether these jurisdictional holdings might have been supportable had the cases arisen from operations in state territorial water (where there is no prohibition against the application

[257]Domingue v. Ocean Drilling & Exp. Co., 923 F.2d 393 (5th Cir. 1991), cert. denied, 502 U.S. 1033 (1992) (applying Louisiana law to a contract regulating indemnity issues arising from an injury to an OCS jackup rig worker); Diamond Offshore Co. v. A& B Builders, Inc., 75 F. Supp. 2d 676, 679-80 (S.D. Tex. 1999), aff'd in part and rev'd in part on other grounds, 302 F. 3d 531 (5th Cir. 2002) (indicating that state law might apply of its own force to an injury on an OCS semisubmersible rig but ultimately choosing federal maritime law); Thompson v. Teledyne Movible Offshore, Inc., 410 So.2d 822 (La. 1982), appeal dism'd for want of a substantial federal question, 464 U.S. 802 (1983) (applying features of Louisiana's workers' compensation law to an injury on an OCS platform).

[258]See Domingue v. Ocean Drilling and Exp. Co., 923 F.2d 393 (5th Cir. 1991), cert. denied, 502 U.S. 1033 (1992) (concluding that a contract regulating indemnity issues arising from injury to a well service worker on an OCS jackup rig was nonmaritime and applying state law, evidently of its own force); Houston Oil & Minerals Corp. v. American Int'l Tool Co., 827 F.2d 1049 (5th Cir. 1987) (concluding that a products liability action against the supplier of defective drilling apparatus that caused property damage on a jackup rig was not within admiralty tort jurisdiction and applying state law as surrogate federal law).

of state law of its own force to nonmaritime matters),[259] they are wrong on the OCS.[260]

2. The routinely-recited PLT test is flawed

In 1990 the panel in *Union Texas Pet. Corp. v. PLT Engineering, Inc.*[261] quoted OCSLA §§ 1333(a)(1) and 1333(a)(2)(A) and then segued into the following formulation:

> [F]or adjacent state law to apply as surrogate federal law under OCSLA, three conditions are significant. (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 with Federal law.[262]

Subsequent panels considering whether to apply adjacent-state law have routinely quoted the *PLT* formulation as their analytical starting point,[263] and the formulation has come to be called "the *PLT* test."[264]

There are three things wrong with the *PLT* test: (a) *PLT*'s first element affirmatively misrepresents § 1333(a)(2)(A) by putting "temporarily attached" structures within its coverage. (b) *PLT*'s second element elides the fact that § 1333(a)(2)(A) precludes the application of adjacent-state federal law only when it is "inconsistent with . . . other Federal laws." Federal maritime law and adjacent-state surrogate federal law might both apply in a case in which there is no inconsistency between the two. (c) *PLT*'s third element overlaps its second in a confusingly inaccurate way, implying on the one hand that federal maritime law may not have to be inconsistent with adjacent-state law in order to oust it and on the other hand that federal maritime law may not constitute "other Federal laws" for § 1333(a)(2)(A) purposes.

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[259]The *Houston Oil* panel, supra note 258, said that there should be admiralty jurisdiction in the case before it but felt bound to follow Sohyde Drilling & Marine Co. v. Coastal Gas Prod. Co., 744 F. 2d 1132 (5th Cir. 1981), a similar property damage case involving a movable drilling rig in an inland Louisiana waterway. See 827 F.2d at 1053 ('stating that "we are constrained to apply nonmaritime principles as a consequence of . . . *Sohyde*"). If the *Houston Oil* panel had understood that rejecting admiralty jurisdiction in OCS movable rig cases puts them in a substantive law void—whereas the same holding inshore does not—it could have distinguished *Sohyde*, which it clearly wanted to do.

[260]The *Domingue* and *Houston Oil* panels "cured" their mistaken applications of admiralty jurisdictional principles by making other mistakes. *Domingue* ignored § 1333(a)(1)'s "exclusive Federal jurisdiction" provision and applied state law of its own force. *Houston Oil* ignored § 1333(a)(2)(A)'s restriction to "artificial islands and fixed structures" and applied state law as surrogate federal law.

[261]895 F.2d 1043 (5th Cir. 1990).

[262]Id. at 1047.

[263]See supra note 227.

[264]Hodgen v. Forest Oil Corp., 87 F.3d 1512, 1525 (5th Cir. 1996).

The *PLT* panel was working with a good idea: An orderly step-by-step process for determining the applicability of adjacent-state law in OCS cases would be quite useful. But the *PLT* implementation of that idea falsifies both OCSLA's language and the Supreme Court's construction of OCSLA in *Rodrigue*. For such a step-by-step formulation to be faithful to OCSLA and *Rodrigue*, it would need to proceed as follows:

- Does the controversy fall within the coverage of § 1333(a)(2)(A)? If not, stop there. Adjacent-state law cannot apply. This question narrows the field of debatable cases by taking state law out of play in litigation confined to events on temporarily-attached apparatus.
- Does the case also fall within admiralty jurisdiction? If not, the adjacent-state law should apply unless it is inconsistent with a federal statute or administrative regulation.[265]
- If the case falls within admiralty jurisdiction, federal maritime law is applicable. Is federal maritime law inconsistent with the adjacent-state law under consideration? If so, apply the federal maritime law to the exclusion of the adjacent-state law. If not, apply them both.

3. The Davis test for admiralty contract jurisdiction is obsolete

The OCS oil patch is latticed with contracts and subcontracts. Litigation arising from injuries to OCS workers ordinarily entails claims for contractual indemnity among the putative tortfeasors. Whether a contract calling for indemnity is maritime or not is a recurrently dispositive question. "[I]f the contract is a maritime contract, federal maritime law applies of its own force, and state law does not apply."[266] If the contract calling for indemnity is not a maritime contract, the governing law will be adjacent-state law made surrogate federal law by OCSLA § 1333(a)(2)(A). Very often the applicable adjacent-state law will be that of Texas or Louisiana.

Both Texas and Louisiana have anti-indemnity statutes that will invalidate most indemnity contracts.[267] Federal maritime law, on the other hand, shows no hostility to indemnity agreements:

> Maritime law generally enforces express contractual indemnity agreements. In addition, agreements to indemnify a party for its own negligence do not

[265]See, e.g., Shell Offshore, Inc. v. Kirby Exploration Co., 909 F.2d 811, 815 (5th Cir. 1990) (holding that Louisiana property law could not apply because it conflicted with "[f]ederal regulations prohibit[ing] the owner of [an OCS platform] from abandoning the platform").

[266]Demette v. Falcon Drilling Co., 280 F.3d 492, 497 (5th Cir. 2002), citing Hodgen v. Forest Oil Corp., 87 F.3d 1512, 1526 (5th Cir. 1996).

[267]Tex. Civ. Prac. & Rem. Code §§ 127.001-127.008 (Vernon 2001); La. R.S. 9:2780 (2007).

> violate any fundamental policy of maritime law. The only requirement is that the agreement be clearly expressed in unequivocal terms.[268]

Therefore, determining whether the indemnity contract is maritime or not is very often the dispositive issue.

The Fifth Circuit regularly complains about how difficult it is to tell whether an OCS indemnity contract is maritime.[269] In *Davis & Sons, Inc. v. Gulf Oil Corp.*[270] Judge Rubin made a heroic effort to synthesize the circuit's jurisprudence into something that made sense, stating:

> The attempt to determine whether a contract, particularly one linked to offshore oil and gas production, is governed by state or maritime law has led to much confusion. . . . . While we can discern no single mode of analysis in the many cases addressing this subject, they do appear to be based on a fairly consistent underlying approach, which we now articulate.[271]

Judge Rubin then set forth his proposed synthesis, which turned out to be fairly elaborate. In the following quotation, the subsection signals have been supplied for ease of reference.

> [A]—If . . . the contract consists of two parts, a blanket contract followed by later work orders, the two must be interpreted together in evaluating whether maritime or land law is applicable to the interpretation and enforcement of the contract's provisions. The blanket contract is not of itself complete and calls for no specific work. The actual contract between the parties therefore consists of the blanket agreement as modified by the later work order.[272]
>
> [B]—A contract may contain both maritime and non-maritime obligations . . . . If separable maritime obligations are imposed . . . , these are maritime obligations that can be separately enforced in admiralty without prejudice to the rest, hence subject to maritime law. . . . .[273]
>
> [C]—Whether the blanket agreement and work order, read together, do or do not constitute a maritime contract depends, as does the characterization of any other

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[268]Julia M. Adams and Karen K. Milhollin, *Indemnity on the Outer Continental Shelf—A Practical Primer*, 27 TUL. MAR. L.J. 43, 74 (2002) (citing Hardy v. Gulf Oil Corp., 949 F.2d 826, 834 (5th Cir. 1992), Corbitt v. Diamond M. Drilling Co., 654 F.2d 527, 540 (5th Cir. 1986), and Giacona v. Marubeni Oceano (Panama) Corp., 623 F.Supp. 1560, 1568 (S.D. Tex. 1985)). See also Orduna S.A. v. Zen-Noh Grain Co., 913 F.2d 1149, 1153 (5th Cir. 1990); Thurmond v. Delta Well Survey, 836 F.2d 952, 952 (5th Cir. 1988); Theriot v. Bay Drilling Corp., 783 F.2d 527, 538-39 (5th Cir. 1986); Seal Offshore, Inc. v. American Standard, Inc., 736 F.2d 1078, 1080 (5th Cir. 1984).

[269]See, e.g., Hodgen v. Forest Oil Corp., 87 F.3d 1512, 1523 n. 8 (5th Cir. 1996) (stating that "[w]e have on previous occasion expressed our frustration with the inconsistency of our case law in this general area" and citing four cases as examples).

[270]919 F.2d 313 (5th Cir. 1990).

[271]Id. at 315.

[272]Id.

[273]Id. at 315-16.

> contract, on the nature and character of the contract, rather than on its place of execution or performance. A contract relating to a ship in its use as such, or to commerce or navigation on navigable waters, or to transportation by sea or to maritime employment is subject to maritime law. What constitutes maritime character is not determinable by rubric . . . . The Supreme Court has resorted to the observation that a contract is maritime if it has a genuinely salty flavor.[274]
>
> [D]—Determination of the nature of a contract depends in part on historical treatment in the jurisprudence and in part on a fact-specific inquiry. We consider six factors in characterizing the contract: (1) What does the specific work order in effect at the time of injury provide? (2) What work did the crew assigned under the work order actually do? (3) Was the crew assigned to work aboard a vessel in navigable waters? (4) To what extent did the work being done relate to the mission of that vessel? (6) What work was the injured worker actually doing at the time of injury?[275]

All of the Fifth Circuit's post-*Davis* cases have tried to use the foregoing approach. But the judges have not been fond of it,[276] and they continue to complain that there is no really good test for determining whether an OCS contract is maritime.[277] Indeed, *Davis* has not worn well. Part A of the *Davis* approach is not controversial, and it continues to be a helpful beginning point. But the rest of *Davis* needs to be forgotten. Part B rests on admiralty's ancient "mixed contracts" doctrine;[278] the Supreme Court's new decision in *Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd.* seems to have repudiated that entire body of jurisprudence.[279] Part C of *Davis* contributes nothing except a realistically pessimistic note.

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[274]Id. at 316 (citations and internal quotation marks omitted).

[275]Id. (citations and internal quotation marks omitted).

[276]See, e.g., Smith v. Penrod Drilling Corp., 906 F.2d 456, 460 (5th Cir. 1992) (stating that "[a]pplication of [the *Davis*] factors to the instant case is unenlightening").

[277]See, e.g., Hoda v. Rowan Companies, 419 F.3d 379, 380 (5th Cir. 2005) (panel opinion by Judge Jones, stating: "This appeal requires us to sort once more through the authorities distinguishing maritime and nonmaritime contracts in the offshore exploration and production industry. As is typical, the final result turns on a minute parsing of the facts. Whether this is the soundest jurisprudential approach may be doubted, inasmuch as it creates uncertainty, spawns litigation, and hinders the rational calculation of costs and risks by companies participating in this industry.").

[278]The heart of the mixed contracts doctrine was that admiralty contract jurisdiction "is limited to contracts, claims, and services purely maritime." Rea v. The Eclipse, 135 U.S. 599, 608 (1890) (emphasis supplied). "Two exceptions to the 'wholly maritime' requirement [were] well established. One [was] that if the maritime and non-maritime elements are separable, the admiralty court will exercise jurisdiction over the maritime portion. The other [was] that if the non-maritime element of the contract is incidental, the court will exercise admiralty jurisdiction over the entire claim." DAVID W. ROBERTSON, STEVEN F. FRIEDELL, AND MICHAEL F. STURLEY, ADMIRALTY AND MARITIME LAW IN THE UNITED STATES 31 (2001).

[279]543 U.S. 14, 26-27 (2004) (disapproving mixed-contracts decisions from the Second, Fifth, and Federal Circuits). See David W. Robertson and Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 30 TUL. MAR. L.J. 195, 206 (2006) (stating that "with little explanation or analysis, the [*Kirby*] Court simply rejected the established mixed contracts doctrine").

Part D of *Davis* is the gist of it, and both subparts of Part D are flawed. The "historical treatment" reference does no more than remind courts and counsel to look for close analogies in the jurisprudence. This is what courts must always do when there is no clear governing general rule or principle. The six factors are too pointillistic: they have led Fifth Circuit panels down such odd lines of thought as "whether drilling mud services are more akin to wireline work [which has sometimes been viewed as quintessentially non-maritime] or to casing services [which can be maritime if done on a vessel-type drilling rig.]"[280]

It may be a stretch to claim that the Supreme Court's new *Kirby* decision disapproves the *Davis* approach, but *Kirby* does present the Fifth Circuit with an opportunity to abandon *Davis*. In the course of determining that a contract for the transportation of goods from Australia to Huntsville, Alabama—a contract contemplating sea shipment from Australia to Savannah, Georgia, and rail shipment from Savannah to Huntsville—was maritime in its entirety, the *Kirby* Court made two points that combine to justify jettisoning *Davis*. First (as we saw just above),[281] *Kirby* seems to do away with the entire mixed contracts doctrine upon which a key step in the *Davis* analysis rests. Second, *Kirby* arguably simplifies admiralty law's approach to determining whether contracts are maritime in such a way as to obviate the necessity for painstakingly pointillistic approaches like *Davis*'s. These two points are elaborated in subsections *a* and *b* just below. Subsection *c* then sets forth a proposed post-*Kirby* test for determining whether an OCS contract is maritime.[282]

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[280]Fontenot v. Southwestern Offshore Corp., 771 So.2d 679, 684 (La. App. 3d Cir.), writ denied, 773 So.2d 144 (La. 2000) (describing an argument that the parties to the case had gleaned from Fifth Circuit jurisprudence).

[281]See supra note 279.

[282]The district court in Alleman v. Omni Energy Services Corp., 434 F. Supp.2d 405, 411 (E.D. La. 2006), predicted that the Fifth Circuit will not look to *Kirby* for help, giving three reasons for its prediction: "First, [*Kirby*] did not purport to change existing law. . . . . Second, the multi-factor *Davis & Sons* inquiry is designed to determine the nature of the contract in a manner consistent with the mandate of . . . [*Kirby*] that courts focus on the overall character of the contract, rather than on discrete factors [such] as the place of the contract's formation or performance. . . . . Finally, the Fifth Circuit has applied the *Davis & Sons* test on at least one occasion since [*Kirby*] was decided. See Hoda v. Rowan Cos., 5129 F.3d 379, 381 (5th Cir. 2005) (considering *Davis & Sons* factors, but not discussing [*Kirby*)." 434 F. Supp. 2d at 411. Each of the *Alleman* court's arguments is answerable: (a) The *Kirby* opinion may not proclaim itself as changing the law, but it demonstrably does so, particularly by jettisoning of the mixed contracts doctrine. (b) The multiple factors of *Davis* do indeed seek to determine a contract's "overall character," but they fail, as many Fifth Circuit panels have noted. (c) *Hoda* does not mention *Kirby*, but it does deplore *Davis*. See 419 F.3d at 380 (stating that the circuit's contracts-jurisdiction jurisprudence "creates uncertainty, spawns litigation, and hinders the rational calculation of costs and risks by companies participating in [the offshore oil and gas] industry").

a. Kirby undermines the "mixed contracts" foundation of Davis

Part B of the *Davis* panel's attempted synthesis of the Fifth Circuit's jurisprudence on the maritime nature *vel non* of OCS contracts incorporates the mixed contracts doctrine.[283] Post-*Davis* panels have continued to treat that doctrine as of central importance.[284] But now the Supreme Court's *Kirby* decision has seemingly repudiated the mixed contracts doctrine.[285] The *Kirby* Court determined that an intermodal shipment-of-goods contract contemplating sea and land legs was maritime in its entirety. Under mixed-contracts decisions from the Second and Fifth, and Federal Circuits, the contract would not have been maritime. The *Kirby* Court disapproved those decisions,[286] which rested on the same mixed-contracts jurisprudence that Judge Rubin relied on in *Davis*.[287]

b. Kirby simplifies the approach to determining admiralty contracts jurisdiction

The mixed-contracts doctrine had a perceived constitutional restriction at its heart. Learned Hand expressed the point this way:

> A contract both maritime and non-maritime is ordinarily indivisible, so that the rights of the parties cannot be adjusted separately, those maritime in the admiralty, and the rest elsewhere. Admiralty must refuse to assume any jurisdiction over it at all, because it must either ignore the principles of the law of contract, *or extend its powers beyond their constitutional scope*.[288]

The unanimous Supreme Court in *Kirby* took a conspicuously more robust view of admiralty's constitutional reach. The Court's first sentence set the tone: "This is a maritime case about a train wreck."[289] The next step was to

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[283]*Davis*, 919 F.2d at 315-16 & nn. 7-8, cites Compagnie Francaise De Navigation A Vapeur v. Bonassse, 19 F.2d 777, 779 (2d Cir. 1927), for a classic statement of the mixed contracts doctrine and three district court decisions, including Hale v. Co-Mar Offshore Corp., 588 F. Supp. 1212, 1217 (W.D. La. 1984), for the applicability of the mixed contracts doctrine in the OCS context. See also Thurmond v. Delta Well Surveyors, 836 F.2d 952, 955 (5th Cir. 1988) (citing Laredo Offshore Constructors, Inc. v. Hunt Oil Co., 754 F.2d 1223, 1231 (5th Cir. 1985), for the importance of the mixed contracts doctrine in the Fifth Circuit's OCS contracts-jurisdiction jurisprudence).

[284]See, e.g., Hollier v. Union Texas Petroleum Corp., 972 F.2d 662, 664 (5th Cir. 1992) ("we apply maritime law when an injury occurs during the performance of a maritime obligation under a mixed maritime/non-maritime contract").

[285]See supra note 279. See also Folksamerica Reinsurance Co. v. Clean Water of New York, Inc., 413 F.3d 307, 315 (2d Cir. 2005) (indicating that *Kirby* treatment of the mixed contracts doctrine is not confined to the intermodal transportation contracts context but instead "suggests a global principle" whereby the determinative inquiry is whether the principal objective of the contract is maritime commerce).

[286]See *Kirby*, 5443 U.S. at 26-27 (disapproving Hartford Fire Ins. Co. v. Orient Overseas Container Lines, 230 F.3d 549, 555-56 (2d Cir. 2000); Sea-Land Serv., Inc. v. Danzig, 211 F.3d 1373, 1378 (Fed. Cir. 2000); and Kuehne & Nagel (AG & Co.) v. Geosource, Inc., 874 F.2d 283, 290 (5th Cir. 1989).

[287]See *Sea-Land*, supra note 286, 211 F.3d at 1378-79 (citing *Compagnie Francaise*, supra note 283); *Kuehne & Nagel*, supra note 286, 874 F.3d at 290 (citing *Hale*, supra note 283).

[288]*Compagnie Francaise*, supra note 283, 19 F.2d at 779 (emphasis supplied).

[289]543 U.S. at 18.

proclaim: "Our authority to make decisional law for the interpretation of maritime contracts stems from the Constitution's grant of admiralty jurisdiction to federal courts."[290] The final step was to set forth a broadened approach to determining which contracts are maritime:

> Conceptually, so long as a bill of lading [a shipment-of-good contract] requires substantial carriage of good by sea, its purpose is to effectuate maritime commerce—and thus it is a maritime contract. Its character as a maritime contract is not defeated simply because it also provides for some land [non-maritime] carriage.[291]

As the Second Circuit has noted, *Kirby*'s analysis of admiralty's contracts jurisdiction cannot sensibly be confined to the context of intermodal (sea and land) shipping contracts but instead "suggests a global principle."[292] From that point of view, the Kirby Court's key language can be taken to mean this:

> So long as a contract's substantial purpose is to effectuate maritime commerce, it is a maritime contract. Its character as a maritime contract is not defeated simply because it also provides for some nonmaritime obligations.[293]

c. A proposed post-Kirby replacement for Davis

The legal doctrine articulated in *Davis* is too elaborate and too innately flexible to provide full resolving power; much is left to the judicial instinct as to whether the particular contract at stake "has a 'genuinely salty flavor.'"[294] Careful study of the *results* of the Fifth Circuit's post-*Davis* cases shows that the judges' instincts are aligned with the sensible proposition put forward two decades ago in *Theriot v. Bay Drilling Corp.*: "Oil and gas drilling on navigable waters aboard a vessel is recognized to be maritime commerce."[295] The *Theriot* proposition can readily be combined with the Supreme Court's analysis in *Kirby* to yield the following test for whether an OCS contract is maritime:

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[290]Id. at 23.

[291]Id. at 27.

[292]*Folksamerica*, supra note 285, 413 F.3d at 315.

[293]As the text indicates, this is a *Folksamerica*-inspired paraphrase of the *Kirby* opinion's key passage.

[294]*Davis*, 919 F.2d at 316 (quoting Kossick v. United Fruit Co., 365 U.S. 731, 742 (1961).

[295]783 F.2d 527, 438 (5th Cir. 1986). *Theriot* was criticized by the panel in Union Texas Petroleum Corp. v. PLT Engineering, Inc., 895 F.2d 1043, 1049 (5th Cir. 1990). But a later panel in Lewis v. Glendel Drilling Co., 898 F.2d 1083, 1086 (5th Cir. 1990), deemed the criticism irrelevant, instead following *Theriot* and pointing out that *Theriot* remains good law. *Lewis* emphasizes the *Theriot* proposition, stating: "Since at least as early as 1970, our authorities have identified contracts for offshore drilling and mineral operations involving the use of a 'vessel' as maritime in nature." Id. See also Demette v. Falcon Drilling Co., 280 F.3d 492, 501 n. 36 (5th Cir. 2002) ("Contracts involving vessels tend to be deemed maritime.").

> So long as a contract's substantial purpose is to effectuate oil or gas drilling on navigable waters aboard a vessel, it is a maritime contract. Its character as a maritime contract is not defeated simply because it also provides for obligations that are not related to the use of a vessel.[296]

With one exception, the results of Fifth Circuit's post-*Davis* cases indicate that this proposed formulation describes the judges' actual thinking.[297] The exception is simply an outlier, and it has been frequently criticized.[298]

d. Shortchanging the seventh amendment

OCSLA § 1349(b)(1) grants federal district courts subject matter jurisdiction over a broad range of "cases and controversies arising out of, or in connection with . . . any operation conducted on the [OCS] which involves exploration, development, or production of the minerals, of the subsoil and seabed of the [OCS], or which involves rights to such minerals . . . ." Many cases falling within §1349(b)(1)'s coverage will also fall within admiralty jurisdiction. In a case covered by both admiralty jurisdiction and § 1349(b)(1), the plaintiff can choose the basis for the federal court's subject matter jurisdiction.

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[296]This proposed test combines the language of *Kirby*, *Folksamerica* (supra note 285), and *Theriot*. Calling for focus on the contract's "substantial" purpose (*Kirby*, 543 U.S. at 24) is a more candid version of a frequently-quoted shibboleth from 1 BENEDICT ON ADMIRALTY § 183 (7th ed. 1985): "in order that [maritime] character should attach, there must be a direct and proximate juridical link between the contract and the operation of a ship." In legal parlance, the words "direct," "proximate," and "juridical" are all infamously vague; stringing them together produces gobbledygook.

[297]In the following seven cases, the panels deemed contracts maritime because they included obligations significantly related to the use of vessel-type drilling rigs: Hoda v. Rowan Companies, Inc., 419 F.3d 379 (5th Cir. 2005); Diamond Offshore Co. v. A&B Builders, Inc., 302 F.3d 531 (5th Cir. 2002); Demette v. Falcon Drilling Co., 280 F.3d 492 (5th Cir. 2002); Dupre v. Penrod Drilling Corp., 993 F.2d 474 (5th Cir. 1993); Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115 (5th Cir. 1992); Dupont v. Sandefer Oil & Gas, Inc., 963 F.2d 60 (5th Cir. 1992); Smith v. Penrod Drilling Corp., 960 F.2d 456 (5th Cir. 1992). In the following two cases, the panels deemed contracts nonmaritime because they did not involve in any significant way the use of a vessel or vessel-type drilling rig: Hodgen v. Forest Oil Corp., 87 F.3d 1512 (5th Cir. 1996); Hollier v. Union Texas Petroleum Corp., 972 F.2d 662 (5th Cir. 1992).

[298]Domingue v. Ocean Drilling and Exp. Co., 923 F.2d 393 (5th Cir. 1991), cert. denied, 502 U.S. 1033 (1992), held that a contract for wireline services on a jack-up drilling rig was nonmaritime. The key to the *Domingue* panel's reasoning seems to have been the observation that "wireline services are peculiar to the oil and gas industry and, viewed apart from the circumstances under which they are performed, are distinctly non-maritime in nature." Id. at 396. The panel did not explain why it made sense to ignore "the circumstance[]" that the contract in suit called for performance on a vessel. For judicial criticism of *Domingue*, see Demette v. Falcon Drilling Co., 280 F.3d 492, 499 (5th Cir. 2002); Hodgen v. Forest Oil Corp., 87 F.3d 1512, 1524-25 (5th Cir. 1996); Wagner v. McDermott, Inc., 899 F. Supp. 1551, 1555-56 (W.D. La. 1994), aff'd, 79 F.3d 20 (5th Cir. 1996).

If the plaintiff uses Fed. R. Civ. P. 9(h) to invoke admiralty jurisdiction,[299] the case is not a "suit[] at common law" for Seventh Amendment purposes and will be tried to the bench.[300] In all other cases in which legal relief (e.g., damages) is sought, both parties have the right provided by the Seventh Amendment (and by Fed. R. Civ. P. 38(a)) to demand a jury trial.[301]

In a case falling under both § 1349(b)(1) and admiralty jurisdiction, the question of whether the governing substantive law will be federal maritime law or adjacent-state law can frequently be complex or subtle enough to defy ready determination at the threshold of the case. The court may need to hear evidence before determining whether there is an applicable federal maritime norm that is inconsistent with adjacent-state law. Therefore, it cannot make sense to make the existence of a right to jury trial dependent upon the ultimate question of the source of the governing substantive law. Yet at least one Fifth Circuit panel and several district courts have indicated that there is no right to jury trial if the governing substantive law turns out to be federal maritime law.[302] As was pointed out in Section II-C-14 above, these courts were demonstrably wrong. The necessary correction is simply to understand that nothing in federal maritime law speaks against jury trial; bench trial is a procedural right that is solely dependent on Fed. R. Civ. P. 9(h).[303]

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[299]Rule 9(h) provides: "A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c) [admiralty impleader], 38(e) [bench trial], 82 [venue], and the Supplemental Rules for Certain Admiralty and Maritime Claims [in rem actions, maritime attachment and garnishment, Limitation of Liability petitions]. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15 [amended and supplemental pleadings]. A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3) [admiralty interlocutory appeals]."

[300]See, e.g., Hails v. Atlantic Richfield Co., 595 F. Supp. 948 (W.D. La. 1984).

[301]See, e.g., Debellefeuille v. Vastar Offshore, Inc., 139 F. Supp. 2d 821 (S.D. Tex. 2001).

[302]Texaco Exploration and Production, Inc. v. AmClyde Engineered Products Co., 448 F. 3d 76, 771 (5th Cir. 2006) ("we must determine the applicable substantive law in order to address whether the denial of jury trial was reversible error"); Dozier v. Rowan Drilling Co., Inc., 397 F. Supp. 2d 837. 842 (S.D. Tex. 2005) ("Facially, the motions request rulings on Plaintiffs' right to amend and Plaintiffs' right to a jury trial, but the fundamental issue and true point of contention is whether this action is governed by maritime law or Louisiana law."); Solet v. CNG Producing Co., 908 F. Supp. 375,378 (E.D. La. 1995) (holding that a defendant not within admiralty jurisdiction had a jury-trial right but that two defendants covered by both admiralty and § 1349(b)(1) would have their cases tried to an advisory jury).

[303]Remember that Rule 9(h), supra note 299, provides for bench trial both when the plaintiff properly invokes admiralty jurisdiction and when admiralty is the only basis for federal-court jurisdiction.

e. Miscellaneous mistakes

1. Asserting that the § 1333(a)(2)(A) provision that "other Federal laws" oust inconsistent adjacent-state law refers only to federal statutory law.

A lengthy treatment of the OCS jurisprudence in AMERICAN LAW REPORTS (A.L.R.) repeatedly states that "the term 'federal law' in the section of OCSLA . . . providing that state laws apply to actions under OCSLA to the extent that they are not inconsistent with federal laws refers not to the federal common law but to federal statutory laws."[304] This statement is erroneous. As we saw above in Section II-C-6, the principal referent of the § 1333(a)(2)(A) term "other Federal laws" is the federal maritime law, which is predominantly nonstatutory.

The A.L.R. annotation based its statement on a number of district court decisions that do indeed say that the § 1333(a)(2)(A) term "other Federal laws" refers only to statutes.[305] All of these cases made the statement as a way of rejecting the applicability in OCS cases of a nonmaritime rule of federal common law said to derive from the Supreme Court's opinion in *United States v. Seckinger*.[306] *Seckinger* was a government contracts case, and it is often cited for the proposition that "under federal [common] law, a corporation may recover indemnity for its own negligence if the applicable contract expressly so provides."[307] If such a federal-law rule existed and applied in OCS cases, it would operate via OCSLA § 1333(a)(2)(A) to preclude the application of the Louisiana and Texas anti-indemnity statutes.[308] These district courts were right to reject the applicability of the asserted *Seckinger* rule, but their technique—trying to limit § 1333(a)(2)(A)'s reference to "other Federal laws" to statutes—was problematic.

The Fifth Circuit has neither endorsed nor directly repudiated the district courts' technique for rejecting the applicability of the asserted *Seckinger*

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[304]Donald T. Kramer, Annotation, *Construction and Application of § 4 of Outer Continental Shelf Lands Act of 1953 (43 U.S.C.A. § 1333), Relating to Laws Applicable to Subsoil and Seabed of Outer Continental Shelf and Artificial Islands and Fixed Structures Erected Thereon*, 163 A.L.R. FED. 1, 47 (2000). See also id. at 75 ("It seems well settled that the phrase 'other Federal laws' in 43 U.S.C.A. § 1333(a)(2)(A) refers not to federal common law, but instead only to federal statutory law.").

[305]Walter Oil & Gas Corp. v. NS Group, Inc., 867 F. Supp. 549, 553 (S.D. Tex. 1994); McCall v. Columbia Gas Development Corp., 635 F. Supp. 49, 51 n. 1 (W.D. La. 1986); Alexander v. Chevron USA, Inc., 623 F. Supp. 1462, 1464 n. 4 (W.D. La. 1985), aff'd on other grounds, 806 F.2d 526 (5th Cir. 1986); Hebert v. Kerr-McGee Corp., 618 F. Supp. 767, 769 (W.D. La. 1985); Frazier v. Columbia Gas Development Corp., 596 F. Supp. 429, 431 (W.D. La. 1984).

[306]397 U.S. 203 (1970).

[307]*Frazier*, supra note 305, 596 F. Supp. at 430.

[308]See supra Section III-C-3.

rule. But it has held that *Seckinger* does not establish a rule of federal law that has any applicability on the OCS.[309]

2. Overstating the rule nullifying choice-of-law contracts.

The panel in *Texaco Exploration and Production, Inc. v. AmClyde Engineered Products Co.* stated that "the parties' [contractual] choice of law will not trump the choice of laws scheme provided by Congress in OCSLA."[310] The statement is too broad. The true rule is the following:

> OCSLA is . . . a Congressionally mandated choice of law provision [sometimes] requiring that the substantive law of the adjacent state is to apply even in the presence of a choice of law provision in the contract to the contrary.[311]

When OCSLA calls for the application of federal maritime law, there is no restriction on choice-of-law contracts, because "[m]aritime law defers to a valid choice of law clause in a contract."[312] It is only when OCSLA calls for the application of adjacent-state law that choice of law contracts are trumped.

3. Suggesting that federal maritime law applies more broadly in state territorial waters than on the OCS.

Lewis v. Glendel Drilling Co. read the Fifth Circuit's OCS jurisprudence to require "applying maritime law to certain mineral exploration contracts when the drilling occurs in state territorial waters, as here, while state law governs precisely the same contractual relationship a few miles further [sic] offshore pursuant to the OCSLA."[313] This cannot be right.[314] As was explained above in Sections II-C-6 and II-C-7, state law cannot apply of its own force to events covered by OCSLA § 1333(a)(1), and state law cannot apply as surrogate federal law for events covered by § 1333(a)(1) but not by § 1333(a)(2)(A). Following out the implications of the *Lewis* suggestion in such a situation—e.g., a contractual dispute arising out of an injury on a jacked-up rig on the OCS—would sometimes put the matter in a substantive-law void, unreachable by maritime law via *Lewis*, unreachable by state

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[309]Doucet v. Gulf Oil Corp., 788 F.2d 250, 252 (5th Cir. 1986) (on rehearing); Matte v. Zapata Offshore Co., 784 F.2d 628, 630 (5th Cir. 1986).

[310]448 F.3d 760, 772 n. 8 (5th Cir. 2006).

[311]Union Texas Petroleum Corp. v. PLT Engineering, Inc., 895 F.2d 1043, 1050 (5th Cir. 1990).

[312]Julia M. Adams and Karen K. Milhollin, *Indemnity on the Outer Continental Shelf—A Practical Primer*, 27 TUL. MAR. L.J. 43, 68 (2002) (footnote omitted).

[313]898 F.2d 1083, 1087 (5th Cir. 1990).

[314]The *Lewis* court acknowledged that the proposition is "absurd" (id.) but said that it is nevertheless entailed in the circuit's "contradictory" OCS jurisprudence (id. at 1084).

law via the "exclusive Federal jurisdiction" provision in § 1333(a)(1), and unreachable by state law as surrogate federal law via the coverage limitations of § 1333(a)(2)(A).[315]

IV
A WISH LIST: THREE IMAGINED EN BANC DETERMINATIONS

A. Demette

Judge DeMoss's clarion call for en banc rehearing in *Demette v. Falcon Drilling Co.* went unheeded.[316] This was unfortunate, because the panel opinion in *Demette* is a source of several of the mistakes on which this article is focused, including the two most important ones.[317]

The issue in *Demette* was the frequently-litigated question of the validity of a contract obligating an OCS services contractor to indemnify an oil company for litigation costs and damages arising from an injury to an OCS worker. The panel's holding affirmed summary judgment upholding the contract's validity. The panel need not have written at length: It could simply have said that the virtually identical issue had already been adjudicated in *Campbell v. Sonat Offshore Drilling, Inc.*[318] But the panel did write at length, and its course of reasoning was misguided in important ways.

1. What the Demette panel said

The *Demette* panel began by making the overbroad claim that § 1333(a)(1) of OCSLA "creates a 'situs' requirement for the application of

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[315] As we have seen, Fifth Circuit panels "cure" the *Lewis* mistake by making the more important mistake of misreading § 1333(a)(2)(A) to have the same coverage as § 1333(a)(1).

[316] 280 F.3d 492, 518-19 (5th Cir. 2002) (DeMoss, J., dissenting), reh. and reh. en banc denied, 37 Fed. Appx. 93 (5th Cir. 2002) (table). The pertinent passage from Judge DeMoss's dissent is quoted supra note 16.

[317] These are limiting the coverage of 43 U.S.C. § 1333(b) to the situses listed in 43 U.S.C. § 1333(a)(1), and expanding the coverage of 43 U.S.C. § 1333(a)(2)(A) to include the temporarily-attached apparatus covered by 43 U.S.C. § 1333(a)(1).

[318] 979 F.2d 1115 (5th Cir. 1992). In *Campbell*, the oil company (UTP) contracted with Sonat for the use of Sonat's jack-up drilling rig and with Frank's for Frank's workers to perform casing services on the rig. A Frank's worker was hurt transferring from an auxiliary vessel to the jack-up rig and sued UTP and Sonat. The court held that Frank's was obligated under its contract with UTP to indemnify UTP and Sonat.

The situation in *Demette* was indistinguishable. The oil company (Unocal) contracted with Falcon for the use of Falcon's jack-up rig and with Frank's for Frank's workers to perform casing services on the rig. A Frank's worker was hurt on the rig and sued Falcon. Falcon impleaded Unocal. The court ultimately held that Frank's was obligated under its contract with Unocal to indemnify Unocal and Falcon.

other sections of the OCSLA."[319] It then went on for several pages in support of the obviously correct conclusion that a jacked-up rig falls within the coverage of § 1333(a)(1).[320] (In the course of this discussion, the panel made the misleading and unnecessary suggestion that pipelines are not "erected" on the seabed within the meaning of §§ 1333(a)(1) and 1333(a)(2)(A).[321])

The panel's next step was to assert that a jacked-up rig also falls within the coverage of § 1333(a)(2)(A), so that adjacent-state law might sometimes properly govern events upon and involving the rig.[322] As was demonstrated above in Section II-C-5, this was wrong. But the mistake did not lead the *Demette* panel into error, because it then held that the contract between the oil company and the services contractor was "a maritime contract, [so that] federal maritime law applies of its own force, and state law does not apply."[323] This statement—the heart of the case—was correct. The panel could have supported it simply by saying "this point was decided in *Campbell*." Instead, the *Demette* panel engaged in a longish treatment of the flawed *PLT* test before eventually getting around to mentioning that *Campbell* was dispositive.[324]

The *Demette* panel then turned to whether federal maritime law contains anything that would invalidate the indemnity contract in suit. In the course of concluding no, the panel focused on 33 U.S.C. §§ 905(b) and 905(c). Section 905(b) prohibits indemnity contracts between vessel operators and LHWCA employers (and by its terms would have invalidated the contract in suit), but §905(c) removes OCS reciprocal indemnity contracts from the § 905(b) prohibition.[325] The panel concluded that 43 U.S.C. § 1333(b) applied to the case and therefore made 33 U.S.C. § 905(c) applicable.[326] (This was the right answer, but the panel's reasoning included the seriously

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[319]280 F.3d at 496. Section II-C-4 supra challenges this claim.

[320]See id. at 496-99. Section II-C-3 supra shows that the panel was belaboring the obvious.

[321]Id. at 498 & n. 19. Section II-C-3 supra shows that this suggestion was wrong.

[322]See id. at 497 (asserting that §§ 1333(a)(1) and 1333(a)(2)(A) have identical coverages). This assertion is challenged in section II-C-5 supra.

[323]Id. at 497.

[324]See id. at 497-501& n. 35 (discussing *PLT* and eventually concluding by citing *Campbell* as "circuit precedent virtually compel[ling] the conclusion that this is a maritime contract."). The *PLT* test is criticized supra Section III-C-2.

[325]On June 12, 2001, the *Demette* panel handed down an original opinion that was reported at 253 F.3d 840 (5th Cir. 2001). In that opinion, it suggested that as a congressional directive that reciprocal indemnity agreements are valid, § 905(c) will automatically trump contradictory state law. Id. at 850 n. 52. On January 26, 2002, the panel withdrew its earlier opinion and substituted the one reported at 280 F. 3d 492 (5th Cir. 2002). This opinion deleted the broad claim about § 905(c) and substituted the more cautious statement that "section 905(c) removes the section 905(b) prohibition." 280 F. 3d at 503.

[326]See id. at 496-502.

mistaken assertion that § 1333(a)(1) "creates a 'situs' requirement for the application of . . . section[] 1333(b)."[327])

The final step was the only new law actually applied by the *Demette* panel: The services contractor argued that the injury in suit was covered by the LHWCA of its own force as well as by the OCSLA adoption of the LHWCA in 43 U.S.C. § 1333(b), and that 33 U.S.C. § 905(c) removes the § 905(b) prohibition only when the *only* basis for LHWCA coverage is 43 U.S.C. § 1333(b). In rejecting this argument,[328] the *Demette* panel stuck to the plain language of § 905(c), which says that the § 905(b) prohibition is inapplicable to "any reciprocal indemnity provision whereby the employer of a person entitled to receive benefits under this Act by virtue of [43 U.S.C. § 1333(b)] and the vessel agree to defend and indemnify the other." The *Demette* concluded that "by virtue of" does not mean "solely by virtue of."[329]

2. An imagined en banc rehearing opinion in Demette[330]

Here an OCS services contractor seeks to avoid the application of a contractual provision whereby it agreed to indemnify an oil company against damages and defense costs arising from injuries to the contractor's employees on a jacked-up rig on the OCS offshore Louisiana. The contractor argues that the contract is invalidated by the Louisiana Oil Field Indemnity Act. In the alternative, the contractor argues that the contract is invalidated by federal maritime law and specifically by 33 U.S.C. § 905(b).

The Louisiana statute cannot apply in this case. Under 43 U.S.C. § 1333(a)(1), there is "exclusive Federal jurisdiction" over cases arising from events on "all installations and other devices permanently or temporarily

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[327]Id. at 496.

[328]See Id. at 501-03.

[329]Id. at 502.

[330]It is worth noting that this imagined rehearing opinion bears no resemblance to the one Judge DeMoss wanted. Judge DeMoss's *Demette* dissent argued vigorously that a jacked-up rig should not be classed as a vessel but rather as a fixed platform (which would have taken the case out of federal maritime law and made the Louisiana Oil Field Indemnity Act applicable). See 280 F. 3d at 504-19. Probably Judge DeMoss's reform agenda is no longer feasible in light of the Supreme Court's decision in Stewart v. Dutra Const. Co., 543 U.S. 481 (2005). *Stewart* holds that 1 U.S.C. § 3 defines "vessel" for most maritime-law purposes. 1 U.S.C. § 3 provides that "the word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." The *Stewart* Court said this definition "sweeps broadly" (504 U.S. at 494) and includes even "a mud dredge in the quiet waters of a Potomac creek" (id. at 497). The International Association of Defense Contractors (IADC) appeared as amicus curiae in *Stewart* and urged adoption of the broad 1 U.S.C. § 3 definition as a way of stabilizing the vessel status of jacked-up rigs and similar OCS apparatus. See the IADC amicus brief at 2004 WL 1180643. Shortly after *Stewart* was handed down, IADC counsel published an article stating that the offshore drilling industry is pleased with *Stewart* and believes that it settles the vessel status of jacked-up and similar rigs. James Patrick Cooney, *The View from the Oil Patch*, 3 BENEDICT'S MARITIME Bulletin 122 (2d quarter 2005).

attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom." The jacked-up rig on which the events in suit occurred falls squarely within § 1333(a)(1)'s coverage. Section 1333(a)(1)'s provision for "exclusive Federal jurisdiction" precludes the application of state law. To the extent that it held to the contrary, *Domingue v. Ocean Drilling and Exploration Co.*[331] was wrong and is hereby overruled.

Nor can the Louisiana statute apply as surrogate federal law under 43 U.S.C. § 1333(a)(2)(A). This provision can have no applicability to a jacked-up rig or to any other apparatus that is only temporarily attached to the seabed; by its terms § 1333(a)(2)(A) is limited to "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon." The jacked-up rig in this case was neither an artificial island nor a fixed structure. To the extent that it implies that § 1333(a)(2)(A) can apply to temporarily-attached apparatus, *Union Texas Petroleum Corp. v. PLT Engineering, Inc.*[332] was wrong and it is hereby overruled.[333]

The OCS contractor's argument that federal maritime law invalidates the indemnity contract must also be rejected. Federal maritime law is generally hospitable to indemnity agreements, requiring only that they be plainly written. It is true that 33 U.S.C. § 905(b)—a special-purpose provision of federal maritime law—generally invalidates indemnity contracts between LHWCA employers and vessel operators. But in this circumstances of the present case the § 905(b) prohibition is countermanded by 33 U.S.C. § 905(c), which states in pertinent part:

> Nothing contained in [§905(b)] shall preclude the enforcement according to its terms of any reciprocal indemnity provision whereby the employer of a person entitled to receive benefits under [the LHWCA] by virtue of section 4 of the Outer Continental Shelf Lands Act [43 U.S.C. § 1333(b)] and the vessel [operator] agree to defend and indemnify the other for costs of defense and loss or liability for damages arising out of or resulting from death or bodily injury to their employees.

It is indisputable that the worker injury in this case fell within the coverage of 43 U.S.C. § 1333(b), which sweeps broadly:

> With respect to disability or death of an employee resulting from any injury occurring as a result of operations conducted on the outer Continental Shelf

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[331]923 F.2d 393 (5th Cir.), reh. and reh. en banc denied, 940 F.2d 117 (5th Cir. 1991), cert. denied, 502 U.S. 1033 (1992).

[332]895 F.2d 1043 (5th Cir. 1990).

[333]The pro tanto overruling of *PLT* would also entail pro tanto overruling of its progeny. See supra note 227.

> for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the [LHWCA].

In our *en banc* opinion in *Mills v. Director, OWCP* we read a geographical limitation into § 1333(b) by requiring that the injury occur "on an OCS platform or the waters above the OCS."[334] The injury in the present case occurred on a jacked-up rig (a vessel[335]) on the OCS and thus on OCS waters. Therefore, the injured worker in this case was entitled to LHWCA benefits "by virtue of" 43 U.S.C. § 1333(b). This in turn means that under the plain terms of 33 U.S.C. § 905(c), the prohibition of 33 U.S.C. § 905(b) is inapplicable.

B. Diamond

In *Diamond Offshore Co. v. A&B Builders, Inc.*[336] the panel sought diligently to follow the reasoning of the *Demette* panel and thereby fell into serious error. The contract between Diamond and A&B called for A&B to repair Diamond's semi-submersible drilling rig (the *Ocean Concorde*) located more than 100 miles offshore. The contract included reciprocal indemnity provisions. An A&B employee named McMillon was injured performing the repairs and sued Diamond in Texas state court. Diamond then sued A&B in federal court, seeking a declaratory judgment that A&B was obligated to defend and indemnify Diamond.[337] A&B countered that the contract was invalid under state law or in the alternative under 33 U.S.C. § 905(b). The trial court held that the contract was valid. The Fifth Circuit panel agreed on the state law point, reasoning that the vessel-repair contract was maritime, which precluded the operation of state law.

However, the Fifth Circuit was unable to affirm the trial court's determination that 33 U.S.C. § 905(c) saved the contract from the § 905(b) prohibition. As we saw in discussing *Demette* just above, § 905(c) negates the § 905(b) prohibition only when the injured worker was "entitled to receive benefits under [the LHWCA] by virtue of [43 U.S.C. § 1333(b)]." The Fifth Circuit panel in *Stewart* read *Demette* to mean that 43 U.S.C. § 1333(b)

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[334]877 F.2d 356, 362 (5th Cir. 1989) (en banc).

[335]See supra note 330.

[336]302 F.3d 531 (5th Cir. 2002).

[337]Diamond also sought breach of contract damages. The district court declined to reach this issue. Diamond Offshore Co. v. A&B Builders, Inc., 75 F. Supp. 2d 676 (S.D. Tex. 1999). The Fifth Circuit held that this was an abuse of discretion and remanded the case for treatment of the breach-of-contract damages issue. 302 F.3d at 538-40, 551.

would not apply unless the semi-submersible rig was attached to and erected on the seabed at the time of the injury. Because the record was not clear on that point, the case had to be remanded to the trial court to determine "whether, at the time of McMillon's alleged injury, the *Ocean Concorde* was 'temporarily attached to the seabed of the OCS' and 'erected on the seabed of the OCS' . . . "[338]

1. What the Diamond panel said

A&B's state-law arguments were correctly and readily rejected.[339] A&B's only serious argument was that 33 U.S.C. § 905(b)—which forbids indemnity contracts between vessel operators and employers of LHWCA-covered workers—invalidated its agreement to indemnify Diamond. There was little doubt that § 905(b) applied: McMillon's injury satisfied the LHWCA's situs and status requirements, he was not a member of the *Ocean Concorde*'s crew, and Diamond and A&B were thus LHWCA vessel operator and employer respectively.

A&B's problem was that 33 U.S.C. § 905(c) establishes an exception to the § 905(b) prohibition for injuries covered by 43 U.S.C. § 1333(b). A&B had two arguments for escaping §905(c). As the *Diamond* panel correctly and concisely explained, the first of these was doomed by *Demette*:

> A&B argues that the § 905(c) exception does not override § 905(b) because McMillon is directly covered by the LHWCA and thereby was not entitled to receive LHWCA benefits *exclusively* "by virtue of" the OCSLA. As A&B itself recognizes, this Court previously rejected this precise argument in *Demette* . . . . In Demette, we concluded that the plain meaning of "by virtue of" in § 905(c) "does not imply exclusivity." 280 F.3d at 502.[340]

A&B's second argument for escaping § 905(c) depended on the *Demette* dictum that 43 U.S.C. § 1333(a)(1) (which covers only the subsoil and seabed of the OCS and apparatus permanently or temporarily attached thereto) "creates a 'situs' requirement for the application of other sections of the OCSLA, including section[] 1333(b)."[341] Diamond argued that the *Demette* dictum was wrong because of the Fifth Circuit's *en banc* decision in *Mills v. Director, OWCP* that "LHWCA coverage as extended under § 1333(b)

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[338]Id. at 546 (quoting *Demette*, 280 F.3d at 497).

[339]"Contracts for vessel repair services are traditionally treated as maritime." 302 F.3d at 549. "[T]herefore maritime law applies of its own force. Consequently, state law cannot apply . . . ." Id. at 550.

[340]Id. at 541 n. 9.

[341]*Demette*, 280 F.3d at 496.

applies to employees who . . . suffer injury or death on an OCS platform *or the waters above the OCS*."[342]

The *Diamond* panel rejected Diamond's reliance on *Mills* and instead elected to follow the *Demette* dictum. This was where the *Diamond* panel went seriously astray. Its explanation of its reasoning began as follows:

> Since *Demette* addressed an injury occurring on a drilling rig that was attached to the seabed of the OCS, as opposed to floating on the water above the OCS, Diamond would have us read the *Demette* situs test as dicta. Diamond claims that construing *Demette* otherwise would run afoul of our well-established rule that a panel of this Court cannot overrule a previous *en banc* decision. This argument is unavailing. *Demette* clearly articulated the rule regarding what qualifies as an OCSLA situs.[343] We conclude that the *Demette* situs test is binding and that it does not conflict with our prior decision in *Mills*. *Mills* stated that § 1333(b) applies to workers who "suffer injury or death on an OCS platform or the waters above the OCS." 877 F.2d at 362. As we previously explained in *Demette*, however, *Mills* did not purport to specify the precise contours of OCSLA's situs requirement.[344]

The *Diamond* panel sought to justify its assertion that *Mills* did "not purport to specify the precise contours" of § 1333(b) by saying that the only issue in *Mills* was "whether a land-based welder injured on Louisiana soil qualified for LHWCA benefits under OCSLA."[345] With respect, the *Diamond* panel seemed determined to ignore the plain language whereby the en banc court in *Mills* did indeed specify the coverage of § 1333(b).

The *Diamond* panel then explained at some length that the record before it did not enable it to tell whether McMillon's injury fell under § 1333(b) (as delimited by § 1333(a)(1)):

> Diamond has failed to put forth evidence that the *Ocean Concorde* was "attached" to and "erected" on the seabed of the OCS . . . . * * * [T]he summary judgment evidence does not show that McMillon's alleged injury occurred while the *Ocean Concorde* was physically "attached" to the ocean floor. After the *Ocean Concorde* was towed to its ultimate location, it would then be anchored to the seabed. The evidence does not indicate whether McMillon was welding inside a pollution pan during towing or while the *Ocean Concorde* was attached to the seabed by its anchors. * * * Since there is no evidence that the *Ocean Concorde* was connected to the ocean floor by its anchors or through its drilling mechanisms, and there is no evidence of any other contact with the seabed, the . . . requirement that the *Ocean Concorde*

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[342]877 F.3d 356, 362 (5th Cir. 1989) (en banc) (emphasis supplied).

[343]By "an OCSLA situs" the *Diamond* panel meant a 43 U.S.C. § 1333(b) situs. Its mistake was in following the *Demette* dictum that § 1333(b) situs is tied to § 1333(a)(1) situs (which is restricted to apparatus that is "attached" to the seabed).

[344]306 F.3d at 543.

[345]Id.

> was "erected" on the OCS at the time of McMillon's alleged injury is clearly not satisfied.[346]

The panel remanded the case to the district court for further evidence on the "attached/erected" issue, stating:

> *Demette* articulated a significantly different rule than had been used here by the district court in determining whether McMillon's alleged injury occurred on [a § 1333(b)] situs. [The trial judge followed the en banc decision in *Mills*. See 75 F. Supp. 2d at 683. The *Demette* dictum rejected *Mills*.] Neither the district court nor the parties, in developing the summary judgment record . . . had the benefit of our opinion in *Demette*. We therefore reverse the district court's grant of partial summary judgment on the issue of the validity of the indemnity provision and remand with directions to allow Diamond to put forth additional summary judgment proof . . . . This should require only a brief supplement to the record detailing the contact, if any, that the *Ocean Concorde* had with the ocean floor at the time of McMillon's alleged injury, such as its anchors, drilling mechanisms, and flooded columns, displacement hulls, or caissons, that connected the rig to the seabed and supported the drilling platform. . . . . As this Court has already concluded that the *Ocean Concorde* was a device on the OCS for the purpose of exploring for oil and gas, the district court will need to address [only] whether, at the time of McMillon's alleged injury, the *Ocean Concorde* was "temporarily attached to the seabed of the OCS and "erected on the seabed of the OCS" and therefore falls into the second category of OCSLA situses. *Demette*, 280 F. 3d at 497.[347]

The *Diamond* panel's rule—that 43 U.S.C. § 1333(b) coverage (and hence the 33 U.S.C. § 905(c) exception) would not kick in until the *Ocean Concorde* had completed the tow to a drilling location and been attached to the seabed—means that the indemnity agreement would be invalid under 33 U.S.C. §905(b) during the tow and valid after the attachment. It would be hard to imagine a rule with more potential for "upset[ting] stable commercial expectations."[348]

2. An imagined en banc rehearing opinion in Diamond.

The operator of a semisubmersible drilling rig (the *Ocean Concorde*) located about 100 miles offshore engaged a contractor to perform repairs aboard the vessel. In their contract, the operator and the contractor agreed to indemnify one another against damages and defense costs resulting form injuries to their respective employees. One of the repair contractor's

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[346]Id. at 544-45.

[347]Id. at 546.

[348]Lewis v. Glendel Drilling Co., 898 F.2d 1083, 1087 (5th Cir. 1990) (Jones, J., for the court, stating that "[w]e should not lightly 'straighten out' the formal logic of the law where to do so would upset stable commercial expectations.").

employees (McMillon) was hurt while working aboard the vessel. McMillon sued the vessel operator in state court. When the contractor did not honor its promise to defend and indemnify the operator, the operator sued the contractor in federal district court seeking a declaratory judgment that the indemnity contract was valid and enforceable. The district court upheld the contract's validity.

The record does not disclose whether, at the time of McMillon's injury, the *Ocean Concorde* was under tow or attached at a drilling location. However, this is not a necessary fact; the district court's conclusion was correct in either case.

The contractor's argument that state law (either of its own force or as surrogate federal law by way of 43 U.S.C. § 1333(a)(2)(A)) invalidates the contract can be quickly disposed of. Vessel repair contracts are traditional maritime contracts. Maritime contracts are governed by federal maritime law, not by state law. (If the *Ocean Concorde* was attached at a drilling location at the time of the worker's injury, the provision for "exclusive Federal jurisdiction" in 43 U.S.C. § 1333(a)(1) provides an additional justification for ousting state law from this case.)

Nor can state law come into this case by way of 43 U.S.C. § 1333(a)(2)(A). That provision's coverage is confined to "the subsoil and seabed of the [OCS] and artificial islands and fixed structures erected thereon." Regardless of whether it was under tow or attached at a drilling location, the *Ocean Concorde*, like other movable drilling rigs, was clearly neither an artificial island nor a fixed structure.

The contractor's argument that 33 U.S.C. § 905(b) outlaws the indemnity provision in its contract with the *Ocean Concorde*'s operator must also be rejected. By the plain terms of 33 U.S.C. § 905(c), the § 905(b) prohibition is inapplicable to situations in which the injured worker was "entitled to receive [LHWCA] benefits by virtue of [43 U.S.C. § 1333(b)]." The panel in *Demette v. Falcon Drilling Co.* correctly held that §905(c) applies regardless of whether the injury fell within the coverage of LHWCA of its own force.[349]

The only question is therefore whether McMillon's injury fell within the coverage of 43 U.S.C. § 1333(b). Plainly it did. As we held in our en banc decision in *Mills v. Director, OWCP,* "LHWCA coverage as extended under § 1333(b) applies to employees who . . . suffer injury or death on an OCS platform *or the waters above the OCS*."[350] Regardless of whether the *Ocean Concorde* was under tow or affixed at a drilling location when McMillon

[349]280 F.3d 492, 502-03 (5th Cir. 2002).

[350]877 F.2d 356, 372 (5th Cir. 1989) (en banc) (emphasis supplied).

was injured, it was situated on the waters above the OCS. The panel in *Demette* was wrong to say that 43 U.S.C. § 1333(b) does not cover injuries on floating vessels; on that point *Demette* is hereby overruled.

C. Texaco Exploration

The 1998 accident that led to the litigation in *Texaco Exploration and Production, Inc. v. AmClyde Engineered Products Co.*[351] was indistinguishable from an accident in 1986 that had brought *McDermott, Inc. v. AmClyde*[352] to the Supreme Court. In the 1986 accident, an offshore platform-mounted crane being used to construct the platform tried to lift a platform deck from a barge and move it to the platform. The crane failed, dropping the deck onto the barge and seriously damaging it.[353] The lawsuit was a products liability action against the manufacturer/seller of the crane and its components. The accident in *Texaco Exploration* occurred when a barge-mounted crane tried to lift a platform deck from a materials barge to the platform being constructed and failed, dropping the deck into the deep (1750 feet) waters of the Gulf of Mexico. Here, too, the resulting lawsuit was a products liability action against the manufacturer/seller of the crane.

The Supreme Court in *McDermott v. AmClyde* assumed that admiralty jurisdiction was unquestioned,[354] as had the Fifth Circuit in that case.[355] But—without any mention of *McDermott v. AmClyde*—the Fifth Circuit panel in *Texaco Exploration* held that the accident in that case did not fall within admiralty jurisdiction.

In the view of the *Texaco Exploration* panel, the absence of admiralty jurisdiction meant that Texaco's jury demand in the district court had been improperly rejected. This in turn meant that a 24-day bench trial had gone for naught.

The *Texaco Exploration* panel's main conclusion—that Texaco had a Seventh Amendment right—was undoubtedly correct. But the panel's course of reasoning led it into a number of troublesome assertions.

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[351]448 F.3d 760 (5th Cir. 2006).

[352]511 U.S. 202 (1994).

[353]See id. at 205 ("When petitioner first used the crane in an attempt to move an oil and gas production platform—the 'Snapper deck'—from a barge to a structural steel base affixed to the floor of the Gulf of Mexico, a prong of the cranes main hook broke, causing massive damage to the deck and to the crane itself."). The Fifth Circuit's opinion in McDermott v. AmClyde adds the information that "the deck fell onto the barge." 979 F.2d 1068, 1070 (5th Cir. 1992).

[354]See 511 U.S. at 204 ("this admiralty case"); Id. at 207 (stating that the case was governed by "admiralty law").

[355]See 979 F.2d at 1070 (repeated references to "general maritime law").

1. What the Texaco Exploration panel said

A critique of the *Texaco Exploration* panel's conclusion that there was no admiralty jurisdiction begins with the fact that the platform deck that the barge-mounted crane in *Texaco Exploration* dropped into the Gulf of Mexico had come to the offshore site on a materials barge. The crane (mounted on another barge) tried to lift the platform deck from the materials barge and dropped it into deep water. The panel analyzed admiralty jurisdiction in the terms laid down in the Supreme Court's 1995 decision in the *Grubart* case.[356] It acknowledged that the *Grubart* location requirement "is easily satisfied as the parties agree that the products liability and negligence torts alleged here occurred on navigable water."[357] However, the panel then went on to conclude that the case failed to satisfy the *Grubart* requirement that the tortfeasor's activity must bear a substantial relationship to traditional maritime activity. The panel explained this conclusion in two somewhat questionable ways. First, it said that "the undisputed facts demonstrate that traditional maritime transportation was complete at the time of the loss."[358] This statement is questionable because it looks a bit light slight-of-hand; until the crane dropped it, the platform deck was still on the barge on which it had traveled from shore, awaiting delivery to its intended destination.

The *Texaco Exploration* panel's second reason for concluding that the case lacked a sufficient connection to traditional maritime activity was this:

> Texaco's causes of action, which we have concluded are inextricably connected with the development of the Outer Continental Shelf and an installation for production of resources there, are insufficiently connected to traditional maritime activity to support the application of admiralty law.[359]

This statement is questionable because it implies that OCSLA coverage and admiralty jurisdiction exist in an either-or relationship, whereas in fact admiralty jurisdiction and core OCSLA concerns typically overlap.

The *Texaco Exploration* panel—having already held that there was no admiralty jurisdiction—then wrote a longish essay in support of the conclusion that federal maritime law would not apply to the case.[360] This was puzzling, since the absence of admiralty jurisdiction removes any possible basis for the applicability of federal maritime law. In the course of this essay, the panel said two troublesome things. First, it said that "the parties' [contractual] choice of law will not trump the choice of laws scheme provided by

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[356]Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995).
[357]448 F.3d at 770.
[358]Id. 769.
[359]Id. at 771.
[360]See id. at 771-76.

Congress in OCSLA."[361] As we saw above in Section III-E-2, the statement is an overbroad version of the actual rule: that when 43 U.S.C. § 1333(a)(2)(A) calls for the application of adjacent-state law as surrogate federal law, this provision trumps any contractual choice-of-law provisions to the contrary.

Second, the *Texaco Exploration* panel read the Supreme Court's decision in *Rodrigue* to mean that the OCSLA "rejected wholesale the application of admiralty law," so that "[a]dmiralty law does not govern the merits simply because OCSLA covers the cause of action."[362] This statement is questionable. As we saw above in Section III-A, *Rodrigue* reads the OCSLA's legislative history to demonstrate that OCSLA did nothing whatsoever to the applicability of admiralty law.

Finally, the *Texaco Exploration* panel reached the conclusion that the case must be remanded for jury trial. Because the plaintiff invoked subject matter jurisdiction on the basis of 43 U.S.C. § 1349(b)(1)—and did not plead the case as an admiralty case under Fed. R. Civ. P. 9(h)—this was correct. But the *Texaco Exploration* court made a large mistake in its reasoning process, stating that "we must determine the applicable substantive law in order to address whether the denial of jury trial was reversible error."[363] As we saw above in Section II-C-14, this is a completely unworkable approach to the existence of the right to jury trial.

2. An imagined rehearing en banc opinion in Texaco Exploration

This case stems from an accident on the OCS during the construction of a fixed drilling platform for Texaco Exploration. A heavy component of the platform came from the shore to the site aboard a materials barge. When a barge-mounted crane tried to lift the component from the materials barge to move it into place on the platform, the crane failed, dropping the component into waters 1750 feet deep. Texaco Exploration brought a products liability action against the manufacturer of the crane.

a. Subject matter jurisdiction

This suit was brought in federal district court. Texaco pleaded subject matter jurisdiction under 43 U.S.C. § 1349(b)(1), which is a broad grant of federal question jurisdiction over, *inter alia*, cases and controversies arising out of or in connection with the exploration, development, or production of

[361] 448 F.3d at 772 n. 8

[362] Id. at 773 & n. 9.

[363] Id. at 771.

minerals on the OCS. Indisputably, § 1349(b)(1) supports subject matter jurisdiction here.

b. The parties' right to jury trial

Texaco made a timely demand for jury trial. This demand should have been granted. The Seventh Amendment provides a right to jury trial over all federal actions seeking legal relief (such as money damages) except those in which (a) admiralty is the only basis for federal-court subject matter jurisdiction or (b) the plaintiff has properly invoked the right to a bench trial provided by Fed. R. Civ. P. 9(h). Because 43 U.S.C. § 1349(b)(1) provides a nonadmiralty basis for subject matter jurisdiction here, and because Texaco did not plead Rule 9(h), both parties had the right to jury trial in this case.

The district court was mistaken in holding that the mere existence of admiralty jurisdiction meant that there was no jury-trial right. Operating under this view, the trial judge conducted a 24-day bench trial. Unfortunately, that proceeding was for naught. The case must be remanded for trial to a jury.

c. Governing substantive law: Is this an admiralty case?

Because a remand is necessary, this Court should provide guidance on the choice-of-law questions that need resolution before the case can be retried. The first step in this process is to determine whether the case falls within admiralty jurisdiction. It does; the trial judge was right about this.

In the first place, the accident in this case cannot be distinguished on jurisdictional grounds from the one over which the Supreme Court exercised admiralty jurisdiction in *McDermott, Inc. v. AmClyde*.[364] This alone is a compelling reason for concluding that the case at hand falls within admiralty jurisdiction.

In the second place, admiralty jurisdiction exists under the plain language of the Admiralty Extension Act (AEA):

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.[365]

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[364] 511 U.S. 202 (1994).

[365] 46 U.S.C. app. § 740. In late 2006, the Admiralty Extension Act was recodified as 46 U.S.C. § 30101 and slightly reworded so that in pertinent part it now reads as follows: "The admiralty and maritime jurisdiction of the United States extends to and includes cases of 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."

In *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, we held that the AEA provides admiralty jurisdiction only if the case satisfies the "maritime relationship" requirements the Supreme Court has imposed in non-AEA cases.[366] However, we are persuaded that a quarter century of intervening jurisprudence has robbed *Sohyde* of validity.[367] The convincing analysis provided by the Seventh Circuit in *Tagliere v. Harrah's Illinois Corp.*[368] leads us to the view that the AEA is a stand-alone grant of admiralty jurisdiction that is in no way dependent on the maritime relationship requirements laid down by the Supreme Court for cases not falling under the AEA.[369] Accordingly, *Sohyde* is no longer good law, and it is hereby overruled. In the present case there was admiralty jurisdiction under the AEA because the accident was caused by an appurtenance of a vessel (the barge-mounted crane) on navigable water.[370]

In the third place, even if there were additional maritime relationship requirements for admiralty jurisdiction, they would be satisfied in this case. The Supreme Court's most recent treatment of the maritime relationship requirements is the 1995 *Grubart* decision, in which the Court held that admiralty tort jurisdiction exists if (a) in light of "the general features of the type of incident involved, [the incident] has a potentially disruptive effect on maritime commerce,"[371] and (b) "the general character of the activity giving

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[366]644 F.2d 1132, 1136 (5th Cir. 1981).

[367]When *Sohyde* was decided, the only Supreme Court decision treating "maritime relationship" requirements for admiralty tort jurisdiction was Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249 (1972). Since then the Court has handed down three others, and in each of these, the Court indicated that the AEA might be a stand-alone basis for admiralty jurisdiction without regard to any maritime relationship requirement. Foremost Ins. Co. v. Richardson, 457 U.S. 668, 677 n. 7 (1982); Sisson v. Ruby, 497 U.S. 358, 359 n. 1 (1990); Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 543 n. 5 (1995). See also Marathon Pipe Line Co. v. Drilling Rig Rowan/Odessa, 761 F.2d 229, 233 (5th Cir. 1985) (basing a finding of admiralty jurisdiction over a suit alleging damages to a pipeline by a jack-up rig under tow solely on the Extension Act). Cf. Domingue v. Ocean Drilling and Exploration Co., 923 F.2d 393, 397 n. 9 (5th Cir. 1991) (Brown, J. [the author of *Sohyde*], questioning the relevance of *Sohyde* to OCS jurisdictional disputes and stating that *Sohyde* is "unrelated to [the] issue of whether work under [an] oil and gas services contract bears [a] significant relationship to maritime activity").

[368]445 F.3d 1012 (7th Cir. 2006).

[369]See generally David W. Robertson and Michael F. Sturley, *The Admiralty Extension Act Solution*, 34 J. MAR. L. & COM. 209 (2003).

[370]See *Tagliere*, supra note 368, 445 F.3d at 1013 ("Since 'vessel' has been interpreted to include the vessel's fixtures, furniture, and other 'appurtenances,' Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 535 (1955); Scott v. Trump Indiana, Inc., 337 F.3d 939, 943 (7th Cir. 2003); Anderson v. United States, 317 F.3d 1235, 1237-38 (11th Cir. 2003), the injury resulting from the defective stool in this case was an injury caused by a vessel.").

[371]Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 526, 534 (1995) (citation and internal quotation marks omitted).

rise to the incident[372] shows a substantial relationship to traditional maritime activity."[373] The "potentially disruptive" requirement is met in the present case because when a vessel causes damage to another vessel's cargo, maritime commerce *is* thereby disrupted. The "substantial relationship" requirement is met because the defendant's crane was provided for uses that included offloading cargo from a vessel to an offshore destination.

In light of the clear existence of admiralty jurisdiction here, it may be useful to briefly examine the panel's contrary conclusion. It seems to have been based on the view that the Supreme Court's decision in *Rodrigue v. Aetna Cas. & Sur. Co.*[374] interpreted the Outer Continental Shelf Lands Act(OCSLA) as having "rejected wholesale the application of admiralty law."[375] In this respect the panel misreads *Rodrigue*, which holds that OCSLA neither expands nor restricts admiralty jurisdiction.[376] (Our statement in *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.* that "OCSLA can only be regarded as a substantive restriction of the district court's admiralty jurisdiction"[377] evinces a similar misreading of *Rodrigue*.)

d. Governing substantive law: Is this case covered by § 1333(a)(2)(A)?

43 U.S.C. § 1333(a)(2)(A) makes adjacent-state law available for application as surrogate federal law for "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon." Because this case involves an accident occurring in the course of "erect[ing]" a "fixed structure" on the OCS seabed, it is covered by § 1333(a)(2)(A).

e. Governing substantive law: What law applies in cases covered by both admiralty jurisdiction and § 1333(a)(2)(A)?

Section 1333(a)(2)A) provides that adjacent-state law cannot apply if it is "inconsistent with [other OCSLA provisions] or with other Federal laws." Federal admiralty law is the most important form of "other Federal laws" referenced by this provision. Therefore, no features of adjacent-state law

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[372]The *Grubart* Court indicated that the "activity giving rise to the incident" inquiry entails "ask[ing] whether a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand." 513 U.S. at 539-40 (emphasis supplied).

[373]Id. at 534 (citation and internal quotation marks omitted).

[374]395 U.S. 352 (1969).

[375]*Texaco Exploration*, 448 F.3d at 773.

[376]See 395 U.S. at 361 (noting that OCSLA was not "intended to extend" admiralty principles); Id. at 359 (stating that if admiralty law were applicable of its own force, it "would be exclusive" of the application of state law via OCSLA).

[377]754 F. 2d 1223, 1232 (5th Cir. 1985). The (hypothetical) en banc court's disapproval of the *Laredo* statement would entail also disapproving the other cases cited supra note 226.

that are inconsistent with federal admiralty or maritime law can have any applicability here.[378]

V
THE SOLUTIONS PRESENTED IN THIS ARTICLE ARE DOCKET-SIDE NEUTRAL

This article describes four important interpretations of OCSLA that diverge from some Fifth Circuit panel and district court decisions. Each of these interpretations would sometimes benefit one side of the dispute, sometimes the other.

First, state law cannot govern disputes arising from events on jacked-up rigs and similar temporarily-attached apparatus that is covered by § 1333(a)(1) but not by § 1333(a)(2)(A). Instead, federal maritime law must be applied. In personal injury litigation, federal maritime law is sometimes more favorable to plaintiffs than state law[379] and sometimes less so.[380]

In commercial litigation, federal maritime law is generally more favorable to freedom of contract than state law. With respect to choice-of-law contracts, this tendency will obviously have no consistent bias for any particular interest. With respect to indemnity contracts, this tendency is pro-indemnity. Perhaps more often than not, large oil companies might like a pro-indemnity regime better than small service and supply contractors would. On the other hand, several of the Fifth Circuit's indemnity contract decisions involved small contractors seeking indemnity from big oil companies.[381]

Second, § 1333(b) extends LHWCA coverage over all injuries to OCS workers (except seamen and government workers) hurt in the geographic

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[378]The accident in this case occurred at a location "on the Outer Continental Shelf off the coast of Alabama and Louisiana." 448 F.3d at 765. At the present stage of the case, "no party [has] identifie[d] the adjacent state such that the law of the adjacent state may be applied." Id. at 775. Accordingly, we must leave it to the district court to determine whether it is Alabama's or Louisiana's substantive law that § 1333(a)(2)(A) may make applicable, as well as whether the particular features of that state's law that come into play during the litigation are inconsistent with federal maritime law.

[379]See, e.g., Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959) (vessel status of offshore jacked-up rig enabled injured worker to sue as a seaman under the Jones Act).

[380]See, e.g., Strong v. B.P. Exploration & Production, Inc., 440 F.3d 665 (5th Cir. 2006) (applicability of federal maritime law to injury to wireline worker on liftboat entailed a shorter statute of limitations than state law; plaintiff's action held time-barred); Uzdavines v. Weeks Marine, Inc., 418 F.3d 138 (2d Cir. 2005) (vessel status of bucket dredge meant that worker was a seaman and therefore not entitled to the LHWCA benefits he sought); Harvey's Casino v. Isenour, 724 F.2d 705 (Iowa 2006) (seaman status of casino-boat workers prevented the workers from being entitled to the state workers' compensation benefits they sought).

[381]See Dupre v. Penrod Drilling Corp., 993 F.2d 474 (5th Cir. 1993); Dupont v. Sandefer Oil & Gas, Inc., 963 F.2d 60 (5th Cir. 1992); Alleman v. Omni Energy Services Corp., 434 F. Supp. 2d 405 (E.D. La. 2006).

area covered by OCSLA, regardless of whether the injury occurred on a floating vessel, an aircraft, a temporarily-attached apparatus, a fixed platform, an artificial island, or in the water. Broad § 1333(b) coverage helps workers who want LHWCA benefits; it helps employers who want the LHWCA to shield them from tort liability. Broad § 1333(b) coverage means that more indemnity contracts are valid than would otherwise be the case. This pro-indemnity tendency favors vessel operators vis-a-vis LHWCA employers. In the OCS context, the vessel operator is as likely to be a smaller company than the LHWCA employer[382] as a larger.

Third, § 1349(b)(1) affords a basis for federal-court subject matter jurisdiction that entails the applicability of the Seventh Amendment. This means that in any case falling within § 1349(b)(1)'s broad coverage, either party can demand a jury unless the plaintiff brought the case to federal court on the basis of admiralty jurisdiction by pleading it under Fed. R. Civ. P. 9(h). Obviously, the Seventh Amendment's bilateral right to jury trial is docket-side neutral.

Fourth, there is an important restriction on the removal from state to federal court of cases falling within the coverage of § 1349(b)(1). If the plaintiff claims rights under a substantive OCSLA provision or under state law adopted by § 1333(a)(2)(A), the case is removable without regard to the citizenship of the defendants. But if the plaintiff claims rights under federal maritime law, the case is not removable unless no defendant is a citizen of the forum state. Obviously, restricting removal favors plaintiffs over defendants. But state-court plaintiffs may include not only personal injury victims but also commercial plaintiffs of all types, including employers of injured workers seeking indemnity from allegedly negligent workers. So here, too, the recommended interpretation entails little or no systematic bias. And in any event, it reflects the gist of the Supreme Court's *Romero* decision, a matter that seems beyond the appropriate reach of the Fifth Circuit.

VI
CONCLUSION

When an important national court admits that it is in trouble and calls out for help, the court's practicing and academic bar are obliged to respond. We might do this by writing books and articles. But we can do it most effectively by aggressively pursuing en banc rehearings in cases in which the court's panels may have gone astray. This article provides suggestions and authorities that can be used to persuade the Fifth Circuit to grant en banc

[382]See, e.g., Dupre v. Penrod Drilling Corp., 993 F.2d 474 (5th Cir. 1993).

rehearings in order to address the expensive and wasteful confusions and inconsistencies in its OCS jurisprudence.

Fifth Circuit Rule 35.1 aims at discouraging us from seeking en banc rehearings,[383] but we must be brave about this. We need to treat Judge DeMoss's *Demette* peroration[384] with deep seriousness and respect. We need to take Rule 35.1 with a grain of salt.

[383]Supra note 1.
[384]Supra note 16.