Federalism, the Admiralty, and Oil Spills

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I

INTRODUCTION

The Exxon Valdez oil spill brought to the public’s attention a matter of national and international importance. Although that spill was significant in the amount of oil spilled,¹ the size of the economic interests at risk, and the sensitivity of the ecosystem affected, ocean-based oil spills occur relatively frequently.² How best to deal with the legal ramifications of these oil spills has become a matter of great concern to politicians, environmentalists, and the oil and transportation industries. Issues exist relating to cleanup costs, compensation for loss of natural resources, criminal liability, and payment for civil damages.

The federalism issues created by civil damages suits brought by private litigants have received less attention than they deserve. The Exxon Valdez disaster showed that a major oil spill can implicate both federal and state laws. Plaintiffs claiming harm from the spill brought actions under state and federal law in both legal systems. The resulting liability questions centered on the interaction of federal general maritime law, federal statutory law,³

²See Goldberg, Recovery for Economic Loss Following the Exxon Valdez Oil Spill, 23 J. Legal Stud. 1, 1 n.1 (1993); Millard, Anatomy of an Oil Spill: The Exxon Valdez and the Oil Pollution Act of 1990, 18 Seton Hall Legis. J. 331 (1993). A recent study by the International Tanker Owners Pollution Federation has shown, however, that the number of tanker spills has been reduced markedly in the last twenty years. Almazan, Sharp Drop in the Number of Tanker Spills Since ’70s, Bus. Times, July 27, 1995, at 1.
³At the time of the spill, the following federal statutes regulated oil pollution: the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1376; the Outer Continental Shelf Lands Act Amendments of
state common law, and state statutory law. This collection of remedies caused a great deal of confusion and controversy. After years of Congressional inaction, the magnitude of the problems presented in the *Exxon Valdez* case led to the passage of the Oil Pollution Act of 1990 ("OPA"), which continued to allow the application of state law without fully clarifying how federal and state law were to interact.

This overlapping jurisdiction runs contrary to the constitutional grant of admiralty powers to the national authorities. Admiralty jurisdiction was given to the federal courts to insure a uniform application of the law to encourage trade and foster the United States maritime industry’s growth. United States courts have prevented the states from enforcing state legislation contrary to admiralty principles, largely to avoid having a hodgepodge of laws apply to a vessel moving from one state to another.

Although federal courts will predictably apply admiralty law to oil spill actions, the field is wide open in a state court. Unfortunately, given the divergence of state law approaches, levels of liability arising out of oil spills can vary drastically depending on where they occur. While efforts have been made to make these more uniform through national legislation and international negotiations, United States politicians have been unable to muster the political will to subjugate the states’ interests to the need for national and international uniformity. This article will suggest that the courts can and should overcome this political impasse by reasserting the federal power to deal with these admiralty issues.

II

UNIFORMITY IN MARITIME LAW

The goal of maritime law is to create an efficiently functioning set of rules that is uniform and predictable. Such a system allows vessels to trade worldwide with relatively little fear of surprise and the delay and additional expense that such surprises can cause. Given the United States’ federal system, a uniform set of laws relating to maritime issues was even more important. Without a unifying national system, each state could have

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4See the discussion of state laws infra text accompanying notes 201–06.


7See the discussion of state laws infra text accompanying notes 201–06.

8See the discussion of OPA infra text accompanying notes 171–83 and the discussion of the relevant international agreements infra text accompanying notes 184–200.

adopted different maritime rules, causing an adverse effect on both internal and external commerce. Indeed, this need for uniformity was the motivating force behind the maritime grant in the Constitution.\textsuperscript{10} The Constitution's drafters placed the admiralty power in the national realm in Article III, Section 2, which provides, "[t]he judicial Power shall extend . . . to all Cases of admiralty and maritime jurisdiction."\textsuperscript{11} Familiar with a system of uniform laws relating to ocean-going commerce,\textsuperscript{12} the founders understood the importance of commerce to the new nation, and they understandably chose to delimit an area of law that would provide uniformity with those of our trading partners.\textsuperscript{13} Admiralty was deemed so important that it was the only substantive area in which subject matter jurisdiction was specifically granted to the federal courts by the Constitution.\textsuperscript{14} In \textit{The Lottawanna},\textsuperscript{15} the Supreme Court explained the importance of uniformity by writing:

That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction. . . ."

One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.\textsuperscript{16}

This recognition of the importance of a national maritime standard left open the question of what fell within the federal purview and what constituted a matter of state concern. While there is a national concern for maritime activities, the states clearly retain an interest in that industry's effects within their borders. The states have passed a great deal of legislation

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\item[\textsuperscript{10}]See S. Friedell, 1 Benedict on Admiralty § 105 (7th ed. rev. 1995).
\item[\textsuperscript{11}]Id. In \textit{The Federalist Papers}, Alexander Hamilton explained the need for a national admiralty power: The fifth point will demand little animadversion. The most bigotted idolizers of state authority have not thus far shewn a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important part of them are by the present confederation submitted to federal jurisdiction.The \textit{Federalist} No. 80.
\item[\textsuperscript{13}]Id. at 163–64.
\item[\textsuperscript{14}]D. Robertson, Admiralty and Federalism 1 (1970).
\item[\textsuperscript{15}]88 U.S. (21 Wall.) 558 (1874).
\item[\textsuperscript{16}]Id. at 574–75.
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relating to these interests.\textsuperscript{17} How the courts have dealt with these problems has been a matter of some controversy. Nineteenth century cases seemed to allow state courts to apply state law when exercising their traditional common law jurisdiction.\textsuperscript{18} Some commentators argued that state law could be applied when it provided the plaintiff with a remedy not allowed in admiralty, but rejected when it deprived a plaintiff of a remedy.\textsuperscript{19} Others argued that the maritime law did not form a complete system of law, but could be supplemented by state law to fill the “gaps.”\textsuperscript{20} In some cases, the Supreme Court seemed to apply the “better rule” approach, allowing the state rule when it was considered preferable, but barring it when the federal rule was better.\textsuperscript{21} The various theories do not adequately explain all of the Supreme Court’s decisions in the area. How much deference should be given to the federal power remains a matter of debate today.

\textit{A. Jensen and its Progeny}

The Supreme Court’s strongest endorsement of uniformity came in \textit{Southern Pacific Co. v. Jensen},\textsuperscript{22} a constitutional challenge to a state workmen’s compensation award. The employer argued, among other things, that application of the New York workmen’s compensation scheme violated the Constitution’s admiralty clause. Writing for the Court, Justice McReynolds found the New York legislation invalid because Congress is the primary organ for creating maritime law.\textsuperscript{23} Accordingly, in the absence of federal legislation, the federal courts were to dictate the general maritime law.\textsuperscript{24}

The fashioning of the maritime law was not left to the states, Justice McReynolds reasoned, because of the need for uniformity. Although admitting that state legislation could change the maritime law “to some extent,”\textsuperscript{25} he found this to be limited when the state rule “contravenes the essential purpose expressed by an act of Congress or works material

\textsuperscript{17}See Gilmore & Black, supra note 6.
\textsuperscript{18}Currie, supra note 12, at 160. See the discussion of the “savings to suitors” clause of the Judiciary Act of 1789, which allowed state courts this jurisdiction, infra text accompanying note 29.
\textsuperscript{19}Currie, supra note 12, at 166. One authority has suggested that prior to \textit{Jensen}, there was little need to address this issue because it was not until the twentieth century that state legislators began to create legal rights unknown to the common law and admiralty, which were quite similar at the time. See Robertson, supra note 14, at 149.
\textsuperscript{20}Currie, supra note 12, at 166–67. Gaps in the admiralty law are substantive areas for which there is neither legislation nor court-made law.
\textsuperscript{21}Id. at 219.
\textsuperscript{22}244 U.S. 205 (1917).
\textsuperscript{23}Id. at 215.
\textsuperscript{24}Id.
\textsuperscript{25}Id. at 216.
prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.”

The fact that Congress had failed to legislate in the area was held to be unimportant. Comparing admiralty law to interstate commerce, Justice McReynolds explained that where Congress had not legislated, such inaction would be seen as proof that it intended the area to go unregulated. Thus, Congress’ inaction would not be seen as leaving the area open for state action. Application of the New York statute would lead to the:

destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impaired.... The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed.

Finally, Justice McReynolds held that the state’s actions were not saved by the “savings to suitors” provision of the Judiciary Act of 1789, which allows plaintiff to seek common law remedies in the state courts. Justice McReynolds found that the New York workmens’ compensation scheme was a remedy unknown to the common law, and, thus, not saved. Jensen stands as a strong statement in favor of maritime preemption. The states simply may not interfere when such interference would do harm to the maritime uniformity—even when the maritime law provides no remedy at all. Thus, Jensen provides a three part test. First, a state rule is invalid if it conflicts with admiralty legislation passed by Congress. Second, it also is invalid if it works material prejudice to a characteristic feature of admiralty. Finally, state laws may not interfere with admiralty’s uniformity and harmony. This test continues to have vitality today.

Reacting to Jensen, Congress amended the Judiciary Act to expand the

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26Id.
27Id. at 217.
28Id.
29The provision reads as follows:
That the district courts... shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction... saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it. ...

30Jensen, 244 U.S. at 218.
31In dissent, Justice Holmes penned the following, well-known statement:
The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact. It always is the law of some State, and if the District Courts adopt the common law of torts, as they have shown a tendency to do, they thereby assume that a law not of maritime origin and deriving its authority in that territory only from some
savings provisions of the original act to include "the rights and remedies under the workmen's compensation law of any state." In *Knickerbocker Ice Co. v. Stewart*, the Supreme Court found this as objectionable as what was seen in *Jensen*. Because the Constitution granted only Congress the right to legislate the maritime law, the states were deprived of all power to legislate in any way that violated the *Jensen* test. Since the framers' purpose was to give the admiralty power to Congress, it could not delegate its deliberative obligation to the states. To do otherwise would greatly damage the "harmony and uniformity" necessitated by "essential international and interstate relations." Thus, the Court found the addition to the savings clause to be void.

Assuming that the problem with its previous legislation was that it applied to seamen, Congress reacted to the *Knickerbocker Ice* decision by altering the savings clause to include only non-crew members. Once again, the Supreme Court struck down the amended savings clause as unconstitutional in delegating the admiralty power to the states in *Washington v. W.C. Dawson & Co.*

This series of decisions has been the subject of considerable criticism. Professor Currie called the "extreme insistence upon uniformity...puzzling," particularly when the delegation to the states is being perpetrated by the federal legislature. He went on to say that *Knickerbocker Ice* and *Dawson* were probably aberrational. Professors Gilmore and Black claim that *Jensen* is in a virtual dead heat with *The General Smith* “for the distinction of being the most ill-advised admiralty decision ever handed down by the Supreme Court.”

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particular State of this Union also governs maritime torts in that territory. . .

Id. at 222.

33253 U.S. 149 (1920).
34 Id. at 160.
35 Id. at 163.
36 Id.
38254 U.S. 219 (1924).
39 Currie, supra note 12, at 191.
40 Id. at 191. Professor Currie cited language from Justice Black in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 321 n.29 (1955), where he "rejected a suggestion that a state law would be invalid even if sanctioned by Congress as 'so lacking in merit that it need not be discussed.'"
4117 U.S. (4 Wheat.) 438 (1819) (establishing the home port lien doctrine).
42Gilmore & Black, supra note 6, at 642. On the other hand, they also state:
These latter cases are now in a sense drowned law, since Congress has enacted a Federal Longshoremen's compensation statute. . . . But, however one may react emotionally to the bringing to bear of their high-flown vaguenesses to the barring of the tiny and doubtless pathetically needed recoveries that were at stake, it is difficult not to think that the major premise they state is a sound one. If there is any sense at all in making maritime law a federal subject, then there must be some
decision as difficult to apply. Much of the criticism of these decisions, however, stems from a dissatisfaction with the result, rather than a rejection of the Court’s uniformity reasoning. To be sure, it is difficult to feel comfortable with a decision that denies an injured worker any remedy. Now that this problem has been solved by the enactment of the Longshore and Harbor Workers Compensation Act, it seems wise to reexamine the reasoning of Jensen to determine whether its core value of maritime uniformity continues to have validity in the latter part of the twentieth century. Even critics of Jensen acknowledge that the states cannot have unlimited freedom to legislate in the admiralty field. Some limits must apply. Perhaps the continued viability of the Jensen formulation is the result of an inability to fashion a preferable approach. Jensen continues to allow the courts flexibility to deal with the multiplicity of problems created by the preemption issue.

After Jensen, the Supreme Court added an interest-balancing approach in Kossick v. United Fruit Co. That case concerned the question of whether the New York Statute of Frauds should be applied to a shipowner’s agreement to compensate a seaman for any damages incurred due to poor treatment by a public health service. After explaining that the decision on whether to apply state or federal law is “one of accommodation,” the Court found that the accommodation in this case required the use of federal admiralty law. It focused on the nationality of the sailors and the need for legal uniformity. Here, there was no peculiar state interest that would suggest the need to apply state law. Commentators and lower courts have attempted to further articulate a balancing approach for determining whether the application of state law is allowed.

Not all state attempts to legislate on the navigable waters have been struck down by the Supreme Court. In Just v. Chambers, for example, the Court addressed the question of whether a state rule allowing personal injury claimants to sue the vessel’s owner for personal fault in a limitation proceeding was constitutional. Although admiralty would not permit such an

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limit set to the power of the states to interfere in the field of its working.

.Id. at 48.

43See Friedell, supra note 10, at § 112. In particular, Professor Friedell argues that all state laws applied in admiralty have some effect on uniformity, and it is difficult to determine whether “a particular state law ‘materially’ prejudices the characteristic features of maritime law...” Id.


46Id. at 738.

47Id. at 741.

48See, e.g., Currie, supra note 12, at 221.

49See the discussion and cases cited in Friedell, supra note 10, at § 112.

50312 U.S. 383 (1941).
action, the Court allowed the state law claim because "the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation."51 The decision did not overrule or limit Jensen; it merely found that the Jensen rules were not violated in this case. In Standard Dredging Corp. v. Murphy,52 however, Justice Black concluded that Just had severely limited Jensen.53 The Supreme Court also recognized the states' great latitude in regulating maritime-related behavior in Romero v. International Terminal Operating Co.:54

Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article III evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce. It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope..."In the field of maritime contracts," this Court has said, "as in that of maritime torts, the National Government has left much regulatory power in the States." Thus, if one thing is clear it is that the source of law in saving-clause actions cannot be described in absolute terms. Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout history. This sharing of competence in one aspect of our federalism has been traditionally embodied in the saving clause of the Act of 1789. Here, as is so often true in our federal system, allocations of jurisdiction have been carefully wrought to correspond to the realities of power and interest and national policy.55

Shortly thereafter, in Huron Portland Cement Co. v. City of Detroit,56 the Supreme Court allowed a local government to prosecute a vessel for violating a local smoke abatement statute even though the federal govern-

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51Id. at 388.
53Id. at 309.
54358 U.S. 354 (1959). The opinion listed a number of areas in which the Court had allowed state regulation:

State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered in admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes. State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance—all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity.

Id. at 373–74.
55Id. (footnotes omitted). See also Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971).
ment had inspected and licensed the vessel for use in interstate commerce. Because the federal licensing scheme’s purpose was to protect the interests of maritime navigation, rather than the health and safety of the local citizenry, the Court found no federal preemption.57 But the Supreme Court struck down state pilotage, design, and safety measures that conflicted with a federal statute in *Ray v. Atlantic Richfield Co.*58 The Court distinguished *Huron* on the ground that the *Ray* regulations had the same purpose as the federal rules. Thus, the federal rules preempted those state regulations. The Court focused its analysis on the Constitution’s Supremacy Clause, rather than the admiralty power.

The Supreme Court’s recent pronouncement on maritime preemption in *American Dredging Co. v. Miller*59 considered whether federal maritime law preempts a state law on *forum non conveniens*. After being injured while working as a seaman on the Delaware river, William Miller brought suit in Louisiana state court under the Jones Act60 and general maritime law.61 Under Louisiana law, *forum non conveniens* is not utilized in Jones Act or maritime law cases,62 but is allowed in all other areas. Quoting from *Jensen*, Justice Scalia’s opinion found the proper test to be whether *forum non conveniens* “is either a ‘characteristic feature’ of admiralty or a doctrine whose uniform application is necessary to maintain the ‘proper harmony’ of maritime law,”63 the second and third tests of the *Jensen* formulation. In a footnote, Justice Scalia acknowledged Justice Stevens’ argument that *Jensen* is no longer good law, but found that because none of the parties had argued against the application of *Jensen* and because the Louisiana law did not violate *Jensen*, it would be inappropriate to reject *Jensen* in this context.64

The opinion seems to elaborate upon the language of *Jensen*: in order for a doctrine to constitute a characteristic feature of the admiralty, it must

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57Id. at 446. Ironically, Justice Douglas dissented on the ground that the states may not constitutionally prosecute violators of local health codes when the equipment in question is licensed by the federal authorities. Id. at 449–55. Thirteen years later, however, he took a very different view of this matter in *Askew v. American Waterways Operators*, 411 U.S. 325 (1973). See infra text accompanying notes 89–90.
59114 S. Ct. 981 (1994).
61Williams sought recovery for unseaworthiness, unpaid wages, and maintenance and cure.
62114 S. Ct. at 984. The trial court felt that it was bound to apply the federal *forum non conveniens* rules and dismissed the case. Its decision was affirmed by the Louisiana Court of Appeal for the Fourth District. 580 So. 2d 1091 (La. Ct. App. 1991). Finding the doctrine inapplicable in Jones Act and general maritime law cases, the Louisiana Supreme Court reversed. 595 So. 2d 615 (La. 1992).
63114 S. Ct. at 985. There was no argument that the first test relating to Congressional preemption applied in this case.
64Id. at 985 n.1. In his concurring opinion, Justice Stevens maintained that *Jensen* is no longer necessary for the protection of admiralty uniformity because the Commerce Clause gives Congress ample power to protect commerce through federal statutes. Id. at 992.
originate in admiralty or have exclusive application in the admiralty setting. In American Dredging, Justice Scalia found that although its early use by the federal courts was primarily in admiralty, forum non conveniens had become “a doctrine of general application,” rather than a characteristic feature of admiralty.

Noting that allowing a forum non conveniens argument in federal court that would not be allowed in the state court is contrary to the uniformity requirement, Justice Scalia admitted that the line between state rules that violate the federal admiralty power and those that do not has been unclear. Justice Scalia found, however, that this case presented different issues than many previous cases. First, the doctrine of forum non conveniens is a procedural doctrine. While admiralty was meant to preserve uniformity of substantive law, there is no requirement of procedural uniformity. Second, the doctrine of forum non conveniens does not encourage uniformity. Justice Scalia stated that because the forum non conveniens decision is one that is discretionary for the trial court, and can be reversed only when there has been a clear abuse of discretion, “uniformity and predictability of outcome [are] almost impossible.” Justice Scalia’s opinion seems to reject an interest balancing approach to the federal-state law conflict, refusing to consider whether the state’s rules will “impair maritime commerce.” Instead, Justice Scalia stated that the only question to be answered is whether the state has “the power to regulate the matter.”

Finally, the Solicitor General had argued that the Court should make clear that its holding is limited to domestic parties. Justice Scalia responded: “We

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65Id. at 986.
66Id.
67Id. at 987–88.
68Id. at 988. Justice Scalia compared the doctrine to federal venue provisions, which the states are not required to follow. In his concurring opinion, Justice Souter stated that although he generally agreed with the substance-procedure dichotomy created in the Court’s opinion, in cases where the distinction is “obscure,” “how a given rule is characterized for the purposes of determining whether federal maritime law preempts state law will turn on whether the state rule unduly interferes with the federal interest in maintaining the free flow of maritime commerce.” Id.
69Id. at 989. The Court also felt that its holding was supported by its analysis of the Jones Act: More particularly, we have held that the Jones Act adopts the “uniformity requirement” of the FELA, requiring state courts to apply a uniform federal law. And—to come to the point of this excursus—despite that uniformity requirement we held in Missouri ex rel. Southern R. Co. v. Mayfield [340 U.S. 1, 5 (1950)] that a state court presiding over an action pursuant to the FELA “should be freed to decide the availability of the principle of forum non conveniens in these suits according to its own local law.”
70We think it evident that the rule which Mayfield announced for the FELA applies as well to the Jones Act, which in turn supports the view that maritime commerce in general does not require a uniform rule of forum non conveniens.
71Id. at 989–90.
72Id. at 988 n.3.
think it unnecessary to do that. Since the parties to this suit are domestic entities it is quite impossible for our holding to be any broader." The bottom line of American Dredging then is that, at least for the time being, Jensen retains its vitality. Only one member of the Court felt that it should be overturned. The others used the principles of Jensen in reaching their conclusions. The Court’s suggestion that its holding may only be applicable to domestic parties is somewhat puzzling. The arguments used to support the Court’s holding would seem to be equally applicable in international and interstate cases. Of course, separate rules for domestic and international parties would lead to an even greater lack of uniformity.

B. Askew v. American Waterways Operators

The seminal case relating to the issue of maritime preemption of state water pollution control laws came in Askew v. American Waterways Operators, involving a constitutional challenge to Florida’s Oil Spill Prevention and Pollution Control Act ("the Florida Act"). The Florida Act contained provisions providing for unlimited liability without fault for oil spills from vessels entering or leaving Florida ports. In addition, proof of financial responsibility and specialized safety equipment could be required of such vessels. Under the statute, state officials were allowed to board vessels for safety inspections. Prior to the passage of the Florida Act, Congress had enacted the Water Quality Improvement Act of 1970 ("WQIA"). Unlike the Florida Act, the WQIA provided for limited liability without fault for government clean-up costs. Costs were unlimited, however, when the spill was caused by willful negligence or misconduct. The federal law also contained financial responsibility requirements and authorized additional safety regulations. Unlike the Florida Act, the WQIA contained no provisions relating to private remedies for damages.

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71Id.
72The dissent (by Justices Kennedy and Thomas) argued strongly in favor of the need for uniformity. It maintained that the origins of the doctrine are not what is important; what is important is whether the doctrine "is an important feature of the uniformity and harmony to which admiralty aspires." Id. at 993. Citing numerous instances of judicial abstention, the dissent concluded that the doctrine is "an established feature of admiralty law." Id. at 994.
75Id. The law contained detailed provisions relating to the management of oil carrying vessels. These included specific insurance, bonding, and regulatory requirements.
77Id. § 11(f).
78Id. § 11(g).
79Id. § 11(p).
resulting from a spill.\textsuperscript{80} Traditional maritime tort remedies and restrictions were left in place.

The \textit{Askew} case presented a challenge to the Florida statute's facial validity. In a thoughtful, well-reasoned opinion, a three-judge panel of the United States District Court for the Middle District of Florida unanimously found the Florida legislation to be invalid because it intruded on the admiralty's exclusive domain—a far greater intrusion than had occurred in \textit{Jensen}.\textsuperscript{81}

The court rejected the notion that the Florida Act covered matters of purely local concern not affecting maritime interests.\textsuperscript{82} The court also dispensed with the argument that where there is no maritime remedy, the states are allowed to fill the gaps with their own remedies. Pointing to the Supreme Court's decision in \textit{Moragne v. States Marine Lines, Inc.},\textsuperscript{83} the court found admiralty to be "fully capable of fashioning a remedy for the breach of substantive duties imposed by the general maritime law..."\textsuperscript{84}

The WQIA included specific non-preemption language that attempted to save state legislation.\textsuperscript{85} Citing \textit{Knickerbocker Ice},\textsuperscript{86} the court pointed out that

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  \item \textsuperscript{80}335 F. Supp. at 1246.
  \item \textsuperscript{81}The court explained:
    If applied to the plaintiffs and intervenors in this case, the Florida Act would effect—in the words of \textit{Jensen}—the "destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded."

    This is not a situation in which a state legislature has sought to act in an area of purely local concern and its enactment is no real encroachment on federal interests. Rather, this is a case where the State purports to impose upon shipping and related industries duties which under the federal law they do not bear. . . . We need not belabor the point that to permit the states severally to regulate these industries as Florida seeks to do would sound the death knell to the principle of uniformity.

  \item \textsuperscript{82}Id. at 1248.
  \item \textsuperscript{83}98 U.S. 375 (1970). In that case, the Supreme Court fashioned a maritime wrongful death action for deaths due to unseaworthiness in a state's territorial waters.
  \item \textsuperscript{84}335 F. Supp. at 1249.
  \item \textsuperscript{85}The preemption language read:
    Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State.

  \item \textsuperscript{86}Pub. L. No. 91-224, § 11(o)(2).
  \item \textsuperscript{87}The court cited \textit{Knickerbocker Ice, The Lottawanna}, and The Steamer St. Lawrence, 66 U.S. (1 Black) 522 (1861), and quoted the following passage from \textit{Knickerbocker Ice}:
    The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations.

  \item \textsuperscript{253 U.S. at 160.}
\end{itemize}
Congress cannot empower the states to legislate admiralty issues and that the language accordingly meant only that states are allowed to regulate within constitutional restrictions. Since the Constitution gave admiralty powers to the federal government, the states could not pass legislation like the Florida Act that usurps those powers. The Florida Act was thus “null and void and without effect.”

In a unanimous opinion written by Justice Douglas, the Supreme Court reversed, stating:

[t]o rule as the District Court has done is to allow federal admiralty jurisdiction to swallow most of the police power of the States over oil spillage—an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of the coastal people are greatly dependent.

Relying on the statute’s non-preemption language, the Court concluded that far from prohibiting state legislation, such regulation was specifically allowed by the WQIA. Justice Douglas admitted that the WQIA provided for “a pervasive system of federal control over discharges of oil,” but felt that the state legislation did not conflict with the federal law provisions. Although the Florida Act on its face survived the constitutional challenge, the Court did not decide several crucial issues. One was whether the state recoupment of cleanup costs could exceed those provided for in the WQIA. The Court also did not decide whether the WQIA preempts the Limitation of Liability Act. Justice Douglas found that “there is room for state action in

\[87\] 335 F. Supp. at 1249.
\[88\] Id. at 1250.
\[90\] Id. at 328–29.
\[91\] The Court also relied on other portions of the statute:

(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly-owned property resulting from discharge of any oil or from the removal of any such oil.

(3) Nothing in this section shall be construed . . . to affect any State or local law not in conflict with this section.

Pub. L. No. 91–224, § 11(o). In addition, the Court cited the Conference Report, which explained that any state would be free to provide requirements and penalties similar to those by this section or additional requirements and penalties. These, however, would be separate and independent from those imposed by this section and would be enforced by the States through its courts.


\[92\] For example, while the WQIA provided for payment of federal cleanup costs, the Florida Act provided for the payment of state costs, creating a “harmonious” system for the recovery of those expenses. 411 U.S. at 330. In addition, the Florida Act’s requirement of evidence of financial responsibility was found not to conflict with the WQIA. Id.

\[93\] 411 U.S. at 332.
cleaning up the waters of a State and recouping, at least within federal limits, so far as vessels are concerned, her costs."\(^{94}\)

Going beyond the question of clean-up costs, the Court addressed whether the state could collect damages for injuries done by oil spills. After reviewing the growth of the oil transport industry and the effects on the environment, Justice Douglas found that because the federal legislation related only to clean-up costs, the states were free to fashion remedies for damages caused to both state and private interests.\(^{95}\) Those portions of the Florida Act requiring special gear for containment of oil spills were similarly not problematic because the state had yet to promulgate the regulations under the statute. Thus, there was no way to determine whether they would conflict with the Coast Guard regulations and the WQIA.

Having determined that there was no statutory preemption, the Court turned to the second and third questions presented by Jensen, namely, whether the state rule interfered with a characteristic feature of admiralty or injured maritime law’s harmony and uniformity. Justice Douglas held that Jensen had been limited by subsequent cases such as Romero\(^{96}\) and Just.\(^{97}\) He added that admiralty jurisdiction did not traditionally cover shore damages. Although the passage of the Admiralty Extension Act\(^{98}\) extended admiralty jurisdiction to cover such damages, Justice Douglas believed that the federal legislation was not necessarily meant to give admiralty exclusive jurisdiction, given the more limited historical coverage of the admiralty.\(^{99}\) Justice Douglas went on to say that even when Congress has legislated, the state may also act so long as there is no “clear conflict with the federal law.”\(^{100}\) Justice Douglas also pointed out that the federal maritime concern

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\(^{94}\)Id.

\(^{95}\)Id. at 336.

\(^{96}\)Id. at 389–90. See the discussion of Romero supra text accompanying notes 54–55.

\(^{97}\)Id. See the discussion of Just supra text accompanying notes 50–51.

\(^{98}\)46 U.S.C. app. § 740. The Act provides that “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.”

\(^{99}\)The Court cited Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971), which had stated, “we should proceed with caution in construing Constitutional and statutory provisions dealing with the jurisdiction of the federal courts.” Id. at 212.

\(^{100}\)411 U.S. at 341. Justice Douglas quoted from Kelly v. Washington, 302 U.S. 1 (1937): the State may protect its people without waiting for federal action providing the state action does not come into conflict with federal rules. If, however, the State goes farther and attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule.

Id. at 15. In an amicus brief, the Maritime Law Association of the United States argued:

If there were a reversal of the decision below, it would be only a matter of time before each of the coastal states would enact its own statutes, covering not only the area of water pollution, but
was with maritime navigation, while state regulations relating to public health and welfare had been upheld.

The opinion closes by attempting to narrow its import:

As discussed above, we cannot say with certainty at this stage that the Florida Act conflicts with any federal Act. We have only the question whether the waiver of pre-emption by Congress in § 1161(o)(2) concerning the imposition by a State of “any requirement or liability” is valid.

It is valid unless the rule of Jensen and Knickerbocker Ice is to engulf everything that Congress chose to call “admiralty,” preempting state action. Jensen and Knickerbocker Ice have been confined to their facts, viz., to suits relating to the relationship of vessels, plying the high seas and our navigable waters, and to their crews. . . .

Jensen thus has vitality left. But we decline to move the Jensen line of cases shoreward to oust involving law from situations involving shoreside injuries by ships on navigable waters. The Admiralty Extension Act does not preempt state law in those situations.\textsuperscript{101}

Although relied on as the backbone for non-preemption of state pollution statutes, in reality Justice Douglas’ opinion is vague and fails to deal with many of the difficult issues presented by this federal-state conflict. The holding seems to be that the WQIA’s non-preemption language saved the Florida Act’s application to shoreside injuries from a facial challenge to its validity. The decision’s exact meaning remains open to question: is it the narrow decision that it seems to be, or should it be read to allow the states great deference in fashioning local pollution laws? No Supreme Court decision since Askew has broadened its holding,\textsuperscript{102} and the lower courts have had difficulty determining the opinion’s breadth. Some have followed Askew, thereby applying state laws to pollution claims relating to shore damages.\textsuperscript{103} Other courts seem to give the case a more expansive reading,
allowing the states to regulate more freely. Still others have avoided the issue.

Two relatively recent decisions from the circuit courts of appeal demonstrate this confusion. In *In re Ballard Shipping*, the First Circuit considered whether the admiralty rule prohibiting recovery for purely economic loss preempted a contrary state statute. Finding that *Jensen* is "by its own terms something less than a rule of automatic and mechanical preemption," the court looked to the interpretation of *Jensen* in *American Dredging*. The First Circuit determined that the limitation of economic losses neither originated in nor was an exclusive feature of admiralty. It therefore did not work material prejudice to a characteristic feature of admiralty. As for third prong of *Jensen*, which finds preemption if the state law interferes with the admiralty's harmony and uniformity, the court distinguished the instant facts from *American Dredging*, which involved an unusual procedural, rather than substantive, conflict.

The resolution of *Ballard Shipping* depended on a balancing of the state interests in regulation against federal interests in harmony and uniformity, rather than a blind acceptance of "rigid national uniformity." On the state side stood the concern with oil pollution damage to its waters and shore. The plaintiffs had argued that *Askew* decided the preemption issue. The court allowed that this was possible, but noted that *Askew* was limited to ship-to-shore injuries and resisted extending *Askew* to indirect injuries where only the losses are felt on shore. Such an interpretation would leave nothing for the admiralty's exclusive jurisdiction. In any event, the court felt that *Askew* stood for the proposition that the state has a strong interest in "vessel-caused oil pollution damage."

On the federal side, the court differentiated between rules relating to primary conduct and secondary conduct. Rules relating to primary conduct are the substantive rules that actually regulate the behavior of maritime actors, and uniformity is most important for these. The court distinguished

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106 32 F.3d 623 (1st Cir. 1994).

107 Id. at 627.

108 Id. at 628.

109 Id. at 627-28.

110 Id. at 629.

111 Id.
the instant case as one involving only the secondary burden put on maritime commerce by liability rules.\textsuperscript{112} The court accordingly was reluctant to strike down a state regulation as unconstitutional in such a case. On the other hand, the very purpose of the admiralty rule limiting damages for economic losses was to decrease the burden on maritime commerce. Given the relatively even balance between the two sets of interests, the court looked to the provisions of the OPA which allow recovery for pure economic loss. Although the Act did not apply,\textsuperscript{113} the court felt that it was clear evidence of Congressional intent to allow recovery for economic loss, tipping the balance against preemption.\textsuperscript{114}

In an even more recent case, the Fourth Circuit relied on the continuing validity of \textit{Jensen} in cases not within the narrow ambit of \textit{Askew}. In \textit{State of Maryland Dep’t of Natural Resources v. Kellum},\textsuperscript{115} a barge ran aground on an oyster bed in the territorial waters of Maryland. Under the general maritime law, the plaintiff would have been required to show negligence in order to recover. The state statute, however, provided a strict liability scheme. Reviewing \textit{Askew} and \textit{Jensen}, the court found that \textit{Jensen} controlled,\textsuperscript{116} distinguishing \textit{Askew} as involving the “twilight zone” that exists between the federal power and state power on the shoreward side of the shoreline.\textsuperscript{117} Here, the oyster beds were clearly in the navigable waters within the traditional admiralty jurisdiction. Because the state statute conflicted with the substantive admiralty rules, the court refused to apply the state legislation.\textsuperscript{118}

\textit{C. Trans-Alaska Pipeline Oil Litigation}

Three separate, but similar, sets of litigation demonstrate the morass created by apparently conflicting state and federal law. Two cases that arose out of spills of oil once carried by the Trans-Alaska Pipeline were heard by Judge H. Russell Holland of the United States District Court for the District of Alaska. The third resulted from a spill of such oil off the coast of California, culminating in litigation in the United States District Court for

\begin{itemize}
\item \textsuperscript{112}Id. at 630.
\item \textsuperscript{113}OPA did not apply because it was not in effect at the time of the spill and, by its own terms, cannot be applied retroactively. Id. at 631.
\item \textsuperscript{114}Id.
\item \textsuperscript{115}51 F.3d 1220 (4th Cir. 1995).
\item \textsuperscript{116}Id. at 1226.
\item \textsuperscript{117}Id. at 1225.
\item \textsuperscript{118}Id. at 1227–28.
\end{itemize}
the Central District of California. All three presented issues relating to the interaction of federal and state law.\textsuperscript{119}

\section{1. The Glacier Bay and Exxon Valdez}

In \textit{In re Glacier Bay},\textsuperscript{120} the owner, charterers, and operators of the \textit{Glacier Bay} filed a motion for exoneration from or limitation of liability relating to an oil spill of crude oil originating in the Trans-Alaska Pipeline. Under the Limitation Act,\textsuperscript{121} vessel owners and charterers are allowed to limit their liability to the vessel’s value after the accident plus any freight owing. Plaintiffs in various damage actions moved to dismiss the limitation complaint on the grounds that the Trans-Alaska Pipeline Authorization Act ("TAPAA")\textsuperscript{122} repealed the Limitation Act as to Alaska pipeline oil.\textsuperscript{123} TAPAA provides for a $100 million strict liability fund for all such spills: the polluter pays the first $14 million while damages beyond this, up to a total of $100 million, are paid from a fund set up by the statute.\textsuperscript{124} In addition, the statute allows the state to create a liability scheme for damages exceeding $100 million. In \textit{Glacier Bay}, the limitation plaintiffs first attempted to limit their liability to $6.5 million, the value of the vessel and its freight following the spill, but then conceded that TAPAA’s provision for a $14 million strict liability fund applied.\textsuperscript{125} To the extent that the claims exceeded $100 million or were based on general maritime law, state statute, or state common law, the limitation plaintiffs thought the Limitation Act should apply.

Judge Holland disagreed. Interpreting the language of § 1653(c),\textsuperscript{126} which provided for liability "[n]otwithstanding the provisions of any other law," he

\begin{footnotesize}
\textsuperscript{119}For further discussion of these cases, see Lewis, The Limits of Liability: Can Alaska Oil Spill Victims Recover Pure Economic Loss?, 10 Alaska L. Rev. 87 (1993). In reality, the discussion that follows barely touches on the confusion that has been created by the interaction of federal and state law. In the \textit{Exxon Valdez} case claimants brought claims in both federal and state courts. Some of these claims were later removed to federal court. In addition, claims for compensation were made to the $100 million TAPAA fund. Thus, at least three forums worked to sort out the damage claims generated by the \textit{Exxon Valdez} spill.

\textsuperscript{120}741 F. Supp. 800 (D. Alaska 1990), aff'd, 944 F.2d 577 (9th Cir. 1991).

\textsuperscript{121}46 U.S.C. app. §§ 181–189.

\textsuperscript{122}43 U.S.C. §§ 1651–55.

\textsuperscript{123}741 F. Supp. at 802.

\textsuperscript{124}43 U.S.C. at § 1653(c)(3).

\textsuperscript{125}741 F. Supp. at 802.

\textsuperscript{126}The language reads as follows:

\textit{Notwithstanding the provisions of any other law, if oil that has been transported through the trans-Alaska pipeline is loaded on a vessel at the terminal facilities of the pipeline, the owner and operator of the vessel (jointly and severally) and the Trans-Alaska Pipeline Liability Fund established by this subsection, shall be strictly liable without regard to fault in accordance with the provisions of this subsection for all damages, including clean-up costs, sustained by any person or
determined that TAPAA's repeal of the Limitation Act was not limited to the strict liability provisions. Judge Holland regarded TAPAA as a comprehensive scheme for all oil coming through the Alaska pipeline\(^{127}\) and a complete repeal of the Limitation Act as to TAPAA oil for all liabilities, whether created by state or federal law. This meant that shipowners could be subject to unlimited liability for a TAPAA oil spill. Judge Holland based his conclusion on the fact that § 1651 states that "[n]otwithstanding the provisions of any law," the owner or operator of a vessel carrying TAPAA oil "shall be strictly liable without regard to fault in accordance with the provisions of this subsection," as well as the fact that § 1653(c)(3) provides that any claim not paid by the polluter or out of the TAPAA fund "may be asserted and adjudicated under other applicable Federal or state law."\(^{128}\) Since § 1653 must be read as a whole, Judge Holland also applied the repeal to these federal and state claims outside TAPAA.

The Ninth Circuit Court of Appeals affirmed,\(^{129}\) but focused more on the rules relating to implicit repeal of pre-existing statutes rather than TAPAA’s "notwithstanding” language. The Ninth Circuit pointed out that an earlier statute is repealed by implication when the acts “are in irreconcilable conflict.”\(^{130}\) Here there was an overall conflict between TAPAA and the Limitation Act.\(^{131}\)

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43 U.S.C. at § 1651(c)(1).
\(^{127}\)411 F. Supp. at 803.
\(^{128}\)In full, this portion of the statute reads:
Strict liability for all claims arising out of any one incident shall not exceed $100,000,000. The owner and operator of the vessel shall be jointly and severally liable for the first $14,000,000 of such claims that are allowed. Financial responsibility for $14,000,000 shall be demonstrated . . . before the oil is loaded. The Fund shall be liable for the balance of the claims that are allowed up to $100,000,000. If the total claims allowed exceed $100,000,000, they shall be reduced proportionately. The unpaid balance of any claim may be asserted and adjudicated under other applicable federal and state law.

43 U.S.C. at § 1653(c)(3).
\(^{130}\)944 F.2d at 583.
\(^{131}\)The court explained:
Simply stated, the Limitation Act is contrary to every goal of TAPAA. It allows vessel owners virtually to eliminate liability for catastrophic damages. Application of the Limitation Act to any aspect of TAPAA would frustrate completely TAPAA’s comprehensive remedial nature. . . . We can only conclude that TAPAA was designed to supersede any conflicting law; by TAPAA’s nature, it was intended to become the controlling statute with regard to trans-Alaska oil. TAPAA’s scheme, including both the strict liability and negligence principles, was intended to operate without limitation. Because this scheme is in irreconcilable conflict with the Limitation Act, we hold that TAPAA implicitly repealed the Limitation Act with regard to the transportation of trans-Alaska oil.

Id.
In another motion in the same case, Judge Holland considered whether the economic losses of fishermen and others were compensable damages under TAPAA or the Alaska Environmental Conservation Act ("the Alaska Act"). The defendants argued that because an oil spill is a maritime tort, the substantive law governing the dispute must be maritime law. The substantive law in dispute here was the application of the Supreme Court's decision in *Robins Dry Dock & Repair Co. v. Flint*. In that case, the Court had established that there is no recovery in admiralty for economic losses without physical harm. Applied to the *Glacier Bay* litigation, this rule would result in the dismissal of many of the plaintiffs' cases.

Judge Holland had to decide again the extent to which TAPAA preempts existing admiralty law: this time the judge-made *Robins* rule, rather than the statutory rule of the Limitation Act. First, Judge Holland found that maritime law applied because the tort occurred on navigable waters and was related to a traditional maritime activity. Although the plaintiffs had argued that state law should apply to actions originally brought in state court under the "savings to suitors" clause of the Judiciary Act of 1789, the court correctly concluded that maritime law applied whether the action was in state or federal court.

Once again, Judge Holland focused on the "notwithstanding the provisions of any other law" language of TAPAA. The defendants argued that this referred only to other statutes such as the Limitation Act. Judge Holland felt that this interpretation would be unreasonable because the application of general maritime law would undercut TAPAA's strict liability regime. The defendants also argued that Congress' failure to mention the well-established *Robins* doctrine in the statute should be seen as acquiescence. Although statutes relating to maritime law are generally read to retain the traditional rules, the court noted that an exception exists whenever the legislative purpose shows a contrary goal. In determining that Congress intended to abrogate the traditional maritime rule as applied to Trans-Alaska oil, Judge Holland pointed to OPA, which specifically includes damages for economic loss, the implementing regulations for TAPAA, and the legislative history. All of these led Judge Holland to the conclusion that Congress intended to allow recovery for all damages, unlimited by the

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134 275 U.S. 303 (1927).
135 746 F. Supp. at 1383.
137 746 F. Supp. at 1384.
138 Id. at 1385.
139 Id.
140 Id.
general maritime law. Although nothing in TAPAA specifically does away with Robins, Judge Holland felt that TAPAA’s “plain language and purpose” required the abrogation of traditional maritime law.

Judge Holland next considered whether maritime law eliminated the state law claims for purely economic loss. Because TAPAA’s language encouraged states to create their own liability schemes for oil spills, he found that it would be inconsistent to apply Robins to the state law claims, while relieving the federal law claims from that limitation.\footnote{Id. at 1387. Judge Holland also determined that state law would allow recovery for purely economic losses.}

These Glacier Bay holdings suggest that TAPAA preempts both statutory and judge-made maritime law.\footnote{Of course, the same would be true of other acts, such as OPA, having language similar to that of TAPAA.} To the extent that these statutes allow the states to create liabilities beyond those expressed in federal legislation, the general maritime law will not impose any limitation. States will be free to craft their own remedies when deciding claims exceeding the federal statutory maximum.

Judge Holland was presented with much the same issue in \textit{In re Exxon Valdez}.\footnote{767 F. Supp. 1509 (D. Alaska 1991).} There, defendant Alyeska moved for judgment on the pleadings against selected plaintiffs\footnote{These plaintiffs included “businesses such as boat charters, taxidermists, and fishing lodges; (ii) those with use and enjoyment claims, such as sport fishermen, photographers, and kayakers; and (iii) fish processors and fish tenders.” Id.} whose claims were based solely on economic losses, arguing that Robins and general maritime law prohibited recovery for pure economic loss without concurrent physical damage.

Judge Holland found that the actions complained of were a maritime tort\footnote{Id. at 1511.} and accordingly applied federal maritime law.\footnote{Id. at 1513.} Although TAPAA’s strict liability provisions preempted the general maritime law, Judge Holland did apply general maritime law to all claims in excess of $100 million, both state and federal.\footnote{The court subsequently faced a number of attempts to reargue the economic loss claims. See generally 1995 AMC 1397–1452 (D. Alaska 1994). In a motion for summary judgment, Exxon attacked claims by seafood wholesalers, canner employees, and tenderers for purely economic losses. Citing his earlier decision, Judge Holland found that the plaintiffs could not recover economic losses under the Alaska Act to the extent that those claims exceeded the TAPAA $100 million limitation. In re Exxon Valdez, No. A89-0095-CV (HRH) (Consolidated) (D. Alaska Jan. 26, 1994) (order granting motion for summary judgment).

Exxon brought a motion for summary judgment against commercial fishermen with claims based on a maritime public nuisance action for loss of quality of life and a general maritime action for emotional distress. Judge Holland found ample authority for the proposition that federal law had preempted admiralty public nuisance claims. In addition, he felt that the Ninth Circuit rule allowing fishermen to
TAPAA’s strict liability maximum. Of course, this result runs contrary to the reasoning in Glacier Bay that the economic loss doctrine should not apply to state claims exceeding $100 million. Oddly, Judge Holland mischaracterized the Glacier Bay holding:

This was essentially the ruling in Glacier Bay. The court did not elaborate on the basis for that ruling because the parties in Glacier Bay represented to the court that damages did not exceed $100 million.148

In fact, the earlier decision had clearly stated that the economic loss doctrine should not limit amounts over $100 million.149 Judge Holland’s turnabout merely emphasizes the confusion created by Congressional attempts to create a federal remedy that allows a concurrent state remedy without addressing the applicability of general maritime law.150

recover economic losses had not created a public nuisance cause of action for such plaintiffs. Similarly, the plaintiffs’ argument that admiralty allows recovery for emotional distress was found to be limited by the requirement that the plaintiff be within the zone of danger. As a result, Exxon’s motion was granted. In re Exxon Valdez, No. A89–0095-CV (HRH) (Consolidated) (D. Alaska July 19, 1994) (order granting motion for summary judgment). See also In re Exxon Valdez, No. A89–0095-CV (HRH) (D. Alaska Mar. 23, 1994) (commercial fishermen whose fisheries were neither closed nor contaminated could not recover economic losses based on diminished prices); In re Exxon Valdez, No. A89–0095-CV (HRH) (D. Alaska Mar. 23, 1994) (fishermen may not recover for the diminished value of their limited entry fishing permits and fishing vessels); In re Exxon Valdez, No. A89–0095-V (HRH) (Consolidated) (D. Alaska Mar. 23, 1994) (plaintiffs must show a relationship between physical harm and economic losses in order to avoid Robins dismissal); In re Exxon Valdez, No. A89–0095-CV (HRH) (D. Alaska Mar. 23, 1994) (Native Alaskans cannot recover for non-economic losses relating to loss of culture or way of life).

In another motion certain plaintiffs sought to have their claims, which had been removed by Exxon to federal court, remanded to state court. They argued that their pure economic loss claims would have been allowed by the state court. In re Exxon Valdez, Order No. 282, No. A89–0095-CV (HRH) (Consolidated) (D. Alaska Mar. 10, 1994) (motion to remand denied). Judge Holland dismissed the argument because the state court was bound to follow federal substantive law in an admiralty case. The plaintiffs argued that the Supreme Court’s decision in American Dredging allowed the state courts to apply state law in a state court, even when the setting was admiralty. Judge Holland rejected this argument, noting that American Dredging had involved procedural rules, rather than the substantive admiralty rules that were being argued in the motion before him. He also rejected the argument that the First Circuit’s decision in Ballard Shipping stood for the proposition that states may ignore substantive admiralty law. Disagreeing with the conclusion in Ballard Shipping that OPA tips the balance in favor of applying the state law, Judge Holland noted that OPA was not applicable in the instant case and that the state court therefore had to apply federal admiralty law.

767 F. Supp. at 1515 n.6.

149 Judge Holland had stated:

To the extent that Alaska imposes strict liability in excess of $100 million, there is no conflict between TAPAA and the Alaska Act. However, under the grant of authority to the states, it would be inconsistent to impose the Robins Dry Dock rule from maritime law on state claims when that rule does not apply to TAPAA claims.746 F. Supp. at 1387.

150 In Benefiel v. Exxon Corp., 1991 AMC 769 (C.D. Cal. 1990), the court was presented with another interesting claim based on the Exxon Valdez spill. The plaintiff represented a class of individuals who claimed compensation for the increased price of gasoline that they were forced to pay because of the oil spill. The district court dismissed the case, finding that the admiralty rule of no economic loss without
The *Glacier Bay* defendants did not ignore this apparent inconsistency. A number of motions to dismiss were filed relating to the plaintiffs’ rights to collect for economic losses.\(^{151}\) Showing his frustration, Judge Holland began his decision by discussing the difficulty of resolving the conflicts among general maritime law, federal statute, and state remedies.\(^{152}\)

The first motion to dismiss came from defendant Tesoro, the owner of the oil being transported in the *Glacier Bay*, which argued that *Robins* should apply to the plaintiffs’ claims for pure economic loss. Tesoro was not a TAPAA defendant because it was not a vessel owner or operator. The court explained that its *Glacier Bay* language supporting recovery for economic loss under state law beyond the TAPAA limit was caused by the parties’ assurances that the *Glacier Bay* claims would not exceed $100 million. In contrast, the *Exxon Valdez* decision forced the court to deal squarely with this problem after thorough argument from the parties. Judge Holland felt that the earlier *Glacier Bay* decision should have said: "It would be inconsistent to impose the *Robins* Dry Dock rule from maritime law on state claims under the Alaska Act which do not exceed $100 million when that rule does not apply to TAPAA claims.”\(^{153}\) Now, Tesoro was arguing that the same rule should preclude claims under $100 million because it was not a TAPAA defendant. In other words, it was TAPAA that allowed the state to abrogate the *Robins* rule. Since TAPAA was not applicable to this


\(^{152}\)Judge Holland stated:

All five motions present difficult issues because of the complex nature of the law applicable to oil spills. In both this case and in the *Exxon Valdez*, the law applicable to each plaintiff’s claim is affected by numerous variables, such as the nature of the damage, the size of the claim, and the role each defendant played in the oil spill. Threading one’s way through the resulting legal maze is an arduous task, at best. With complex federal legislation, such as the Trans-Alaska Pipeline Authorization Act (TAPAA) ... involved here, it is often difficult to divine what Congress intended and still more difficult to implement that intent. In this case, the court is required to simultaneously deal with three parallel bodies of law: general maritime law, federal statutory law (TAPAA), and state law...At times the process is much like a three-dimensional chess game. Where, as here, the federal statutory law (TAPAA) is flawed in that the process it created is ill-conceived to accomplish the result that Congress intended, the court’s task becomes overwhelming. The process established by TAPAA is most notable for its glaring gaps in detail as to how the process should work. The court is, therefore, left to force a less than perfect fit between three bodies of law, without benefit of guidance from any precedent.

\(^{153}\)Id. at 631–32 (footnote omitted).

\(^{153}\)Id. at 633.
non-TAPAA defendant, but the state law might allow for recovery, Robins should be applied.\textsuperscript{154}

Judge Holland agreed. Because Tesoro had already been forced to pay a fee to the fund when it purchased TAPAA oil, it had no additional liability under TAPAA.\textsuperscript{155} In essence, if Tesoro had to pay for economic losses under the Alaska Act, it would be paying twice, as it had already been forced to pay into the fund. Therefore, Judge Holland found that Robins effectively limited Tesoro’s liability.

Next, defendants with an interest in the vessel moved to dismiss the economic loss claims. They argued that TAPAA limited their liability to $14 million and that Robins limited state law claims against them above $14 million and below the total TAPAA liability of $100 million.\textsuperscript{156} Since these defendants had already paid their $14 million, they should be out of the case. The plaintiffs argued that Robins does not apply to the defendants to the full $100 million limit. The court agreed with the defendants, finding that the state could not create broader liability than TAPAA while retaining the TAPAA release from Robins. The Alaska Act is relieved of Robins only to the extent that the statute covers TAPAA oil and defendants.\textsuperscript{157} Judge Holland decided that the TAPAA strict liability provisions are limited to $14 million for the vessel by the statute. Above that the traditional maritime limitations apply. Maritime law thus preempts the state statute.\textsuperscript{158}

Defendants not covered by TAPAA also moved to dismiss the state law claims for economic loss. These defendants argued that since the plaintiffs had settled their TAPAA claims with the fund, TAPAA could not now displace Robins. Even without this settlement, the defendants argued that since they were not TAPAA defendants, Robins applied.\textsuperscript{159} The court disagreed on the first point, but agreed on the second. The settlement did not affect statutory liability, but that liability could abrogate Robins.\textsuperscript{160} Until total damages under TAPAA exceed $100 million, Robins does not apply. On the other hand, TAPAA’s abrogation of Robins only applies to TAPAA defendants. Hence, the defendants’ motion to dismiss was granted.\textsuperscript{161}

\textsuperscript{154} This issue comes up because TAPAA settled with the plaintiffs up to its liability limits. This amount did not fully compensate the plaintiffs for their losses, including their economic losses. They therefore went after other defendants to make up the difference. Id. at 634.
\textsuperscript{155} Id. at 635.
\textsuperscript{156} Id. at 636.
\textsuperscript{157} Id. at 637.
\textsuperscript{158} Id.
\textsuperscript{159} Id. at 638.
\textsuperscript{160} Id.
\textsuperscript{161} Id. The defendants also moved to dismiss all of the plaintiffs’ claims based on the fact that they had settled their claims with the fund. The court refused to grant this motion. Id. at 640. The court also denied the motion to dismiss the claims for economic loss by fishermen. The defendants argued that the
2. Slaven v. BP America, Inc.

The Slaven case arose out of a spill of 400,000 gallons of crude oil off the coast of California. Having determined that TAPAA applied to the controversy even though the oil had been transferred to a second vessel after leaving Alaska, the trial court considered whether the Robins rule applied to the TAPAA oil spill. For claims within TAPAA’s $100 million fund, the court looked to the statute’s “notwithstanding” language. Because the statute’s “plain language” indicated that Congress wanted to preempt all limitations on liability, the court found that Robins did not apply, citing as support the ameliorative purpose behind TAPAA’s passage.

Because California law allows recovery for purely economic loss, the court also addressed whether such damages could be awarded beyond the $100 million TAPAA fund. Unlike Judge Holland, the court treated recoveries under and beyond TAPAA the same, refusing to apply Robins. Also unlike Judge Holland’s TAPAA decisions, the Slaven court found it necessary to determine whether general admiralty law preempted state oil pollution law, as opposed to just considering TAPAA’s effect.

The court quickly reviewed the general rules relating to admiralty preemption of state law. Citing Just, it noted that state law may not be detrimental to admiralty law’s essential character or uniformity. States may, however, have rules that supplement admiralty for a particularly local concern. The court may also consider a need for uniformity, the development of the admiralty rules, and the relative state and federal interests. Finally, the court cited Askew as a comparable case.

The decision found that abrogating Robins beyond the $100 million fund provided greater uniformity in admiralty because to do otherwise would allow one rule (no Robins) to apply to claims up to $100 million, while

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Ninth Circuit rule (see Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974)) exempting fishermen from the Robins rule had been overturned by the Supreme Court’s decision in East River. Judge Holland felt that the Supreme Court had not specifically addressed the issue of fishermen in its decision and refused to dismiss their claims. Id. at 641. For a thorough discussion of East River, see Swanson, The Citadel Survives a Naval Bombardment: A Policy Analysis of the Economic Loss Doctrine, 12 Tul. Mar. L.J. 135 (1987).

162 Id. at 641. 163 786 F. Supp. 853 (C.D. Cal.), aff’d, 973 F. 2d 1468, 1469 (9th Cir. 1992).
164 86 F. Supp. 858.
165 Id.
166 The court also pointed to Judge Holland’s decisions in Exxon Valdez and Glacier Bay. In addition, it found support in federal regulations that allow recovery for economic losses. Id. at 859.
167 Id. at 862.
168 In support of these propositions, the court cited Romero, Huron, Kossick, and East River.
another rule (Robins) would apply to claims above that amount.\textsuperscript{169} California has a particularly strong interest in pollution within its borders. In addition, the California regulations related to shoreside injuries, similar to those upheld in the Askew case. In essence, the court applied a balancing test to determine that “any federal interest in uniformity in this area is outweighed by the compelling state interest, there is no actual conflict with federal admiralty law since the law includes TAPAA, and the goal of uniformity is served by allowing for nonRobins and strict liability state remedies.”\textsuperscript{170}

These cases relating to oil spills of TAPAA oil show the confusion that exists when the application of state and federal law is at issue. If the courts find it difficult to discern and apply the law, how is the industry supposed to do so?

III

THE OIL POLLUTION ACT OF 1990

Congress had the opportunity to clear up this confusion when it passed OPA in 1990.\textsuperscript{171} For years, Congress had been embroiled in a struggle over how to resolve the preemption issue.\textsuperscript{172} House versions of the bill had provided for preemption of state laws, while the Senate had fought to preserve the states’ right to legislate in the area.\textsuperscript{173} In addition, the issue of United States ratification of international agreements relating to oil spills was also controversial. The legislation that passed provides for the creation of a unitary set of rules relating to regulation, clean up, liability, and

\textsuperscript{169}86 F. Supp. at 863. The court was particularly concerned about the effect this might have on litigation tactics:

The Court is concerned that having different standards under TAPAA and non-TAPAA could create a serious threat to the uniformity and harmony of maritime law. If recovery under TAPAA is nonRobins and recovery beyond TAPAA is limited by Robins then in a spill with damages that exceed $100 million, the ability to recover for economic damages and the extent of liability for those damages will depend upon tactical maneuvering. Since parties with solely economic damages can recover only under TAPAA, they will want to persuade plaintiffs who could alternatively recover under other laws, to use those other laws and save the TAPAA $100 million for their solely economic damages.

Thus, two identical spills could result in vastly different recovery and liability depending upon how the claims were arranged. This is strikingly pointed out by the Exxon Valdez Court when it urged the government plaintiffs to refrain from using TAPAA since they had alternative statutory remedies so that the economic loss claimants could recover as much as possible.

Id. at 864.

\textsuperscript{170}Id. at 864–65.

\textsuperscript{171}See supra note 5.


compensation. Specifically, responsible parties are liable for removal costs; damages to natural resources; damages, including economic losses, from harm to real or personal property; loss of subsistence use of natural resources; loss of tax revenues by a governmental unit; loss of profits due to harm to real or personal property or natural resources; and costs of additional public services made necessary by the spill. Defenses are limited to acts of god, acts of war, and third party fault, which may only be claimed if the allegedly responsible party has not been negligent. In addition, the responsible party can argue that the claimant was grossly negligent. OPA limits the liability of the vessel, depending on its type and size. These limits do not apply if the responsible party was grossly negligent or in violation of federal safety, construction, or operating regulations.

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17533 U.S.C. at § 2702.

176Id. at § 2703(a).

177Id. at § 2703(b).

178Section 2704(a) provides:

(a) General rule

Except as otherwise provided in this section, the total of the liability of a responsible party under section 2702 of this title and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed—

(1) for a tank vessel, the greater of—

(A) $1,200 per gross ton; or

(B) (i) in the case of a vessel greater than 3,000 gross tons, $10,000,000; or

(ii) in the case of a vessel of 3,000 gross tons or less, $2,000,000;

(2) for any other vessel, $600 per gross ton or $500,000, whichever is greater;

(3) for an offshore facility except a deepwater port, the total of all removal costs plus $75,000,000; and

(4) for any onshore facility and a deepwater port, $350,000,000.

Id. at § 2704.

179Id. at § 2703(c).
addition, a fund is created to pay the costs of spills.\textsuperscript{180} Although the Act provides a comprehensive scheme, its language allows the states to supplement the federal rules:

(a) Preservation of State authorities; ... Nothing in this Act or the Act of March 3, 1851 [The Limitation of Liability Act] shall—

(1) affect, or be construed or interpreted as preempts, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to—

(A) the discharge of oil or other pollution by oil within such state; or

(B) any removal activities in connection with such a discharge; or

(2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under ... State law, including common law.

(c) Additional requirements and liabilities; penalties. Nothing in this Act [or] the Act of March 3, 1851 ... shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof—

(1) to impose additional liability or additional requirements; or

(2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law; relating to the discharge, or substantial threat of a discharge, of oil.\textsuperscript{181}

Thus, Congress chose to allow the states to continue the development of separate laws relating to maritime oil spills, but failed to explain adequately how the state and federal rules are to interact. Under OPA, those favoring greater state control won, but the Act does contain language indicating a willingness to consider international agreements in the future:

It is the sense of Congress that it is in the best interests of the United States to participate in an international oil pollution liability and compensation regime that is at least as effective as Federal and State laws in preventing incidents and in guaranteeing full and prompt compensation for damages resulting from such incidents.\textsuperscript{182}

Of course, given that OPA allows states to push the limits on how far to extend liability, it is unlikely that an international regime would be found acceptable by a Congress wishing to retain the greatest flexibility for the states. Despite the possible benefits, membership in the existing international regimes was rejected because it would make it impossible for the United States or the several states to increase liability rules without the agreement of the international community.\textsuperscript{183}

In crafting OPA, Congress missed an important opportunity, provided by

\textsuperscript{180}Id. at §§ 2712–13.

\textsuperscript{181}Id. at § 2718.


\textsuperscript{183}See Mitchell, supra note 172, at 240.
the emotional reaction to the Exxon Valdez disaster, to clarify the relationship between state and federal law. Instead, the legislation provides for a minimum level of federal regulation, allowing the states to provide heightened liability for oil spills within their jurisdiction.

IV
BACK TO THE FUTURE: THE NEED FOR A RETURN TO JENSEN

Despite all the confusion surrounding the interaction of federal and state claims in the maritime arena, the importance of uniformity remains unquestioned. The national and international admiralty tradition demands the predictability and uniformity historically available for those involved in maritime commerce. Although the courts have questioned the breadth of national maritime supremacy over the years, the basic doctrine has remained secure. A diversity of state laws that significantly impacts on maritime commerce cuts at the very core of the maritime jurisdiction.

A. International Agreements

Although OPA gives lip service to the need for international agreements to deal with oil pollution problems, in reality, the statute rejects the United States’ participation in such international regimes. A complete discussion of the various international agreements and conventions relating to oil spill liability is far beyond the scope of this article, but it is worth noting that workable agreements with adequate compensation limits are available to protect United States interests. The failure of the United States to accede to these agreements has been a major impediment to future international law development.

Major international efforts to deal with the problems created by maritime


\[\text{\textsuperscript{185}The Chairman of the International Association of Independent Tankers has commented on the United States' failure to ratify the 1984 Protocol: "For a major country like the U.S. not to accept to work within the United Nations Organization's IMO, but to go their own way, is a very sad example for other countries." Knott, Wry Agreement on OPA 90, Oil & Gas J., Oct. 4, 1993, at 42.}\]
oil spills began shortly after the *Torrey Canyon* spill near the British coast in 1967.\(^{186}\) In 1969, the International Maritime Consultative Organization (now known as the International Maritime Organization), a specialized United Nations body, convened to discuss oil spill issues and adopted the International Convention on Civil Liability for Oil Pollution Damage ("CLC").\(^ {187}\) The CLC makes the vessel owner absolutely liable for all oil pollution damages, except where the owner can show that the damages resulted from certain delineated matters beyond its control.\(^ {188}\) Because damages can be sought only for losses to the territory or territorial sea of a ratifying country,\(^ {189}\) the CLC and its protocols are currently inapplicable to the United States. The convention also limits the owner’s liability, if the accident occurred without its actual knowledge or privity.\(^ {190}\) In addition, oil company vessels are required to carry insurance or other financial security in the amount of CLC liability.\(^ {191}\)

Because the CLC liability limits were seen as inadequate, the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage ("Fund Convention") was agreed to in 1971.\(^ {192}\) Under the terms of the Fund Convention, a claimant may seek compensation from the fund if the CLC does not cover the losses.\(^ {193}\) The fund is constituted from mandatory donations made by entities in member countries that receive the oil.\(^ {194}\) In 1984, the member nations plus the United States agreed to two protocols\(^ {195}\) that together increased the CLC and Fund Convention limits fourfold.\(^ {196}\) Although the United States signed the 1984

\(^{186}\) Smith, supra note 184, at 115.


\(^{188}\) The CLC provides no liability for damages that:
(a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or
(b) was wholly caused by an act or omission done with intent to cause damage by a third party, or
(c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

\(^{189}\) Id. art. II.

\(^{190}\) Id. art V(1)-(2).

\(^{191}\) Id. art. VII(1).

\(^{192}\) Reprinted at 11 ILM 284 (1972).

\(^{193}\) Id. arts. 4, 5.

\(^{194}\) Id. arts. 10–15.


\(^{196}\) Manieri, supra note 184, at 463. The 1984 Protocol increases maximum liability to $62 million for ships over 140,000 gross tons. Bartlett, In re Oil Spill by the Amoco Cadiz—Choice of Law and a Pierced
Protocols, Congress never ratified them because of legislative concerns regarding the limits of liability and the impact the agreements would have on state legislation.\textsuperscript{197}

Oil pollution from ships is an international problem in need of an international solution.\textsuperscript{198} The reasons are obvious. Oil transportation necessarily implicates multiple international interests: the oil companies themselves are scattered across the globe, the vessels are flagged in numerous countries, and the shipowners and crews are of widely varying nationalities. These ships and the damage they cause traverse national borders. Even when the spill is limited to one country’s territory, ripple effects relating to environmental damage, the availability and cost of oil, and shipping industry concerns can occur. If there is any area for which an international regime seems logical, this is it.

The United States would greatly benefit by joining the international community in its attempts to control oil pollution. United States participation in any major international legal effort is crucial to the success of that effort.\textsuperscript{199} Leadership from the United States has led the international community to increase liability limits and international shipping standards. Without such leadership, international efforts could flounder, leaving the United States vulnerable to ships with substandard designs, maintenance, and crews, and American claimants without adequate remedy.\textsuperscript{200} A strong international regime could help protect American interests when ships travel outside the jurisdiction of the United States, but within striking distance for oil damage to United States territory. Ratification of these conventions could also give United States claimants access to the liability funds that are created by such regimes, providing a pot from which United States citizens harmed by oil spills could obtain damages.

Corporate Veil Defeat the 1969 Civil Liability Convention, 10 Mar. Law. 1, 20 (1985). Together, the 1984 Protocols provide about $140 million in compensation, an amount that increases to $208 million under certain circumstances. Id.

\textsuperscript{197} In addition to these mandatory agreements, the industry has found it beneficial to enter into voluntary agreements to help cover the costs of an oil spill. In 1969 the vast majority of tanker owners agreed to the Tanker Owner’s Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP), which provides compensation for both government and private oil removal expenses. Comment, supra note 184, at 1608. A 1971 agreement, the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL), supplements TOVALOP in cases where other sources of compensation prove inadequate. Id.


\textsuperscript{199} Id.

\textsuperscript{200} Id.
B. The Diversity of State Laws

The need for maritime uniformity is particularly important in the area of ocean-based oil pollution, given the United States' dependence on oil carried by enormous tankers. OPA appears to allow states tremendous latitude in establishing liability for clean up costs and damages caused by oil discharges. In fact, the states have felt free since Askew to pass legislation regulating oil spills.201 Some of these measures relate to all water pollution,202 while others specifically target oil pollution and its effects.203 These statutes generally provide for strict liability for oil spills,204 but vary greatly in terms of whether the amount of liability is limited or not.205 Some states create funds comparable to TAPAA to cover damages from spills, but the source of funding differs greatly. In addition, states often require vessels to carry bonds or insurance in widely varying amounts to show financial responsibility.206

Thus, a vessel carrying oil for use in the United States may be subject to a multiplicity of rules and liabilities as it moves from the territorial jurisdiction of one state to another. First, the vessel is subject to OPA. Then it is subject to the laws of the state where the accident occurs. Finally, it may also find itself liable under the laws of other states where physical damages occur, or possibly even where economic damages occur without any physical loss.

Assuming that the vessel is able to ascertain which of the complex array of laws is applicable, there may be navigational and insurance implications. The vessel may choose one port over another because of the possible difference in liabilities. Insurance costs may vary depending on which territory the vessel passes through. Vessels may ineffectively opt to dock where liabilities are less, rather than close to the point of use for the oil. Alternatively, some vessels may not enter United States waters at all due to the unpredictable exposure under various laws.207 Reputable tanker owners

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202 Perko, supra note 201, at 1225.

203Id.

204Id. at 1226.

205Id.

206Id. at 1228.

207 Apparently, this has already occurred. In 1990 Royal Dutch/Shell quit using its own tankers to
able to pay massive judgments may turn the business over to thinly capitalized operators who will be judgment-proof from the damages due under some state laws. Although OPA requires proof of financial responsibility, there currently is no insurance or financial responsibility requirement that would cover the kinds of damages that occurred in a spill like the Exxon Valdez. It was fortunate that Exxon had the assets to pay the damages. As it stands, oil importers may act to limit the possibility of unpredictable and unlimited damages under a multiplicity of laws. Ultimately, the unpredictability caused by the current legal regime may damage the United States maritime industry, environment, and the consumer.

Knowing that liability laws have an effect on navigational choices, the states might react in different ways. Some may ratchet up the liability to discourage the use of the state’s territory for oil importation. Others desiring additional commerce could ratchet down liability to the federal minimum to encourage oil importation through their states. Once again, this lack of uniformity causes inefficient market aberrations.

C. Reaffirming Jensen

If Congress is unwilling to ratify international agreements or assert national supremacy, is there any way for the courts to assist in securing the needed uniformity? The admiralty clause of Article III of the Constitution provides a mechanism for judicial action, and Jensen provides the needed rationale. Despite the controversy surrounding its continuing validity, Jensen remains a clearly-articulated approach used to decide federal-state admiralty preemption issues. Using the three-part test provided by Jensen and subsequently applied in later decisions, the courts should now consider whether the numerous state statutes regulating oil spills have a deleterious effect on the admiralty. State oil pollution statutes that provide for different or duplicative liabilities than the federal laws should be struck down as violative of the Constitution’s admiralty clause. In particular, higher liability limits should be found invalid. Different theories of liability and different rules relating to responsibility should also be limited. The states should be prevented from creating a set of liability rules that covers the same issues covered by the federal law. The application of Jensen, instead of the

deliver crude oil in United States waters because of "'unlimited and uninsurable' risks..." See Fletcher, Petroleum Tanker Regulations Get Sticky: Shipping Firms Say New Rules Could Disrupt U.S. Oil Imports, Hou. Post, Nov. 21, 1994, at E8. One oil company executive went so far as to say that OPA is "an El Dorado for lawyers." Knott, supra note 185.


See supra text accompanying notes 39–44.
confused standard created in Askew, would lead to the elimination of conflicting state laws.

The first part of the Jensen test asks whether the state regulation “contravenes the essential purpose expressed by an act of Congress.” Because OPA specifically allows states to create liabilities beyond those found in OPA, it appears that most state legislation cannot be successfully challenged under this portion of the test. Unlike TAPAA, OPA’s specific provision makes it clear that the Limitation Act does not contravene state law, eliminating one possible avenue to uniformity.

Of course, it is possible that state rules may interfere with OPA in other ways. State safety and environmental rules may run counter to federal requirements. Askew did not address this issue, and OPA seems to allow some regulation. However, a state statute in direct contravention of OPA’s requirements, such as a rule prohibiting the use of double-hulled vessels, would seem to violate the first part of the Jensen test. Such a rule would contravene the essential purpose of OPA, which is to provide greater safety in the oil transportation industry. The provisions of most state statutes relating to civil liability are less likely to provide this sort of conflict. OPA clearly assumes that states may create additional liability regimes for damaged claimants. Thus, the first part of the Jensen test is not usually going to be at issue.

The second part of the Jensen test considers whether these state statutes contravene a characteristic feature of admiralty law. As the TAPAA cases show, state and maritime laws have clashed on the availability of recovery for economic losses and the application of Robins. Of course, the general maritime law contains many of admiralty’s characteristic features, and one of these may be the Robins rule. Certainly, the “no economic losses” rule is one that has a long and well-established history in admiralty, but if Justice Scalia’s approach in American Dredging is extended to a substantive rule, Robins would be unlikely to be found to have originated in admiralty or to have exclusive application in the admiralty setting. On the contrary, limitations of economic losses are found throughout the common law. Justice Scalia’s opinion leaves open the question of whether the same approach would be used in a substantive law case and fails to develop fully his theory. Robins may still be a characteristic feature of admiralty. Under TAPAA, Judge Holland found that only TAPAA defendants lost the protection of Robins and then only to the extent of the statute’s liability limitation. Under OPA, a plaintiff may recover for economic losses from an OPA defendant, but does this extend to other defendants or beyond the

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210 U.S.C. at § 2718(c).
211 See supra text accompanying notes 59–72.
liability limits seen in OPA? OPA’s provisions do not say anything about the interrelationship between the general maritime law and state law, stating only that neither OPA nor the Limitation Act preempt state law. Assuming that Judge Holland’s position would be adopted, a state law provision expanding economic losses to non-OPA defendants would seem to violate the second Jensen test. The general maritime law may still remain in force. In addition to the difficult issues surrounding Robins, many other state law issues may be presented. This portion of the Jensen test could thus be useful in striking down the portions of state statutes that are particularly offensive to the maritime law.

The final portion of the Jensen test provides the best ammunition for striking down troublesome statutes. The question here is whether the state law “interferes with the proper harmony and uniformity of [admiralty law] in its international and interstate relations.” State laws that create additional, different, or duplicative oil spill remedies from those that are available in admiralty interfere with the proper harmony and uniformity of admiralty law. A multiplicity of varying state laws has a detrimental effect on both international and interstate relations. Both federal legislation and the relevant international agreements serve to encourage harmony and uniformity by providing predictable standards that are applicable nationally or internationally.

In contrast, the current morass of state laws serves to create confusion, perverse incentives, and a heightened level of international tension. In reaching its decision in Jensen, the Supreme Court showed its concern for the effect that the New York legislation would have on the “freedom of navigation between the States and with foreign countries.” Allowing states to legislate freely has a negative effect on this freedom. Of course, it can be argued that any state legislation affecting the maritime industry has this result. But here, the impact of the state legislation on the oil transportation industry is severe. Each vessel owner would be required to consider a multiplicity of laws before making any decisions, adding to the cost of doing business in the United States. This may simply increase the cost of purchasing oil in the United States, or it may have more serious implications. Some vessels may choose to avoid the United States. Others may turn the work over to fly-by-night operators, who lack the resources to pay the unpredictable state judgments. The differences in liability here may be so large as to cause inefficiencies in the delivery system. This is the very result that the framers were trying to avoid when they chose to specify special treatment for admiralty in the Constitution.

Under the balancing test suggested by some decisions, the state interests would seem minimal when compared with the federal concerns. On the federal side, there is a need for a uniform and smoothly functioning set of
admiration laws that will foster trade and encourage growth. The nation has an interest in ensuring that oil pollution is dealt with in a fair and uniform way and that victims are adequately compensated.\textsuperscript{212} Polluters should be forced to pay the cost of their pollution and internalize the costs,\textsuperscript{213} but the liabilities should not get so out of hand that the costs make the use of oil prohibitive. There is also a national interest in protecting natural resources such as fisheries which cross state lines.\textsuperscript{214} The federal government has an interest in fostering a healthy and responsible maritime industry.\textsuperscript{215} It also has an interest in dealing with clean-up costs that often cross state lines. Finally, the foreign relations of the United States are entrusted to the federal government. The United States should lead the way in creating an international regime that encourages safety and provides remedies for those who are harmed by oil pollution. In order to do this, the federal government must have control over United States legislation.

Against these impressive national interests, the state interests are few. The state has a special interest in protecting its environment and the property of its citizenry. It also has an interest in regulating the behavior of possible polluters while they are within the jurisdiction of the state. This is a difficult argument to make because those interests are already protected by federal legislation and, if agreed to, international regimes. Therefore, the state must argue that it has an interest in providing greater or different protection than is offered in those other forums.\textsuperscript{216} The state may ultimately argue that it desires to preclude certain federally-allowed activities from its territories entirely. Of course, that would never be allowed, but the effect of outrageous liabilities may be the same. Vessels may avoid states with extremely stringent liability rules. Thus, a balancing of these interests should also lead to a determination that the states are not allowed to legislate so that the uniformity of oil spill law is destroyed. The Constitution and the courts’ jurisprudence in the area of admiralty preemption clearly allow, and perhaps even require, that the courts strike down state oil pollution laws that conflict with the federal regime. There is currently a misplaced reliance on the rather vague decision in \textit{Askew} to support wide ranging state legislation. \textit{Askew} should be limited to its facts or overturned so that the courts can apply \textit{Jensen} to strike down state legislation that infringes on the admiralty power.

Ultimately, the federal government is in a better position to determine American maritime policy than state legislators, whose main concern may be parochial. Together the executive and legislative branches need to address

\textsuperscript{213}Id.
\textsuperscript{214}Id.
\textsuperscript{215}Id.
\textsuperscript{216}See the discussion of these issues supra text accompanying notes 56–58.
the issues presented by the massive transportation of oil in United States waters. A decision by the United States Supreme Court that the states may not pass legislation creating additional liabilities would do much to bring about this result. It would force legislators to put aside their political posturing about states' rights and look to improving federal legislation or agreeing to international agreements. Without such pressure from the courts, the confusion will continue, and the negative effects of a multiplicity of laws will continue to be felt.

If the courts are unwilling to take this step, it is incumbent upon Congress to move to clarify the confusion created by statutes like TAPAA and OPA. The savings provisions in these statutes simply fail to provide courts or the maritime industry with adequate guidance on what laws apply to maritime oil transportation, creating the confusion that can be seen in the TAPAA litigation. Legislative resolution of this confusion would be difficult, given the number of possible conflicts between state and federal law that can arise, but the current level of confusion seen in OPA and court decisions applying similar statutes is unacceptable.

V
CONCLUSION

Oil spills from ocean going vessels are not likely to disappear. This international problem necessitates an international solution, but the United States political process has failed in reaching this solution. Apparently compelled to give voice to varying state concerns, Congress has forgone the benefits that internationally uniform treatment would provide. Instead vessels must deal with differing legal regimes as they travel from jurisdiction to jurisdiction, and the problem goes beyond the rules that regulate the equipment, navigation, and crew of the vessel. Perhaps most importantly, vessels plying the international oil trade face unpredictability and widely varying liability schemes.

Although this may seem troublesome in the international context, the problem is even more acute within the United States. Under OPA and case law, each state is apparently allowed to fashion its own liability rules beyond those established by the federal law. These state statutes may be enforced even when they contravene the general maritime law. A tanker moving from one United States port to another will likely encounter completely different liability exposures. Ships may choose their port of entry depending on which rules apply. The cost and coverage of insurance may vary as the ship moves from one system to the next. Indeed, some vessels may even decide to avoid United States jurisdictions completely.

Even if one prefers allowing the states greater latitude in admiralty
matters, the current standards are so unstable and confusing that they permit little certainty or predictability for those engaged in the maritime trade. Nothing shows this better than the litigation surrounding the spills of TAPAA oil. Actions in state and federal courts and claims against the TAPAA fund have created near chaos in the various fora. There is nothing in OPA that serves to solve these problems. In future spills, there will still be claims in federal court and state court, as well as against the fund created by the legislation. When the founders created the federal admiralty power in the Constitution, they never intended the current incomprehensible judicial admiralty standards that freely permit state intervention. What was needed with the passage of OPA was a uniform, predictable, and efficient system that would encourage trade and discourage pollution. What we now have is a system totally lacking in uniformity that may discourage trade with the United States. In a time when the United States has chosen to adopt the North American Free Trade Agreement and become a member of the World Trade Organization, its unwillingness to seriously consider entering into the international agreements that will help to free the trade in international oil is troubling.

Short of ratification of the 1984 Protocols, the next best solution would be a judicially-driven interpretation of the Constitution’s admiralty provision to preclude troublesome and unnecessary state laws. The application of Jensen to state oil pollution laws would create a uniform United States maritime law applicable to oil spills. A decision from the Supreme Court that states are not allowed to legislate in this area traditionally covered by admiralty law would prevent parochial interests from blocking international agreements in favor of local interests. Congress would be more likely to ratify the 1984 Protocols because those in favor of state control would be prevented from arguing against a uniform legal regime. The general maritime law, legislation, or an international treaty would provide that uniform approach. At that point, the benefits of the international regime may be more palpable to the Congress. Even if the international regimes are not immediately adopted by the United States, a uniform system for dealing with oil disasters would be applied in United States courts. By rejecting decisions like Askew, or at least limiting their holding, the courts have the opportunity to bring order to the haphazard laws that currently apply to oil spills.