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WATER POLLUTION AND COMMERCIAL FISHERMEN: APPLYING GENERAL MARITIME LAW TO CLAIMS FOR DAMAGES TO FISHERIES IN OCEAN AND COASTAL WATERS

JOSEPH J. KALO†

Although there is a high level of interest in the public at large for maintaining pollution-free water resources, the interest of commercial fishermen is more specific. Because the economic survival of these individuals is directly linked to the quality of the waters in which they fish, the private damage remedy for injury caused by pollution is an important right. Recent decisions of the Supreme Court have circumscribed that right by foreclosing federal common law as a source of injunctive relief or damages. Nonetheless, a close study of the scope and interrelationship of maritime law, state law, and federal legislation leads Professor Kalo to contend that federal relief may not be totally precluded for commercial fishermen. "General maritime law" may still provide a federal remedy for injuries suffered in state territorial waters by these plaintiffs.

Over the past two decades the people of this country have expressed increasing concern about the quality of the environment in which they live and work. There has emerged a heightened awareness of the broad, insidious economic and societal effects of various forms of industrial and chemical pollutants. New environmental laws have been enacted1 and existing laws have been amended and strengthened,2 giving greater weight to maintaining a pure environment.3 Even as some of the political tides have shifted, the public concern with protecting high environmental quality remains.4

Cleaning the nation's waters and maintaining them in as pure a form as

† Professor of Law, University of North Carolina School of Law; A.B. 1966, Michigan State University; J.D. 1968, University of Michigan.

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3. 1 F. GRAD., TREATISE ON ENVIRONMENTAL LAW § 1.01[1]-[2] (1981).
possible have been high on the list of environmental priorities.\(^5\) The public concern has obviously been one of health, safety, and perhaps, esthetics. For the commercial fisherman and other watermen who harvest the sea the concern is more immediate and economic. When water quality is threatened, their livelihood is endangered.

When commercial watermen have found their sea harvest depleted because of oil and chemical pollution of fishing grounds, they often have filed civil actions against the pollutors.\(^6\) These actions, seeking injunctive relief or damages or both, were predicated upon commercial fishermen and shellfishermen having a legally cognizable economic interest in the preservation of the environmental quality of rivers, bays, estuaries, and ocean waters. Frequently these actions, filed in the federal courts, sought relief on a variety of statutory, common law, and maritime theories. The Federal Water Pollution Control Act\(^7\) (FWPCA), the Marine Protection, Research and Sanctuaries Act\(^8\) (MPRSA), The River and Harbors Act of 1899,\(^9\) the National Environmental Policy Act,\(^10\) the fourth, ninth and fourteenth amendments to the United States Constitution, federal common law and general maritime law of nuisance,\(^11\) and other sources were all used, often in a single multifaceted complaint,\(^12\) in an attempt to abate sources of pollution and to recoup losses resulting from a decline of catches.

Some of the theories upon which the commercial watermen have relied in the past have now been foreclosed by recent federal court decisions,\(^13\) the most significant of which are the 1981 United States Supreme Court decisions in *Milwaukee v. Illinois*\(^14\) and *Middlesex County Sewerage Authority v. National*...
With these decisions the Supreme Court has eliminated federal common law as a basis for injunctive relief or private damages in water pollution cases. Injunctive relief and a damage remedy are to be found elsewhere. This elsewhere, in the eyes of the Supreme Court, is state statutory and case law.

Despite the Supreme Court's treatment of federal common law, and even in the absence of diversity of citizenship, the federal courts may not be completely closed to commercial fishermen whose fishing grounds are damaged as a result of pollution: they may be able to bring damage suits under general maritime law or other federal statutes. This article will address four related questions: (1) whether commercial fishermen and shellfishermen have a right under general maritime law to recover damages when fishing and shellfishing grounds are polluted; (2) whether any such rights under general maritime law have been displaced by congressional legislation directing the application of state law to such claims; (3) in the absence of any express congressional directive, whether and under what circumstances both state law and general maritime law can be applied concurrently to these claims; and (4) whether state law may create damage claims for other persons who suffer some economic injury as a result of water pollution, but whose claims are not recognized by maritime law, when awards of damages to them may indirectly impair the rights of commercial fishermen and shellfishermen.

I. An Overview

Federal admiralty jurisdiction exists if pollution activities constitute a maritime tort. If a maritime tort is committed, then general federal maritime law—judicially created substantive law—may determine the nature and the extent of the rights and remedies available to commercial fishermen in water pollution cases. Not all maritime actions that may be brought in the federal courts, however, are governed by general federal maritime law. The

17. 451 U.S. at 328-29; 453 U.S. at 20 n.31.
18. Congress has provided fishermen with both a federal statutory remedy and a fund out of which damage claims can be paid for pollution of fishing grounds caused by oil spills resulting from oil and gas development of the outer continental shelf. Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. §§ 1801-1866 (Supp. IV 1980). Subchapter I of the Act establishes an Offshore Oil Pollution Compensation Fund. 43 U.S.C. §§ 1811-1824. Although double recovery is precluded by 43 U.S.C. § 1820, injured parties have the option of seeking recovery under other federal or state laws rather than pursuant to this legislation. See 43 U.S.C. § 1820(a).
19. See Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 253, 268 (1972) (federal admiralty jurisdiction exists over aviation tort claims only when there is a significant relationship to traditional maritime activity).
20. See, e.g., National Sea Clammers Ass'n, 616 F.2d at 1236, rev'd on other grounds, 453 U.S. 1 (1981); Union Oil Co. v. Oppen, 501 F.2d 558, 560-63 (9th Cir. 1974).
21. See, e.g., Hess v. United States, 361 U.S. 314 (1960); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955); Just v. Chambers, 312 U.S. 383 (1941); see also G. Gilmore & C. Black, The Law of Admiralty §§ 1-17 (2d ed. 1975). The terms "territorial waters" and "territorial seas" are used for convenience and are not intended to exclude inland waters. The arguments presented are applicable to all navigable waters within the jurisdiction of federal admiralty
Supreme Court has held that in some cases, particularly those arising in state territorial waters, state law may be applicable. In the absence of a congressional directive to apply either maritime law or state law, the initial choice depends upon whether a uniform rule establishing a minimal level of protection is considered necessary or whether the matter may be left to the possibly varying rules of the states in whose waters the incidents occur. Thus, the first issue addressed by this article is whether water pollution that interferes with the activities of commercial fishermen constitutes a maritime tort; the second is whether, in the absence of congressional commands, the rights of commercial fishermen are founded in general maritime law or state law. Despite some indications to the contrary, an argument can be made that such pollution does constitute a maritime tort, the legal consequences of which are determined by general maritime law in the absence of a federal statute dictating a different result.

The third issue is whether any federal statute displaces general maritime law and calls for the application of state law in private damage actions brought by commercial fishermen for pollution occurring in state territorial waters. Some cases suggest that either the Submerged Lands Act of 1953 or the FWPCA would require the application of state law rather than maritime law. The Submerged Lands Act of 1953 appears not to mandate the application of state law to private claims for pollution of fisheries, but only to permit the states to impose reasonable, nondiscriminatory conservation measures upon fisheries within state territorial waters. The effect of the FWPCA is more difficult to evaluate, but it likewise does not appear to require the application of state law. Evaluation of the effect of the FWPCA necessitates consideration of Milwaukee v. Illinois and Middlesex County Sewerage Authority v. National Sea Clammers Association. These cases, which interpreted the FWPCA and MPRSA, did not discuss whether private parties relying upon general maritime law may recover damages for pollution of fishing grounds, but did hold that federal common law no longer provides the basis for a private action.


24. E.g., Askew v. American Waterways Operators, Inc., 411 U.S. 325, 332-34 & n.5 (1973). The district court in Burgess, 370 F. Supp. at 249, stated that there was no established federal admiralty rule governing such torts but that admiralty jurisdiction did exist. The court sidestepped the question whether state law provided the governing rules in the absence of an established admiralty rule, see, e.g., Wilburn Boat Co. v. Fireman’s Fund Ins. Co., 348 U.S. 310 (1955), or whether the federal court should create a uniform maritime rule, see, e.g., Moragne v. States Marine Lines, 398 U.S. 375 (1970).

25. See In re Oswego Barge Corp., 664 F.2d 327, 334, 339-45 (2d Cir. 1981) (United States sought recovery under maritime law for cleanup costs of oil spill in St. Lawrence River; claim for cleaning Canadian waters was permitted, even though claim for cleaning United States waters was denied on grounds of preemption by FWPCA).


seeking injunctive relief or damages in water pollution cases. Because general maritime law is merely another species of federal common law, the question naturally arises as to the effect, if any, of these two decisions upon the continued availability of private damage remedies based upon general maritime law. This discussion will show why private rights of action based upon general maritime law are distinguishable from the federal common law rights dealt with in Milwaukee v. Illinois and National Sea Clammers Association, are compatible with those decisions, and are consistent with the legislative intent and statutory language of the FWPCA and MPRSA.

Regarding the fourth and final issue, the Supreme Court has held that in some circumstances state law may be applied concurrently with federal maritime law to the same set of facts. Until recently, the federal courts did not have to decide under which circumstances state law would be applied concurrently with maritime law in water pollution cases. In most of the water pollution cases involving maritime torts, the courts have assumed that state law and maritime law were identical in all significant aspects and, therefore, the result would be the same whichever was applied. Hard choices and hard decisions were thus avoided. The continuing litigation in the Kepone case—Pruitt v. Allied Chemical Corporation—however, clearly points out the need for deciding when state law may apply concurrently with general maritime law.

In Pruitt the district judge held that commercial fishermen and shellfishermen were entitled to recover under general maritime law for economic damages resulting from the Kepone pollution to the James River and Chesapeake Bay, but that boat marina and bait and tackle shop owners who lost profits as a result of the decline in sportsfishing could not recover under general maritime law. The damages suffered by the marina owners and bait and tackle shop operators resulted from the interference with their contractual relationships with sportsfishermen, a group that was directly injured by the defendant's actions. This damage was a type of indirect economic harm not compensable in maritime law. The court went on to hold that the marina owners and boat and tackle shop operators could recover the same damages

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31. See, e.g., Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974).
32. 523 F. Supp. 975 (E.D. Va. 1981). For sixteen months beginning in 1974, Life Science Products Co. mixed and processed the highly toxic chemical Kepone and sold the product to Allied Chemical Co. Large quantities of the toxic waste were dumped in the city of Hopewell's sewage treatment system and eventually ended up in the James River. Large numbers of fish were contaminated in an area reaching far into Chesapeake Bay. Some of the species of fish and shellfish affected by the pollution were migratory. Consequently, traces of Kepone were found in bluefish caught off the New Jersey coast. See Spread of a Deadly Chemical—and the Ever Widening Impact, 81 U.S. NEWS & WORLD REP., Sept. 16, 1976, at 43-44; Tragedy in Hopewell, 107 TIME, Feb. 2, 1976, at 43; Update, 89 NEWSWEEK, Apr. 4, 1977, at 12.
33. 523 F. Supp. at 981-82.
34. Id.
If the district court in the *Pruitt* case correctly applied state law to a maritime tort, the damage remedy provided by general maritime law for commercial fishermen and shellfishermen may be a hollow one in a mass water pollution case. Mass water pollution activities may cause tremendous economic damages. Yet, the defendant's assets, notwithstanding insurance, may be insufficient to compensate all who suffer some form of economic injury. The difficulty is then one of dividing available assets among potential claimants. By recognizing a state cause of action for a group not entitled to recover under general maritime law, the practical ability of commercial fishermen to receive full compensation may be seriously impaired. Thus, the final question addressed by this article is the extent to which state law may be applied to permit recovery by groups suffering indirect economic damages not compensable under general maritime law. State law, it appears, may increase, but not diminish, the protection afforded commercial fishermen by general maritime law; therefore, state law that creates a cause of action for groups not having cognizable rights under maritime law has the effect of impairing the rights of commercial fishermen and is unconstitutional under the admiralty clause.  

II. WATER POLLUTION AS A MARITIME TORT

The threshold question in allowing recovery is whether a particular act of water pollution constitutes a "maritime tort." Such a classification has two important legal consequences, one of which is jurisdictional, the other substantive. First, the admiralty clause of article III of the United States Constitution, and the implementing legislation, 28 U.S.C. section 1333, grant the federal courts subject matter jurisdiction over admiralty and maritime matters, a part of which is maritime torts. Therefore, if pollution is a "maritime tort," plaintiffs may bring suit in a federal district court even in the absence of diversity or the existence of any federal statutory cause of action. Second, as a general rule, federal maritime law, not state law, determines the legal consequences of a maritime tort. Since most maritime claims, just as many other federal claims, may be filed at the plaintiff's option in either a federal court or

35. *Id.*
37. *Id.*
38. 28 U.S.C. § 1333(1) (1976) provides, "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction saving to suitors in all cases all other remedies to which they are otherwise entitled." This provision, which has its origins in the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76, permits a plaintiff who holds an in personam claim, as opposed to an in rem claim, to bring suit, at his election, in a "common-law" court. See generally The Moses Taylor, 71 U.S. (4 Wall.) 411 (1867) (distinction between in personam and in rem claims). If diversity jurisdiction exists and the requisite jurisdictional amount is alleged, the action may be filed in the federal district court; otherwise, it must be filed in the state court. Since a jury is not generally available in an admiralty proceeding, the principal advantage to plaintiff is the availability of a jury trial in a "common-law" court. See, *e.g.*, Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).
state court, classification of pollution as a maritime tort naturally means that, regardless of the forum in which the claim is in fact heard, federal maritime law, not state law, generally will determine the outcome. The term "maritime tort" is thus a term of art defined by the tort jurisdiction granted by the admiralty clause.

Admiralty tort jurisdiction concepts, however, have not remained static over the years. Much like the sands of the barrier islands, the contours of admiralty tort jurisdiction have been altered by shifting tides. Changes in judicial interpretation of the admiralty clause and congressional actions have been part of this process. Prior to 1972, any injuries occurring on or in navigable waters as a result of oil, chemical, or other forms of pollution was maritime torts even if the source or origination of the pollution was some land based activity. The jurisdictional analysis proceeded in two steps. First, the courts held that the locus of the tort was not where the negligent act resulting in the discharge of pollutants occurred, but where the injury took place. Next, by applying the then accepted locality test, the courts held that if the injury occurred in navigable waters, admiralty jurisdiction existed. Thus, the location of the source of pollution was irrelevant. Pollution that originated on land but found its way into navigable waters and caused injury there was

40. For the development of admiralty jurisdiction over torts occurring on inland waters, see The Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825) (jurisdiction limited to tidal waters); The Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851) (jurisdiction extended to Great Lakes and other navigable waters); Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972) (limiting admiralty jurisdiction over torts to those occurring on navigable waters and having a significant relationship to traditional maritime activities).

Prior to 1948, damage to the shoreline, piers, or other structures that were considered extensions of land fell outside admiralty jurisdiction. These injuries occurred on land, thereby failing the "locality" test. Some of these claims were brought within the admiralty jurisdiction of the federal courts as a result of the passage of the Admiralty Jurisdiction Extension Act, Pub. L. No. 695, 62 Stat. 496 (1948) (codified at 46 U.S.C. § 740 (1976)). After 1948, if a vessel was the source or cause of pollution that caused damage to land structures, the action was within admiralty jurisdiction; if the pollution originated on land, however, and then flowed through navigable waters to cause injury to the shore or land structures, the cause still was not cognizable in admiralty. See, e.g., United States v. Matson Nav. Co., 201 F.2d 610 (9th Cir. 1953).


42. In Maier v. Publicker Commerical Alcohol Co., 62 F. Supp. 161 (E.D. Pa. 1945), aff’d per curiam, 154 F.2d 1020 (3d Cir. 1946), defendant discharged grain residue into a sewer that flowed into the Delaware River. The residue filled the holds of two partially submerged vessels plaintiff was attempting to raise from the river. Plaintiff sued to recover the additional costs of removing the residue and raising the vessels. The district court held that the claim was cognizable in admiralty and allowed recovery on a public nuisance theory. See also Maryland Dept’l of Natural Resources v. Amerada Hess Corp., 350 F. Supp. 1060, 1064 (D. Md. 1972); The América, 34 F. Supp. 855 (E.D.N.Y. 1940); cf. Smith v. Lampe, 64 F.2d 201 (6th Cir.) (loss of barge due to signals made with automobile horn during fog), cert. denied, 289 U.S. 751 (1933).


44. Under the locality test, “[e]very species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.” The Plymouth, 70 U.S. (3 Wall.) 20, 36 (1866); see also Victory Carriers, Inc. v. Law, 404 U.S. 202, 205 (1971).

treated for jurisdictional purposes in the same manner as pollution that originated on the waters themselves.\textsuperscript{46}

The determination of the existence of admiralty tort jurisdiction became more complex in 1972 after the Supreme Court's decision in \textit{Executive Jet Aviation, Inc. v. City of Cleveland}, which discarded the locality test as the appropriate measure and adopted instead a "locality plus" test.\textsuperscript{47} \textit{Executive Jet} itself involved the crash into Lake Erie of a small jet when its power failed during takeoff from Burke Lakefront Airport in Cleveland.\textsuperscript{48} Admiralty jurisdiction did not exist over the tort claims arising out of the crash because:

the mere fact that the alleged wrong "occurs" or "is located" on or over navigable waters . . . is not of itself sufficient to turn . . . [the alleged wrong] into a "maritime tort." It is far more consistent with history and the purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity . . . .\textsuperscript{49}

Although the holding was limited to its facts—that there was "no federal admiralty jurisdiction over aviation torts arising from flights by land based aircraft between points within the continental United States"\textsuperscript{50}—and the Supreme Court has never held that the \textit{Executive Jet} test applies to all torts occurring on navigable waters,\textsuperscript{51} all lower courts and commentators have since concluded that a tort now must have both a maritime locale and a significant relationship to traditional maritime activity before admiralty jurisdiction exists.\textsuperscript{52}

Application of the \textit{Executive Jet} test will remove from admiralty jurisdiction some water pollution cases that would have satisfied the locality test,\textsuperscript{53} but it should not affect jurisdiction over cases involving claims by commercial

\textsuperscript{46} In re Motor Ship Pac. Carrier, 489 F.2d 152 (5th Cir.), cert. denied, 417 U.S. 931 (1974).
\textsuperscript{47} 409 U.S. 249, 268 (1972).
\textsuperscript{48} Id. at 250.
\textsuperscript{49} Id. at 268.
\textsuperscript{50} Id. at 274.
\textsuperscript{51} In its most recent pronouncement on admiralty tort jurisdiction, the Court stated that "the \textit{Executive Jet} requirement that the wrong have a significant connection with traditional maritime activity is not limited to the aviation context." Foremost Ins. Co. v. Richardson, 102 S. Ct. 2654, 2658 (1982). The court, however, did not say that the \textit{Executive Jet} test applied to all torts having a maritime locale.
\textsuperscript{53} An example is a case in which sewage dumped into a navigable river makes swimming facilities unusable, causing injury to the owners. The situs requirement is met, but "swimming" is not a traditional maritime activity. See, e.g., Chapman v. City of Gross Pointe Farms, 385 F.2d 962 (6th Cir. 1967); McGuire v. City of New York, 192 F. Supp. 866, 871-72 (S.D.N.Y. 1961). In addition, the pollution source is nonmaritime. Thus, neither the activities of the injured parties nor those of the injuring parties satisfies the second jurisdictional criterion. Cf. Crosson v. Vance, 484 F.2d 840 (4th Cir. 1973) (admiralty jurisdiction does not reach personal injury claim by a water skier arising out of negligent operation of towboat); Pfeiffer v. Weiland, 226 N.W.2d 218 (Iowa 1975) (cause of action not cognizable in admiralty because water skier and boat operator engaged in a strictly recreational activity having no relationship with, and presenting no danger to, traditional maritime commerce).
fishermen and shellfishermen. Both jurisdictional requirements set forth in *Executive Jet* are met in these cases. When pollution enters navigable waters and destroys the marine life or environment, the situs requirement is satisfied. The activity requirement can be satisfied by either the activity of the person claiming the injury or the person causing it. Thus, the fact that the source of pollution is nonmaritime does not remove the case from admiralty jurisdiction so long as the effect of the pollution is to interfere with a traditional maritime activity, some of the oldest of which are fishing, shellfishing, and oystering.

**A. Water Pollution: A Maritime Tort Governed by General Maritime Law**

The existence of a "maritime tort" which gives rise to admiralty jurisdiction is a necessary, but not a sufficient condition for the application of federal maritime law. The general rule has been that maritime law governs all maritime tort cases. Unfortunately, the matter does not end there. The fact of the matter is that maritime law is not a comprehensive body of substantive law, and in territorial and inland waters, state law and maritime law stand in an uneasy coexistence.

The Supreme Court cases describing the relationship between maritime law and state law are bewildering. The landlubber who walks this deck quickly becomes seasick; the mariner's walk and stomach may not be so troubled. It is not that the mariner is able to see what is hidden from the landlubber's eyes; he is simply accustomed to the wild pitching and yawing of the ship. In some instances state law has been applied to fill the "gap" in maritime law; in other instances, even in the absence of a general maritime rule, article III has been interpreted as precluding the application of state law. Other

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55. The district court in Potomac River Ass'n v. Lundeberg Md. Seamanship School, Inc., 402 F. Supp. 344, 358 (D. Md. 1975) stated that "interpretation of *Executive Jet* indicates that the activity of the one injured, rather than the one injuring, must have a maritime nexus." That interpretation, however, seems incorrect. Referring to the "swimming" example, *see supra* note 53, if a ship is the source of the pollution but the persons injured were not engaged in traditional maritime activity, the claim should still be cognizable in admiralty. The test for jurisdiction should be satisfied whether the traditional maritime activity is the source of the injury or the subject of it, since the wrong bears a significant relationship to traditional maritime activity in either case.

56. *See, e.g.*, National Sea Clammers Ass'n, 616 F.2d at 1235-36; Union Oil Co. v. Oppen, 501 F.2d 558, 561 (9th Cir. 1974).


59. *See, e.g.*, Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917); The Roanoke, 189 U.S. 185 (1903).
cases further churn the waters. In some the Court has held that state law may modify or change maritime law; in others, that a general maritime rule displaces state law.  

At the risk of oversimplification, there seem to be three modern general principles controlling the determination whether state law or maritime law or both govern a maritime transaction or event. First, since maritime law is not a comprehensive body of law, the court must initially determine whether there is in fact an applicable preexisting general maritime rule. If there is not, the court must decide whether the federal maritime interest mandates the formulation of a general maritime rule or whether the particular matter may safely be left to the varying rules of the states in which the question arises. Second, Congress has the power under the admiralty clause and the necessary and proper clause to require by legislation that state law be applied to maritime matters. Thus, any statute relating to the matter must be examined to deter-


63. Id. at 316; see also infra note 64.  


There is strong authority for the argument that state law cannot displace or modify maritime law. The argument begins with the admiralty clause, one purpose of which, according to the Court, is the application of a uniform body of law to maritime matters, thereby not allowing the rights of parties to shift from state to state. The Court occasionally has taken the position that the admiralty clause does not permit, even with congressional authorization, the application of state law to maritime matters when the effect would be the displacement or modification of general maritime law. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1919). The leading case for this proposition is Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917), which was one in a series of Supreme Court cases discussing the application of state workmen's compensation laws to long-shoremen and harbor workers. In Jensen the widow of a harbor worker (killed while unloading a ship) received an award under the New York Workers' Compensation Act. The Court set aside the award, holding that application of the New York statute to maritime workers was unconstitutional under article III. The Court reasoned that if states could each apply their own workmen's compensation acts to maritime workers the "necessary consequences would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish." Id. at 217.

Congress then passed an amendment to the Judiciary Act of 1879, the intent of which was to permit the states to apply their own workmen's compensation acts to maritime workers. Act of Oct. 6, 1917, ch. 97, 40 Stat. 395. The congressional power to enact such legislation was predicated upon article III and the necessary and proper clause of article I. These two provisions had been interpreted as vesting in Congress legislative authority over admiralty matters. See Crowell v. Benson, 285 U.S. 22 (1932). In Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920), the expected challenge to that legislation occurred. Once again a widow of a maritime worker sued and received an award under the New York Workers' Compensation Act. The Court held that Congress had the power to legislate over admiralty matters, but that the amendment to the Judiciary
mine whether Congress has in fact mandated the application of state law. Third, even when a general maritime rule exists, state law may still be applied when it provides additional protection to the maritime interest, but not when the effect of application of state law would be to decrease the protection already afforded by general maritime law.65 This section and the next two sections of this article examine the operation of these principles in the context of pollution of fisheries in state territorial waters.

Neither the Supreme Court nor the lower federal courts have provided a clear holding that commercial fishermen have a right under general maritime law to recover damages for pollution to fisheries. Yet it seems clear that such a right exists. The admiralty clause of article III does evidence a general federal

Act was an unauthorized delegation of power to the states and ran afoul of the uniformity requirement of the admiralty clause. Ultimately, the particular issue was resolved by the passage of the Longshoremen's and Harbor Workers' Compensation Act, ch. 509, 44 Stat. 1424 (1927) (codified at 33 U.S.C. §§ 901-945, 947-950 (1976)), but the limitations on both state and congressional power linger on. See Askew v. American Waterways Operators, Inc., 411 U.S. 325, 344 (1973); G. Gilmore & C. Black, supra note 21; M. Redish, supra note 29.

The Supreme Court retreated from the absolutist position that even Congress cannot authorize the application of state law to maritime matters. In Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 321 n.29 (1955) the Court disposed of such an argument: "It is faintly contended that the Federal Constitution forbids States to regulate marine insurance, even where Congress acquiesces or expressly consents. This contention is so lacking in merit that it need not be discussed." This interpretation of article III is more palatable than the extreme uniformity position expressed in Jensen. Congress is certainly capable of determining whether the federal interest in maritime matters requires a uniform body of laws, or whether the matter may be safely entrusted to the states. The Court's role should be the more limited one of determining whether in the absence of any congressional enactment a particular issue is controlled by state or federal maritime law.

The present status of the Jensen-Knickerbocker line of cases is unclear. In Askew, one issue was whether state water pollution controls imposing, among other things, strict liability upon vessels and other facilities for sea-to-shore pollution infringed upon the uniformity requirement of article III. When the relationship between state law and the admiralty clause was discussed, the Court focused upon oil pollution damages to the shore or shore facilities. Since the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 102(O)(2), 84 Stat. 91, 97 (amended 1972), a predecessor of the FWPCA, stated that "nothing in this section shall be construed as preempting any State... from imposing any requirement or liability with respect to the discharge of oil into any waters within such State," the issue was whether, despite this waiver of preemption, the Admiralty Jurisdiction Extension Act, 46 U.S.C. § 740 (1976), which brought ship-to-shore injuries within the federal courts' admiralty jurisdiction, precluded the application of state law to such injuries. Prior to the passage of the Admiralty Jurisdiction Extension Act, regulation of such injuries clearly was within the police power of the state. The Act itself did not purport to remove this area from state control; its purpose was to expand the judicial power of the federal admiralty courts. Therefore, the Court stated that the states retained the power to legislate on these matters unless the Jensen line of cases had to be interpreted as requiring preemption of these historic powers of the states. The Court held that such an interpretation was not appropriate. 411 U.S. at 337-40, 344.

In Askew the Jensen line of cases was limited. According to the Court, "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." Id. at 344. Although the Court had discussed shore-to-sea and sea-to-sea pollution injuries, the last paragraph of the opinion appeared to limit the holding and the downgrading of Jensen: "Jensen thus has vitality left. But we decline to move the Jensen line of cases shoreward to oust state law from situations involving shoreside injuries by ships on navigable waters." Id. Thus, the status of Jensen and the line of "shore-to-sea" and "sea-to-sea" pollution cases was left unresolved. The law to be applied in such cases depends upon an examination of potentially applicable statutes and, in the absence of any such statutes, upon the effects of the skeletal remains of Jensen.

65. See Currie, supra note 57, at 219-20; M. Redish, supra note 29, at 101, 102 n.181.
interest in the promotion of maritime activities, activities upon which this country was highly dependent at the time the Constitution was adopted. Protection of that interest envisioned both the availability of a federal forum and the development of a body of maritime law where necessary. Although the federal interest is occasionally viewed as being one in maritime commerce and limited to the transportation of goods by sea, the transportation of goods was not the only maritime activity upon which this country relied in its early days. Fishing was a major commercial activity in the colonial period and remains so today. Within the last decade, the health of the industry has been the subject of substantial congressional concern and legislation.

International ramifications of an important water based activity and a need for uniformity of law, two additional underpinnings of the admiralty clause, apply as readily to fishing activities as to other traditional maritime activities. Some aspects of the fishing industry, even in territorial waters, may have international implications. Potential exclusion of foreigners from rich fishing grounds, catch limitations, and gear conflicts are among such considerations. Fishing also often involves constant movement between imaginary boundaries of various states. To have the rights of those engaged in the industry subject to change by crossing an imaginary line on a body of water while in the pursuit of migratory fish hardly makes sense. Finally, the cases support an interpretation of article III that logically extends jurisdiction to interference

66. See G. Gilmore & C. Black, supra note 21, § 1-10; M. Redish, supra note 29, at 97-108; The Federalist No. 11 (A. Hamilton).
67. See H. Innis, The Cod Fisheries: The History of an International Economy 224 (1940) (over the period 1789-1818 exports of dried cod alone were worth $49,000,000).
68. See id. at 220 & n.18 (the difficulty of securing united action in the face of trade retaliation by England after the Revolutionary War contributed to the movement for the adoption of the Constitution; in addition, Jefferson issued a report on the importance of fisheries to the economy); see also The Federalist No. 11 (A. Hamilton); id. No. 80, at 478 (A. Hamilton) (C. Rossiter ed. 1961).
69. See G. Gilmore & C. Black, supra note 21, §§ 1-5 to -6.
72. Cf. Douglas v. Seacoast Prods., Inc., 431 U.S. 265 (1977) (federally licensed vessels owned by noncitizens were denied their federally granted right to fish in Virginia on same terms as state residents by a state law prohibiting them from fishing anywhere in Virginia).
73. Id. at 285-86.
with fishing and shellfishing activities. For example, accidents aboard commercial, fishing, or recreational vessels involving seamen or passengers are within the admiralty jurisdiction of the federal courts. There is no reason why interference with actual fishing operations, the main maritime purpose of these vessels, also should not be within admiralty jurisdiction just as interference with any other traditional maritime activity.

If we move away from the violent clashing of the waves of maritime law against the shore of state law in the coastal waters, and into the more legally tranquil ocean waters, the logic of this assertion becomes more apparent. Assume that chemical or oil spills from a tanker or other vessel seriously damage rich ocean fishing grounds; would the Supreme Court hold that there was no maritime tort and that maritime law did not govern the rights of the parties? The lower courts have already held that pollution of territorial waters constitutes a "maritime tort,"—it interferes with the rights of the maritime interests to use the waters. The same analysis would apply to ocean waters. The tanker has the right to use the seas, but not to interfere unreasonably with the coequal rights of other maritime users. If it does, then a maritime tort has occurred. In the absence of a treaty or specific federal statute, what law would a federal court apply in such an instance? If a court were to apply state law, which state's law would govern? By legislation consistent with the constitution, states have the power to control activities within their territorial boundaries, but state law does not operate extraterritorially. If a right exists in the


75. See, e.g., Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960); Byrd v. Byrd, 657 F.2d 615 (4th Cir. 1981). The most recent pronouncement by the Supreme Court on admiralty jurisdiction clearly supports this position. In Foremost Ins. Co. v. Richardson, 102 S. Ct. 2654 (1982) the Court upheld admiralty jurisdiction of a lawsuit in which recovery was sought for the death of a passenger that occurred when two pleasure boats collided on a navigable river. The Court stated that the primary focus of admiralty jurisdiction is the protection of maritime commerce, but that this interest cannot be adequately protected if admiralty jurisdiction is restricted to those individuals actually engaged in commercial maritime activity. The federal interest can only be fully served if all operators of vessels on navigable waters are subject to the same uniform rules of conduct—namely, admiralty law. Id. at 2659.

76. See infra note 74.

77. A specific statute dealing with liability for oil spills arising out of outer continental shelf activities is 43 U.S.C. §§ 1801-1866 (Supp. IV 1980). Liability is limited, however. The only activities covered are those associated with outer continental shelf oil drilling and transportation, and the extent of liability is limited if recovery is sought under the Act. The legislative history does not provide any meaningful discussion of the rights of fishermen to recover damages in the absence of the Act.


hypothesical, it is a right provided by maritime law, which the federal admiralty courts sit to apply just as do the admiralty and maritime courts of other nations.

When the pollution occurs in territorial seas or inland waters, the only difference is that the incident has now occurred within the boundaries of some state. The actors and the injury may remain the same. Does the difference in location require the application of a different body of substantive law? Certainly the federal interest in protecting commercial fishermen from the economic consequences of pollution remains the same. Merely because the incident occurred within state territorial waters does not per se affect the power of the court to apply general maritime law, if general maritime law recognizes a right of recovery in such cases when they occur on ocean waters. Certainly with respect to other maritime torts, the governing law does not change depending upon whether the tort occurs in ocean waters or state territorial waters. Collisions are governed by general maritime law wherever they occur; personal injuries to crewmen or passengers aboard recreational or commercial vessels are similarly treated. Thus, if the governing law is maritime when pollution of fisheries occurs outside state territorial waters, the governing law should be maritime when it occurs within state territorial waters.

B. The Maritime Torts of Private and Public Nuisance

Because the issue could be avoided in past cases, courts have not resolved the question whether maritime law or state law or both concurrently govern the rights of commercial fishermen in pollution cases. When the question has arisen in private and public nuisance actions, courts have stated that the result in the case would be the same whichever law was applied and, therefore, there was no need to resolve the issue. In those cases the courts were correct: the core principles governing maritime torts of private and public nuisance are the same as the common law principles of private and public nuisance. Both the common law and admiralty courts traditionally have permitted individuals to recover damages in both public and private nuisance action when pollution interfered with the use or enjoyment of their property or with some other legally cognizable interest.


82. See, e.g., Union Oil Co. v. Oppen, 501 F.2d at 562; Oppen v. Aetna Ins. Co., 485 F.2d at 257-60; Burgess v. M/V Tamano, 370 F. Supp. at 249; cf. In re Oswego Barge Corp., 664 F.2d 327, 334-43 (2d Cir. 1981) (although the court recognized the possibility that non-negligent conduct amounting to a public nuisance could create liability under general maritime law, it held that the government's remedies were limited to those specifically provided in the FWPCA). The district court in Pruitt v. Allied Chem. Co., 523 F. Supp. 975 (E.D. Va. 1981) avoided making a choice by applying both general maritime law and state law to the claims presented, and then allowing recovery if either source of law makes relief available.
1. Maritime Private Nuisance

If pollution causes a direct injury to or interference with real property, then a private nuisance action can be brought in the common-law courts. Likewise, when pollution causes injury to or interference with maritime property, admiralty courts permit a private nuisance action. Maier v. Publicker Commercial Alcohol Co. is an example of such a private nuisance action in admiralty. In Maier defendant was manufacturing alcohol and allied chemical products near the shore of the Delaware River in Philadelphia. In 1942, pursuant to a directive of the Office of Production Management of the War Production Board, defendant substituted grain for molasses as the basic material in alcohol production. Unfortunately, defendant was not able to obtain the equipment necessary to process the residue, which was discharged into a sewer that emptied into the river. Two hundred and fifty feet from the discharge point of the sewer sat plaintiff’s two partially submerged vessels. The grain residue filled the vessels’ holds, and plaintiff sued to recover the additional cost of removing the mash and raising the vessels. The district court permitted recovery on the theory that defendant’s actions constituted a maritime tort, but did not decide whether the tort was governed by state law or general maritime law. The court simply held that defendant breached a duty to conduct the manufacturing process so as not to injure others and that the failure to do so under the circumstances constituted a private nuisance.

Maier, however, was not a typical nuisance action. Defendant’s activities at the time did not pose any danger to the public health or interfere with the public’s ability to use the river. The residue, much like sand pouring out of a pipe, filled plaintiff’s vessels, injuring him but no others. By contrast, most pollution of navigable waters would probably be regarded by the courts as involving a public nuisance because the pollution would interfere with the interests of the general public in clean, pure, and productive navigable waters.

84. Id. § 88, at 588; Burgess, 370 F. Supp. at 250; Maier v. Publicker Commercial Alcohol Co., 62 F. Supp. 161 (E.D. Pa. 1945), aff’d per curiam, 154 F.2d 1020 (3d Cir. 1946). Courts sitting in admiralty jurisdiction (as well as courts sitting in nonadmiralty jurisdiction) occasionally and mistakenly have held that a single act of pollution does not give rise to a nuisance claim: “a single occurrence oil spill does not now and has never in the absence of legislation amounted to a common law nuisance.” Maryland Dep’t of Natural Resources v. Amerada Hess Corp., 350 F. Supp. 1060, 1069 (D. Md. 1972). Recovery in such cases has been permitted on the ground that the single occurrence constituted a maritime tort of negligence. Id. at 1070-71.

As Prosser points out, however, “nuisance is a field of tort liability, rather than a type of tortious conduct.” W. Prosser, supra note 83, § 87, at 573. Negligence is one specific form of conduct that can give rise to a nuisance, and a single, instantaneous negligent act can cause damage so substantial as to amount to a nuisance. Id. § 87, at 574-75, 579-80.

In most cases the court’s characterization of the theory of recovery will not affect the outcome and, under the liberal pleading rules of the Federal Rules of Civil Procedure, a complaint that is sufficient to plead negligence will also be sufficient to plead a private nuisance based upon that same act. See, e.g., Maier v. Publicker Commercial Alcohol Co.

86. Id. at 163.
87. Id. at 164.
88. Id. at 165.
2. Maritime Public Nuisance

When pollution has such a widespread impact, another principle basic to common law is that a private party cannot recover damages unless the injury he suffers is different in kind from that experienced by the rest of the general public.\(^9\) A maritime public nuisance action brought by a private party confronts the same limitation for precisely the same reasons as exist at common law. When water pollution creates a public nuisance, a private party may not sue for damages unless he can show that he suffered some damage different in kind from that experienced by the public in general.\(^9\) Everyone’s ability to drink, swim in, boat upon, or otherwise use public waters is affected by water pollution. If everyone were free to sue for his or her individual harm, the courts and the defendants would be confronted with an administratively crushing burden of litigation even with the present class action and collateral estoppel rules.\(^9\) Individual damages would have to be assessed, even though these individual losses, important though they may be, are typically small and often difficult to measure in economic terms.\(^9\) The most economic and administratively efficient means of litigating public nuisance claims, whether common law or maritime, is to leave the control of such litigation in the hands of federal and state governmental authorities.\(^9\) In suits brought by these public bodies, the damages to the water and marine life and the cost of cleaning up the public waters may be recovered, thus adequately protecting the interest of the average citizen. Only when a private citizen experiences some unique injury not adequately protected or compensated by actions brought by governmental bodies will an individual suit be both necessary and desirable.\(^9\)

The claims of commercial fishermen and shellfishermen for interference with their ability to harvest marine life in coastal waters generally fall into the...

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(1st Cir. 1977); W. Prosser, supra note 83, § 88. The change in the theory of recovery does not affect the right to recover of claimants similar to the plaintiff in Maier. Undoubtedly, plaintiff in Maier could have obtained relief even if the pouring of grain residue into the river constituted a health hazard and was therefore a public nuisance. The distinction between public and private nuisance has more to do with litigation efficiency and the nature of plaintiff’s interest than with the substantive nature of defendant’s actions.


92. *See* City of Evansville, Ind. v. Kentucky Liquid Recycling, 604 F.2d 1008 (7th Cir. 1979) (in action to recover damages resulting from discharges of contaminants into river, adequacy of enforcement schemes of Rivers & Harbors Act of 1899 and FWPCA precluded any inference that a private cause of action existed), *cert. denied*, 444 U.S. 1025 (1980); Parsell v. Shell Oil Co., 421 F. Supp. 1275 (D. Conn. 1976) (in action for damages arising from oil spill in harbor, court refused to imply private cause of action under Rivers & Harbors Act), *aff’d mem. sub nom.* East End Yacht Club v. Shell Oil Co., 573 F.2d 1289 (1st Cir. 1977). In Township of Long Beach v. City of New York, 445 F. Supp. 1203 (D.N.J. 1978) a township brought action under FWPCA, MPRSA, and state and federal common law, seeking injunctive and declaratory relief against New York City and the Environmental Protection Agency and its administrator for dumping garbage in the Hudson River and the Atlantic Ocean. Although the court said the federal common law of nuisance had not been preempted by the federal statutes in question, no implied cause of action existed under the two federal statutes. *Id* at 1212, 1215.


94. *See* Page v. Niagara Chem. Div., 68 So. 2d 382 (Fla. 1953); Brown v. Florida Chautaugua Ass’n, 59 Fla. 447, 52 So. 802 (1910); W. Prosser, supra note 83, § 88, at 587 & n.68.

95. *See supra* note 78.
category of unique injuries suffered by private individuals as the result of a public nuisance. The leading case upholding the right of fishermen and shellfishermen to recover damages in such cases is Burgess v. M/V Tamano, which involved a disastrous spill of 100,000 gallons of bunker oil by the tanker M/V Tamano in July 1972 as it entered the harbor at Portland, Maine. The spill caused enormous damage to the coastal waters and marine life and spawned a number of public and private lawsuits, one of which was filed by commercial fishermen and clam diggers as well as beach businessmen. The fishermen and shellfishermen sought recovery for interference with their right to fish and dig clams, which the court held was a special, legally protected interest in the use of the coastal waters distinct from the interest of the general public. Each commercial fisherman was making a direct commercial use of the public waters, and to the extent they could prove economic losses, that special use was compensable in a private damage action. The claims of beach and town businessmen, however, for economic damage resulting from the loss of customers who no longer frequented resort businesses in the area was not an injury distinct from that suffered by the general public and, therefore, was not compensable. The businessmen were not making any direct or distinctive use of the public waters. Their injury, although different in degree, was derivative of the right of the public in general and one common to all businesses and residents of the beach area.

Some of the claims of the businessmen would be derivative of the claims of recreational fishermen, and the damages experienced by recreational fishermen also are not compensable. Recreational fishermen may directly use the public waters, but their use is available to any member of the general public. If recreational fishing is destroyed by pollution, recreational fishermen must look to the government for protection of their interests. Merely showing the existence of a public nuisance and an injury different in degree from the general public is not sufficient. The injury must be to a direct and distinctive use of the public waters by the individual. Thus, to the extent that any businessman’s claim is derivative of the claims of recreational fishermen, it is like-

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98. Id. at 249.

99. Id. at 250.

100. Id. at 251.


102. The mere showing of a public nuisance and a unique injury is not a sufficient basis to recover damages under the applicable law. The Oppen v. Aetna Ins. Co. litigation, which arose out of the infamous 1969 Santa Barbara oil disaster, illustrates this point. Oil escaped from the ocean floor near a Union Oil Co. oil platform located off the coast of California. The resulting oil slick permeated the waters of the Santa Barbara Channel and Harbor, rendering the channel and harbor temporarily unusable. After this incident the owners of numerous pleasure boats brought suit against the oil company and its insurer to recover for physical damage to their boats due to con-
wise not compensable. Other cases have adhered to the line drawn by Burgess—commercial fishermen and shellfishermen are entitled to recover provable economic damages in water pollution cases—but those who either do not make direct use of the water for commercial purposes or whose use is not significantly different from that of the public in general may not recover damages. 103

With such broad similarity between the common law and maritime law, it is easy to see how the choice between the two is often avoided. But there are areas of difference that may force the choice in the future. For example, at common law, contributory negligence may be recognized as a complete defense, 104 but in maritime law it may not. 105 Other differences in available defenses and legal standards also may exist. 106 When one of these situations tact with the oil slick and for interference with their navigation rights. Plaintiffs claimed that these rights were protected under both maritime and state law. The court held:

Under federal maritime law loss of use of a private pleasure boat is not a compensable item of damages. The Conqueror, 166 U.S. 110 (1897). A fortiori no cause of action sounding in maritime tort can be maintained when the alleged injury is interference with plaintiffs' use of their boats in the Santa Barbara Channel. Oppen v. Aetna Ins. Co., 485 F.2d 252, 257 (9th Cir. 1973). The court also disposed of plaintiffs' contention that interference with their rights of navigation was compensable under California law in a public nuisance action. Assuming that California law applied, the court held that the damage suffered on account of plaintiffs' loss of navigation rights was no different from that experienced by the public generally, and thus was not a recoverable item in a public nuisance action. Even in the absence of The Conqueror decision, presumably the court would have held that no one could recover for interference with navigation rights without a showing that the interference with plaintiffs' rights resulted in an injury different from that suffered by the general public.

103. See, e.g., Union Oil Co. v. Oppen, 501 F.2d at 558 (9th Cir. 1974); Oppen v. Aetna Ins. Co., 485 F.2d 252 (9th Cir. 1973); Louisiana ex rel. Guste v. M/V Testbank, 524 F.2d 1170 (E.D. La. 1976) (commercial fishermen, oystermen, and shrimpers can maintain suit; recreational fishermen and owners of marinas, seafood restaurants, and other enterprises cannot); Pruitt v. Allied Chem. Corp., 523 F. Supp. 975, 978 (E.D. Va. 1981) (but court did permit some businessmen who lost profits as a result of decline in sportfishing to recover under state law on "surrogate plaintiff" theory); Potomac River Ass'n v. Lundeberg Md. Seamanship School, Inc., 402 F. Supp. 344 (D. Md. 1975); cf. Marine Navig. Sulphur Carriers, Inc. v. Lone Star Indus., Inc., 638 F.2d 700 (4th Cir. 1981) (owner and charterer of vessel that struck a bridge not liable to various parties who were temporarily unable to navigate the James River).

When economic losses are caused by an oil spill resulting from outer continental shelf activities, businessmen and others suffering the type of economic losses experienced in Burgess would be able to receive compensation from the Offshore Oil Pollution Compensation Fund. See 43 U.S.C. § 1813 (Supp. IV 1980). The claims of the businessmen in Burgess would not be covered because the vessel involved was not a source of damages that is covered by the Act. See 43 U.S.C. §§ 1811(5), (15), 1813(a)(2).

104. See V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 1.1 (1974 & Supp. 1981) (38 states plus the Virgin Islands and Puerto Rico have adopted comparative negligence either by statute or judicial action, thereby reducing the importance of contributory negligence in the United States).

105. See G. GILMORE & C. BLACK, supra note 21; V. SCHWARTZ, supra note 104, § 3.3(B).

arises, a choice will be required. *Pruitt v. Allied Chemical Corporation*,\(^{107}\) to be discussed later, poses another situation in which a choice is required. Of course, the difficult choice may still be avoided if a federal statute were read to require the application of state law instead of maritime law. Assuming that Congress may authorize or acquiesce in the application of state law to maritime claims, the next inquiry is whether Congress has in fact done so with respect to claims for interference with fisheries in territorial seas and inland waters. Two congressional enactments—The Submerged Lands Act of 1953\(^{108}\) and the FWPCA—hint at such acquiescence or authorization. The following will discuss these two acts and some of the cases interpreting them.

### III. Neither the Submerged Lands Act Nor FWPCA Causes Maritime Law to Be Displaced by State Law

#### A. Submerged Lands Act of 1953

The Submerged Lands Act of 1953 was passed in response to the United States Supreme Court decision in *United States v. California*, which held that the United States Government and not the State of California legally controlled the submerged land underlying the territorial sea off the coastline of California.\(^{109}\) Prior to that time the prevailing assumption was that the individual states owned and had complete control over such lands and other resources located in the territorial seas.\(^{110}\) The primary effect of the decision in *United States v. California* was to withdraw oil deposits under the territorial seas from state control, thereby depriving the states of a potential source of revenue.\(^{111}\) As a result, a number of states' representatives urged Congress to overturn the decision through legislation.\(^{112}\) Thus, the primary purpose of the Act was to return the submerged lands and resources in the territorial seas to the control of the individual coastal states.

In addition to the concern about the oil deposits, the legislative history of the Act also evidences a belief that the decision called into question the continued validity of the states' historic power to regulate and manage fisheries in state waters, even though the federal executive branch expressed no interest in generally regulating and managing the fisheries.\(^{113}\) The lack of any general federal interest in these fisheries and the failure of individual congressmen to show that the federal government would more effectively manage these re-

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\(^{112}\) Id. at 2-3.

\(^{113}\) Id. at 11, 21-22. "The attorneys general of several Great Lakes States . . . testified that the California case . . . a precedent which the Federal Government could properly urge in any suit against the Great Lakes States to recover for the Federal Government the submerged areas under the Lakes within the boundaries of such States." Id. at 9.
sources\textsuperscript{114} led Congress to the conclusion that the national interest would not be served by transferring these powers to the federal government.\textsuperscript{115} Therefore, another objective of the Act was to assure that the management and regulation of fisheries located in state territorial waters remained in the hands of the individual states.\textsuperscript{116}

Based upon this legislative history and some of the language of the Act itself, a compelling argument can be made that free-swimming fish and shellfish located within state territorial waters are natural resources owned by the state and, therefore, that state law defines both the conditions under which such fish may be taken from the waters and the consequences of any interference with an individual's right to take the fish. The Act, in part, provides:

\begin{verbatim}
It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States.\textsuperscript{117}
\end{verbatim}

Natural resources are defined to include "fish, shrimp, oysters, clams, crabs, lobsters, . . . and other marine animal and plant life."\textsuperscript{118} Thus, the Act speaks of state "ownership" of "natural resources," and fish are included within the statutory definition of natural resources.

The argument for the application of state law is further buttressed by a divided en banc 1976 decision of the Fourth Circuit Court of Appeals. In a somewhat unusual case, \textit{Moore v. Hampton Roads Sanitation District Commission},\textsuperscript{119} the court used the Submerged Lands Act of 1953\textsuperscript{120} and two pre-Act Supreme Court cases, which had discussed aspects of the states' power over oystering,\textsuperscript{121} as the basis for a decision that state law and not federal maritime law governed a claim for damages caused by pollution of oyster beds. The
oyster beds, leased from the State of Virginia, were destroyed as the result of the allegedly negligent operation of a sewage disposal system by the City of Newport News and the Hampton Roads Sanitation District Commission. If the court had concluded that the case was within admiralty jurisdiction and that maritime law applied, the defense of sovereign immunity would not have been available; if the court had concluded that there was no admiralty jurisdiction, the case would not only have been dismissed, but under state law any claim might be met with the defense of sovereign immunity. The court held that damage to oyster leaseholds from sewage discharges by a municipality was not related to the maritime aspects of the oystering industry and was therefore outside admiralty jurisdiction and governed by state law. A similar argument may be made with respect to pollution of other types of fisheries located in state territorial waters.

The force of this argument for application of state law to maritime tort actions for pollution of fisheries in the territorial seas is blunted, however, by other provisions of the Submerged Lands Act of 1953, by the unique, distinguishable features of the Moore case, and by the tone and language of the 1977 United States Supreme Court decision in Douglas v. Seacoast Products, Inc. Although the Submerged Lands Act of 1953 confirmed state authority over submerged lands and other natural resources in the territorial seas, state authority was still subject to limitations. The Act provided:

The United States retains all its navigational servitude and rights in and powers of regulation and control of said land and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested and assigned to the respective States and others by section 1311 of this title.

The exact meaning of this passage for purposes of the application of federal maritime law is not completely clear. The words "admiralty" or "maritime" are not used in the retention clause. Instead, the clause refers to "commerce, navigation . . . and international affairs," a trilogy that makes up a traditional basis for admiralty jurisdiction. Thus, the Act could be read as not intending any displacement of traditional admiralty jurisdiction or general maritime law, thereby leaving claims for pollution to fisheries located within the covered waters to be adjudicated in accordance with maritime law.

In addition, Moore is hardly clear authority for the proposition that Con-

Witsell, 334 U.S. 385, 401 (1948). Moore only held that the consequences of interfering with state leases of oyster beds should be determined by state law.

122. 557 F.2d at 1035, 1037.
123. Id. at 1038-39.
126. See Foremost Ins. Co. v. Richardson, 102 S. Ct. 2654, 2658 (1982); M. Redish, supra note 29, at 98; cf. Moore, 557 F.2d at 1034 n.7; id. at 1036 (Field, J., dissenting).
gress has authorized the application of state law to cases involving interference with commercial fisheries. The case did not involve free-swimming or migratory fish, but only a type of “mariculture” on submerged lands leased from the state.\textsuperscript{127} Interference with the lessees of these state owned oyster beds is distinguishable from the interference with the operations of fishermen and shellfishermen who are pursuing and harvesting free-swimming and migratory fish. The impact of the first type of interference is very localized, whereas pollution of the second type may have an impact far beyond the waters into which the pollutants first spill and upon persons with a more remote connection to the state itself. The Supreme Court has recognized certain maritime events or activities that have no significant implications beyond the particular place they occur as being suitable to control by the states.\textsuperscript{128} Therefore, a holding that pollution of state owned oyster beds, leased to private parties, is governed by state law does not foreclose the application of maritime law to other types of fisheries. Furthermore, the state presumably could have restricted plaintiffs’ oystering operations on the tract leased and could have required that any claims be resolved according to state law. It is not inconsistent with this consideration to hold that even in the absence of specific terms in the lease, state law will determine the nature and extent of plaintiffs’ rights in that tract of submerged land.

The argument for exclusive state jurisdiction, however, is not as persuasive when pollution interferes with other commercial fishing activities, some of which are not dependent upon a license or similar permission from the state in whose water they are conducted. The 1977 decision in \textit{Douglas} shows that the state power with respect to federal licensees is more restricted than the state power over oyster bed lessees, and may be limited with respect to even nonfederally licensed fishermen. The less authority the state has over activities, the less compelling the argument for the application of state law to pollution interference with them.

\textit{Douglas} involved the validity of two Virginia statutes that limited the right of nonresidents and aliens to catch fish in the territorial waters of the state.\textsuperscript{129} The appellant, Seacoast Products, Inc., a Delaware corporation, operated a fleet of federally licensed menhaden fishing vessels in the Chesapeake Bay and other eastern coastal waters. Under Virginia law the vessels owned by Seacoast were not permitted to fish in that portion of the Chesapeake Bay

\begin{footnotes}
\item[127] The \textit{Moore} court relied upon \textit{McCready v. Virginia}, 94 U.S. 391 (1876), but in \textit{Toomer v. Witsell}, 334 U.S. 385, 401-02 (1946), the Supreme Court stated:

\begin{quote}
[T]he \textit{McCready} case related to fish which would remain in Virginia until removed by man. The present case [\textit{Toomer}] ... deals with free-swimming fish which migrate through the waters of several States.
\end{quote}

\ldots \ldots \ldots

\begin{quote}
[O]nly fifteen years after the \textit{McCready} decision, a unanimous court indicated that the rule of that case might not apply to free-swimming fish.
\end{quote}


\end{footnotes}
within Virginia.\textsuperscript{130} One contention of Seacoast was that the Virginia statutes were preempted by the federal enrollment and licensing laws for fishing vessels.\textsuperscript{131} Virginia contended that the federal license simply permitted the licensed vessel to navigate in state waters and that the ownership of fish and the right to determine who could fish in those waters was vested in the states under the Constitution and the Submerged Lands Act of 1953.\textsuperscript{132} The Court rejected Virginia’s contentions.\textsuperscript{133} The state’s assertion that it “owned” free-swimming fish within its territorial waters was dismissed as “pure fantasy.”\textsuperscript{134} According to the Court, the ownership language in its earlier opinions,\textsuperscript{135} upon which the Moore court had relied,\textsuperscript{136} represented a legal fiction intended only to express legal recognition of the states’ power to “preserve and regulate the exploitation of an important resource.”\textsuperscript{137} The powers that states possess to preserve and regulate this resource remain limited by the powers retained by Congress in the Submerged Lands Act of 1953 and any other federal legislation or constitutional provision. Since Congress had expressly retained its powers over commerce, and since Congress has the authority under the commerce clause both to pass legislation regulating the taking of fish in state waters and to license vessels to fish in these waters, any state legislation discriminating against federal licensees must fall. The state’s power with respect to federal licensees, therefore, is limited to the enactment and enforcement of “reasonable and evenhanded conservation measures.”\textsuperscript{138}

The Douglas case did not mention the congressional powers under the admiralty clause, and additional constitutional questions raised by the parties were not addressed by the Court.\textsuperscript{139} Nevertheless, the case has some bearing upon the question whether state law displaces federal maritime law as the appropriate body of substantive law governing the rights of commercial fishermen in water pollution cases. First, the Court affirmed the position that the Act did not pass to the states the power to govern all questions involving fishing in state territorial and inland waters. Second, the Court emphasized the fact that these commercial fishermen were pursuing free-swimming,

\begin{footnotes}
\item[130] Id. at 269-71.
\item[131] Id. at 271-72; 46 U.S.C. § 325 (Supp. IV 1980).
\item[132] 431 U.S. at 280, 283.
\item[133] Id. at 281, 283.
\item[134] Id. at 284; see also id. at 289-90 (Rehnquist, J., dissenting).
\item[135] Id. at 283 n.20, 285.
\item[136] See supra note 121.
\item[137] 431 U.S. at 284 (citing Toomer v. Witsell, 334 U.S. 385 (1948)). Toomer was before the Court as Congress was debating the Submerged Lands Act of 1953. According to House Report No. 1778, Toomer was viewed with alarm, as a “case pending in the Supreme Court in which certain individuals are contending that under . . . [United States v. California] the state of South Carolina has no power to regulate fishing off its coast and within the historic boundary of the state.” H.R. REP. No. 1778, 80th Cong., 2d Sess. 11 (1948). If Congress’ intent in passing the Submerged Lands Act was to thwart that challenge, Congress was unsuccessful. In Toomer statutes imposing higher licensing fees upon nonresidents and creating certain requirements that shrimp be unloaded and packed in South Carolina were held unconstitutional. 334 U.S. 385, 403, 406 (1948). Toomer was reaffirmed in Douglas, 431 U.S. at 282.
\item[138] 431 U.S. at 287.
\item[139] Id. at 271-72.
\end{footnotes}
migratory fish, with both the fishermen and fish moving "without regard for state boundary lines."\textsuperscript{140} State laws that unreasonably restricted these activities would invite similar retaliatory legislation by other coastal states, thereby balkanizing the fishing industry.\textsuperscript{141} To avoid this situation, the Court limited the states' role to enactment and enforcement of conservation measures which must of necessity vary depending upon the season, fish, waters, and other local conditions. Implicit in this conclusion is the idea that some minimum uniform rules govern the activities of fishermen regardless of which state's waters they happen to fish. Third, unless the Court is willing to imply a private cause of action from the licensing statutes, it would seem that the consequences of pollution which interfere with fishing rights granted by federal licensing statutes would be determined by federal maritime law, not by state law.\textsuperscript{142} The activity is maritime, and since the interference has a maritime locale, it is within admiralty jurisdiction. The right is also federal and maritime in nature. Therefore, the law governing interference with the right should also be federal and maritime in nature.

Some fishermen and shellfishermen may not have federal licenses, yet pollution interference with their activities has the same maritime nexus and locale. These fishermen and shellfishermen pursue the same transitory marine species as those persons with federal licenses. If the rights of these fishermen were originally founded in general maritime law, then the Submerged Lands Act should not provide any greater source of state authority over them than over federally licensed fishermen. In this respect, state control over recreational vessels provides a useful analogy. Recreational vessels operating in state territorial waters often must be licensed by the state.\textsuperscript{143} Nevertheless, the consequences of the improper operation of such vessels is still governed by general maritime law, not state law.\textsuperscript{144} When adjudicating claims involving maritime torts committed by or aboard recreational vessels, the overriding consideration has been to have a uniform body of law establishing minimum rights and obligations for all vessels and not to distinguish among federally licensed, foreign licensed or registered, or state licensed vessels.\textsuperscript{145} This consideration is equally compelling in the case of fishermen. The existence or

\textsuperscript{140} Id. at 285.
\textsuperscript{141} Id. at 285-86.
\textsuperscript{142} The reluctance of the Supreme Court to find implied private remedies in other areas makes it unlikely that it will find any in the licensing statutes after all these years. \textit{See generally} Hazen, \textit{Implied Private Remedies Under Federal Statutes: Neither a Death Knell Nor a Moratorium—Civil Rights, Securities Regulation, and Beyond}, 33 \textit{Vand. L. Rev.} 1333 (1980).
nonexistence of a compensable interest should not turn on whether the fisherman possesses a federal license. The minimum level of protection should be the same. Thus, the power to license, which may reflect a number of legitimate state interests, does not necessarily include the power to determine legislatively or judicially the consequences of all the maritime activities of the licensee.

Given this overriding federal policy of establishing a uniform body of law, the Submerged Lands Act should not be read as constituting congressional authorization for the application of state law to claims for interference with fisheries in state territorial waters.

B. Federal Water Pollution Control Act

Another federal statute that bears on the question whether claims for pollution of fisheries are governed by maritime law or state law is the FWPCA.\(^{146}\) Numerous sections of the FWPCA address the authority of the states over discharges of pollutants into navigable waters, including the territorial seas.\(^{147}\) Application of the act has also been the subject of three relevant United States Supreme Court decisions—Askew v. American Waterways Operators, Inc.,\(^{148}\) Milwaukee v. Illinois,\(^{149}\) and Middlesex County Sewerage Authority v. National Sea Clammers Association.\(^{150}\) No section of the act or any of these cases, however, requires the application of state law rather than maritime law to private damage claims for fishery pollution.

1. 33 U.S.C. § 1370

The FWPCA authorizes the states to issue permits and establish water quality and effluent standards for navigable waters and territorial seas,\(^{151}\) but it does not contain any express congressional authorization for the application of state substantive law to maritime matters. The section of the Act dealing with the authority of the state over water quality and effluent standards states:

 Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution . . . . Or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.\(^{152}\)

This section of the Act cannot reasonably be read as authorizing the applica-
tion of state law if state law would not have been applied to an activity prior to the passage of the FWPCA. Evidencing no intent by Congress to authorize application of state law, the language does nothing more than preserve the status quo.

2. 33 U.S.C. § 1321

Another section of the FWPCA, 33 U.S.C. section 1321, addresses the relationship of state law to that portion of the act dealing with oil spills, but it likewise does not purport to affect the preexisting division between maritime activities to which state law may apply and areas to which it may not apply.\(^{153}\) § 33 U.S.C. section 1321(o) states:

(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 or privately owned property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.

(2) 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 or hazardous substance into any waters within such State.

(3) Nothing in this section shall be construed . . . to affect any State or local law not in conflict with this section.\(^{154}\)

This language does not purport to alter the preexisting relationship between maritime law and state law, but only prevents this section of the FWPCA from being interpreted as overriding state law.

3. The Effect of *Milwaukee v. Illinois* and *Middlesex County Sewerage Authority v. National Sea Clammers Association* Upon Maritime Law

Two recent Supreme Court decisions interpreting the FWPCA, however, suggest that any remedy which commercial fishermen may have had under general maritime law has been supplanted by the statutory and state law remedies that are expressly authorized by the FWPCA. In *Milwaukee v. Illinois*\(^ {155}\) and *Middlesex County Sewerage Authority v. National Sea Clammers Association*\(^ {156}\) the Supreme Court held that the FWPCA precluded the use of federal common law as a basis for the recovery of private damages or for injunctive relief in water pollution cases. Federal common law, of course, is simply judge-made law. In essence, federal common law deals with questions for which there is no directly applicable federal statute, but in which there is a

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154. Id.
155. 451 U.S. 304.
156. 453 U.S. 1.
strong federal interest expressed by a specific constitutional provision or congressional statutory scheme and which requires a uniform national rule to effectuate the specific constitutional or congressional objectives. The federal judge creates that rule. If the determination is made that the federal interest does not require such a rule, the question is resolved according to the law of the state in which it arose. Thus, state law always stands in the background to provide a readily available alternative body of law.

General maritime law is simply the federal common law of admiralty operating in the specialized area of admiralty and maritime matters. In the absence of an applicable federal statute, the determination whether the court should create a general maritime rule or apply state law depends, as in cases involving other forms of federal common law, upon the determination whether the federal interest requires a uniform national maritime rule. The federal interest in having a uniform maritime rule, however, embodies considerations not necessarily present in cases involving other forms of federal common law. State law may not stand as a readily available alternative. Maritime claims arise both inside and outside state territorial waters, which raises the question of the propriety of the extraterritorial application of state law to claims arising outside state territorial waters. Even as to claims arising in state territorial waters, the interests reflected in the admiralty clause may oper-


The creation of general maritime law has proceeded along different lines. As Professor Redish states:

In admiralty, the quasi exclusive grant of jurisdiction to the federal courts, the absence in the states of any complete system of maritime laws and remedies, and the tradition of the maritime law as a separate corpus of law . . . , have combined to induce a uniform development of the traditional principles of admiralty in the federal courts, although with occasional absorption of supplementing state law.

M. Redish, supra note 29, at 97 n.139 (emphasis added). Congress has never enacted a comprehensive body of maritime law, but the federal courts nonetheless have interpreted article III as a grant of substantive lawmaking power to the courts and have freely created maritime law. See, e.g., United States v. Reliable Transfer Co., 421 U.S. 397 (1975); Moragne v. States Marine Lines, 398 U.S. 375 (1970); Kossick v. United Fruit Co., 365 U.S. 731 (1961); Byrd v. Byrd, 657 F.2d 615 (4th Cir. 1981); see also G. Gilmore & C. Black, supra note 21, at 45-47.

158. M. Redish, supra note 29, at 80-85.

159. Id. at 97.

160. Id. at 98-105.

ate to preclude the application of state law. Finally, there is a need for uniformity between rules governing claims arising in ocean waters and rules governing claims arising in territorial waters. Since general maritime law is a form of federal common law raising special considerations, the question is whether the FWPCA, or any other federal water pollution control statute, supplants private damage remedies under general maritime law despite these special considerations.

The 1981 Milwaukee v. Illinois decision was part of a chain of litigation stretching back to 1972, when the State of Illinois first sought to enjoin the City of Milwaukee's discharge of inadequately treated sewage into Lake Michigan. In Illinois v. City of Milwaukee the Supreme Court declined to exercise original jurisdiction over the controversy on the grounds that Illinois had available in the district court a federal common law action against the City of Milwaukee to abate a public nuisance in interstate or navigable waters. Immediately after the Supreme Court decision, a federal common law action was filed by the State of Illinois. Five months later Congress passed the Federal Water Pollution Control Act Amendments of 1972.

The federal district court found that Illinois had proven the existence of a public nuisance under federal common law and ordered the City of Milwaukee to eliminate all sewage overflows and to achieve specific effluent limitations in accordance with a plan formulated by the district judge. On appeal, the United States Court of Appeals for the Seventh Circuit ruled that the 1972 amendments to the FWPCA had not preempted the federal common

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163. The federal courts generally do not apply one set of rules of substantive law to maritime torts occurring in territorial waters and a different set to those maritime torts occurring in ocean waters. See, e.g., Byrd v. Byrd, 657 F.2d 615 (4th Cir. 1981). See generally G. Gilmore & C. Black, supra note 21, at 47-51.


165. 406 U.S. at 98-99, 108. The Court held that jurisdiction was not mandatory because the City of Milwaukee, a political subdivision of the state of Wisconsin, was not itself a "state" within the meaning of 28 U.S.C. § 1251(a)(1), which provides that "[t]he Supreme court shall have original and exclusive jurisdiction of all controversies between two or more States." 28 U.S.C. § 1251(a)(1) (1976 & Supp. IV 1980). The City of Milwaukee is, for jurisdictional purposes, a citizen of Wisconsin, and therefore the state of Illinois' right to file an original action in the Supreme Court against Milwaukee was governed by 28 U.S.C. § 1251(b) (1976 & Supp. IV 1980), which provides that "the Supreme Court shall have original but not exclusive jurisdiction of: . . . (3) all actions or proceedings by a State against citizens of another State." Jurisdiction under § 1251(b)(3) is not mandatory, and the Supreme Court refused to exercise jurisdiction because the state of Illinois had an adequate, alternative forum available in federal district court. 406 U.S at 98-99, 108; see also Milwaukee v. Illinois, 451 U.S. 304 (1981).

166. The action was filed on May 19, 1972. 451 U.S. at 310.


168. 451 U.S. at 311-12.
law of nuisance, but that in applying the law of public nuisance, the federal
district court should look to the Act for guidance. Accordingly, the Seventh
Circuit reversed the lower court decision insofar as its plan to control treated
sewage imposed more stringent limitations than those contained in the Environ-
mental Protection Agency permit and regulations.169 The Supreme Court
vacated the court of appeals decision, holding that the 1972 amendments to
the FWPCA preempted the federal common law of public nuisance and that
whatever right Illinois had to seek injunctive relief against the City of Milwau-
kee was limited to the statutory and state law remedies expressly authorized by
the FWPCA.170

Closely following the Milwaukee v. Illinois litigation, a suit was filed in
1977 by a group of commercial fishermen and shellfishermen against various
governmental entities and officials of the States of New York and New Jersey
and the federal government.171 In Middlesex County Sewerage Authority v. Na-
tional Sea Clammers Association, plaintiffs, under a variety of legal theories,
sought injunctive and declaratory relief and 250 million dollars in compensa-
tory and 250 million dollars in punitive damages.172 They alleged that de-
defendants were responsible for the discharge and dumping of sewage and other
waste materials into New York Harbor, the Hudson River, and ocean waters,
thereby causing the widespread destruction of public shellfishing and fishing
grounds and the "collapse of the fishing, claming and lobster industries . . . ."173
Among the issues presented to the United States Supreme Court
was whether any private right of action for water pollution damages based
upon the federal common law of nuisance was entirely preempted by the
FWPCA and the MPRSA, leaving plaintiffs to seek relief under the statu-
tory174 and state law actions authorized by the FWPCA and the MPRSA. The
Court held that the private right was preempted.175

Neither Milwaukee v. Illinois nor National Sea Clammers Association de-
cided whether general maritime tort law was preempted by the FWPCA or the
MPRSA. The issue was not presented in Milwaukee v. Illinois, because the
case did not include a maritime tort claim.176 In National Sea Clammers the

169. Id. at 312.
170. Id. at 326-32.
172. 453 U.S. at 5 & n.4. Plaintiffs based claims upon the FWPCA, MPRSA, section 13 of the
Rivers and Harbors Act of 1899, the National Environmental Policy Act of 1969, New York and
New Jersey environmental statutes, the fifth, ninth, and fourteenth amendments to the U.S.
Constitution, the Federal Tort Claims Act, and state tort law, 453 U.S. at 5 n.6, and also upon general
maritime tort law, id. at 7-8.
173. Id. at 5.
174. Id. at 10-11.
175. Id. at 22.
176. The state of Illinois' complaint was not filed "in admiralty" in district court, and admi-
ralty jurisdiction did not exist for two reasons. First, although the alleged public nuisance oc-
curred in the navigable waters of the U.S. and therefore had a maritime locale, the specific harm
that Illinois was seeking to have abated did not have a "significant relationship to traditional
maritime activity." Executive Jet Aviation v. City of Cleveland, 409 U.S. at 268. Second, even if
the harm bore a significant relationship to traditional maritime activity, the general belief is that
admiralty courts do not have the power to grant purely equitable relief, such as injunctions. See
court of appeals stated that plaintiffs had alleged the existence of a maritime tort, but the Supreme Court avoided deciding the issue by limiting the grant of certiorari to three questions:

(i) whether FWPCA and MPRSA imply a private right of action independent of their citizen suit provision, (ii) whether all federal common law nuisance actions concerning ocean pollution now are preempted by the legislative scheme contained in the FWPCA and the MPRSA, and (iii) if not, whether a private citizen has standing to sue for damages under the federal common law of nuisance.

Although the Court did not address the general maritime law tort claim, it expressed a view about the continued viability of federal judge-made law in light of the "comprehensive" federal water pollution statutes. Early in the opinion, the Court observed that "the federal common law of nuisance had been fully pre-empted in the area of ocean pollution." At the end of its opinion, the Court stated:

This decision disposes entirely of respondents' federal common law claims, since there is no reason to suppose that the pre-emptive effect of the FWPCA is any less when pollution of coastal waters is at issue. To the extent that this case involves ocean waters not covered by the FWPCA, and regulated under the MPRSA, we see no cause for different treatment of the pre-emption question. The regulatory scheme of the MPRSA is no less comprehensive, with respect to ocean dumping, than are analogous provisions of the FWPCA.

The facet of the plaintiffs' action the Court was addressing at the end of the opinion was the claim for damages to fishing and shellfishing as a result of the dumping of pollutants in ocean waters, a claim traditionally regarded as maritime in nature and governed, in the absence of a controlling federal statute, by general maritime law, not federal common law.


178. 453 U.S. at 10-11. The Supreme Court held that an implied private cause of action for violation of the FWPCA or MPRSA did not exist in view of the elaborate enforcement provisions contained in these acts. Id. at 13-21. The Court discussed Cort v. Ash, 422 U.S. 66 (1975), emphasizing that one of the important factors in determining whether private remedies should be implied is the legislative history, which in National Sea Clammers Association led to the conclusion that Congress did not also intend to create private remedies. Id. at 20-21. See generally Hazen, supra note 142. Whether there should be implied private remedies as part of the FWPCA or MPRSA is beyond the scope of this article. A different question is whether there is a private damage remedy under general maritime law. The existence of this preexisting private damage remedy depends upon whether Congress intended to preserve or displace it.

179. 453 U.S. at 22.

180. Id. at 11.

181. Id. at 22 (emphasis added).

182. See supra text accompanying notes 70-76. As will be discussed later, the phrase "federal common law" means different things at different times. It may refer to the right of trial by jury; it may refer to a system of substantive law; or it may refer to the manner of declaring law. In Milwaukee v. Illinois, 451 U.S. 304 (1981), and Middlesex County Sewerage Auth. v. National
The easy, and perhaps, the correct answer to the question of what effect *Milwaukee v. Illinois* and *National Sea Clammers Association* have upon the general maritime tort of public nuisance in water pollution cases may be that they have none. The Supreme Court has given frequent lessons on how to read its decisions to attorneys, lower courts, commentators, and even Congress.\(^\text{183}\) In the cases at issue, the Court did not address the impact of the FWPCA or the MPRSA upon general maritime law, but only upon federal common law.\(^\text{184}\) When the Court addresses one issue it is not addressing another, even related issue. The reference at the end of the opinion to matters covered by the MPRSA and the availability of a private right of action for damages based upon federal common law thus may have no bearing on private rights of action under general maritime law. But the stated holding does encompass pollution of ocean waters. Both the holding and the language at the end of the opinion raise two questions: (1) why general maritime law should be treated differently than federal common law, and (2) what the answer to the first question implies for private damage actions based upon claims of pollution of fisheries in territorial and ocean waters.

The FWPCA and the MPRSA have as their common objective limiting the amount of pollutants discharged from land facilities and other point sources of pollution, or from water based facilities and vessels, into the naviga-
The FWPCA creates a statutory framework under which the EPA, in addition to other mandates, establishes minimum effluent limitations and grants permits to those seeking to discharge pollutants into waters. The states are permitted by the FWPCA to impose higher standards of conduct, the breach of which can result in the issuance of state abatement orders or the holding of the pollutor liable for damages under state laws to public entities or private persons. The MPRSA covers ocean waters and operates in a similar fashion except that the states may only propose criteria to the EPA, which the EPA may adopt as its own if it determines the proposed criteria are not inconsistent with the MPRSA.

Neither the FWPCA nor the MPRSA has as its objective the creation of private damage actions for injuries arising out of the pollution of navigable or ocean waters. Both acts have a provision for citizens' suits, but such suits are limited to seeking the establishment of effluent standards or limitations, or the enforcement of such limitations or standards through injunctive relief or similar orders. Neither act, however, purports to provide exclusive remedies for water pollution injuries. Each contains a "saving clause" that is intended to preserve for injured persons their rights under at least some of the preexisting law.

186. 33 U.S.C. §§ 1311-1376 (1976 & Supp. IV 1980). See generally Zener, The Federal Law of Water Pollution Control in FEDERAL ENVIRONMENTAL LAW 683-87 (1974). Not everyone who discharges pollutants must have a permit. A permit under the FWPCA is not required for discharges that are sent to publicly owned treatment facilities, but the facility itself must have a permit. The spilling or dumping of certain hazardous substances is subject to a separate regulatory scheme, and vessel sewage is the subject of a separate section of the FWPCA. See Zener, supra, at 686-87.
190. Id. § 1416.
194. 33 U.S.C. §§ 1365(e), 1415(g)(5) (1976). Although it is not clear that Congress was considering federal common law when these sections were drafted, Congress is presumed to be aware of all preexisting laws when enacting regulatory schemes. United States v. Neustadt, 366 U.S. 696, 707-08 (1961). The Court in Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), held that claims based upon 42 U.S.C. § 1983 (1976 & Supp. IV 1980) have been supplanted by the comprehensive remedial devices contained in the FWPCA and MPRSA. According to the Court, the language of these clauses, see infra notes 195-96 and accompanying text, does not support the view that Congress expressly preserved § 1983 remedies for violations of these statutes:

there is little reason to believe that Congress intended such a result when it made reference in § 505(e) [33 U.S.C. § 1365(e) (1976)] to "any right which any person . . . may have under any statute or common law or to seek . . . any other relief." The legislative history makes clear Congress' intent to allow further enforcement of antipollution standards arising under other statutes or state common law. . . . A suit for damages asserting a substantive violation of the FWPCA or the MPRSA is far different, even if the remedy asserted is based on the separate right of action created in §1983. We are con-
The FWPCA savings clause, which is similar to the MPRSA clause, provides in subsection (e), "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." In Milwaukee v. Illinois and National Sea Clammers Association the Court held that private relief available under other federal or state statutes and state common law remedies for nuisance were preserved by the section, but suggested that the phrase "common law" did not include "federal common law" and referred only to "routine state common law." The Court, however, cited broader grounds for its decision that private rights of action for water pollution based upon federal common law were preempted by the Act. It held that even assuming that "common law" included "federal common law," such a reading only meant that federal common law remedies were not preempted by the subsection authorizing citizens' actions, not that federal common law was not preempted by the entire Act. It was the Court's view that this subsection contained language commonly accompanying provisions for citizen suits in environmental acts, and represented only the general congressional concern that by passage of this subsection, other preexisting remedies would not be disturbed. Passage of this subsection thus did not represent a legislative intent that the rest of the Act not displace federal common law.

Assuming, as we must, that the Court correctly decided that Congress intended the entire FWPCA and MPRSA to supplant federal common law and that "common law" as used in the savings clauses of both the FWPCA and MPRSA does not include "federal common law," the continued existence of a general maritime tort claim for private damages for nuisance depends upon establishing that Congress did not intend to supplant general maritime law and that general maritime remedies are preserved by the "saving clause." Establishing these propositions requires an examination of the differences between federal common law and general maritime law, as well as the legal

453 U.S. at 31, n.31.

In Milwaukee v. Illinois, 451 U.S. 304, 329 (1981) the Court noted that "even indulging the unlikely assumption that the reference to 'common law' in § 505(e) includes the limited federal common law as opposed to the more routine state common law" does not mean that "the Act as a whole does not supplant formerly available federal common-law actions but only that the particular section authorizing citizen suits does not do so." "Congress knows how to say 'nothing in this Act' when it means to . . . ." Id. at 329 n.22.

195. 33 U.S.C. § 1415(g)(5) (1976) provides:

The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Administrator, the Secretary, or a State agency).

196. Id. § 1365(e) (emphasis added).


199. Id. at 329 & n.22; see supra note 194.
backdrop against which Congress passed the FWPCA and the MPRSA and the Supreme Court decided Milwaukee v. Illinois and National Sea Clammers Association.

a. The FWPCA and Federal Common Law Remedies

Both federal common law and general maritime law are similar in that both bodies of law are judicially created and trace their ultimate legitimacy back to article III, section 2 of the United States Constitution. Each, however, has a different history and distinctive scope. Federal common law springs primarily from article III's grant to the federal courts of judicial power "to all cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ." For the most part, it consists of a limited body of judicially created principles that govern the rights and liabilities of persons in land based activities, transactions, or occurrences. A central theme underlying the concept of federal common law is that the federal courts' power to develop a body of judicially created rules of law is severely constrained. Under the Constitution, the primary responsibility for the development of a body of law, either statutory or common law, to govern the daily activities of the body politic is in the hands of the states, with limited areas withdrawn from the states and included in the legislative power of Congress. In those areas over which the states have initial primary responsibility, the federal courts, even though they may have jurisdictional competence, do not have the power to develop and apply their own concepts of judicially created law.

Federal common law is thus viewed as a limited creation, which operates interstitially to fill gaps in congressional legislation or to effectuate congressional statutory patterns or constitutional mandates. It is a temporal body of law, easily and frequently displaced by congressional action. In Milwaukee v. Illinois, 451 U.S. at 310-17 & n.9.
kee v. Illinois the Supreme Court emphasized that when the question is whether federal statutory law or federal common law applies, a court starts with the assumption that federal statutory law controls, and when Congress moves to occupy a field previously controlled by federal common law, federal common law is readily displaced.206 Thus, the grant of power to create federal common law implies infrequent use with careful consideration of the judicial role and of the delicate balance between state and federal legislative competence.

When the State of Illinois first sued the City of Milwaukee and invoked the original jurisdiction of the United States Supreme Court, the pre-1972 version of the FWPCA did not contain an effective enforcement mechanism, a provision for a citizen suit, or a comprehensive framework for the issuance of EPA and state regulations and permits.207 The Supreme Court recognized the existence of a federal common law remedy to abate a public nuisance in interstate or public waters because the enforcement mechanism of the pre-1972 FWPCA was not viewed as an exclusive federal remedy.208 Had the Court viewed the pre-1972 enforcement mechanism as an exclusive federal remedy, the FWPCA would have precluded the creation of any federal common law remedial devices operating interstitially to effectuate the policy and the expressed congressional concern for protection of the quality of the nation's waters.209 The 1972 amendments to the FWPCA, however, were intended to establish an "all encompassing program of water pollution regulation" with an elaborate set of enforcement procedures.210 Thus, after 1972, private federal common law enforcement mechanisms to help ensure the federal objectives of water pollution control were unnecessary211 and could, if federal judges set effluent standards that were different from those permitted by the Act, upset the balance struck by Congress in the FWPCA regulatory scheme.212

The recognition of federal common law in the 1972 Illinois v. City of Milwaukee suit not only provided a body of law to resolve the dispute, but because federal common law claims can be the basis of federal question


208. Id. at 107-08.


210. Id. at 318.

211. Id. at 317; see Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. at 14-15.

212. The federal district court created exactly such a conflict in Milwaukee v. Illinois, 451 U.S. at 311-12, 325 n.18 (court found that Milwaukee had created a common-law nuisance, and proceeded to order operating procedures and set effluent standards that were stricter than those contained in Milwaukee's EPA permit).
jurisdiction, the recognition of the right also provided a forum to hear inter-state disputes over water quality.\textsuperscript{213} The 1972 amendments to the FWPCA, however, eliminated the need for federal common law as the basis for access to a forum in such cases by providing for a hearing before state and federal agencies to adjust the potential conflicts that might arise between the states.\textsuperscript{214} Private citizens or groups were also granted the opportunity to express their concerns,\textsuperscript{215} with access to a federal forum in limited circumstances.\textsuperscript{216} Persons with an interest in the establishment of standards may participate in the EPA or state administrative process;\textsuperscript{217} those who are injured either by the EPA's failure to establish standards or by a violation of established standards may bring suit for injunctive or similar relief in the federal courts under the FWPCA citizen suit provisions.\textsuperscript{218} The FWPCA also recognizes and preserves state damage or injunctive remedies for water pollution based upon state common law of nuisance or upon state statute. When the states provide such remedies, private citizens or groups who experience economic injuries because of violations of the FWPCA may bring suit for recovery of damages under state law.\textsuperscript{219}

The 1972 amendments to the FWPCA thus eliminated the two supporting rationales for federal common law: the need for adequate enforcement mechanisms to effectuate congressional water quality objectives and the unavailability of a forum to resolve conflicting interests in water quality standards. With the supporting rationales eclipsed, the continued need for a federal common law abatement or damage remedy likewise disappeared.\textsuperscript{220} Milwaukee v. Illinois eliminated the federal common law abatement remedy; National Sea Clammers Association eliminated the federal common law damage remedy. These interstitial remedial devices designed to effectuate congressional objectives were now supplanted by the new congressional scheme.

b. FWPCA and General Maritime Law

The FWPCA, the MPRSA, other environmental acts, Milwaukee v. Illinois, and National Sea Clammers Association have taken their toll in the area of general maritime law as well. This part of the article will demonstrate, however, that their effect is limited to preclusion of private injunctive relief based upon maritime principles.\textsuperscript{221} Private damages may still be recovered.

\begin{itemize}
\item 213. 406 U.S. at 107 & n.9.
\item 216. Id. § 1313.
\item 217. Id. § 1314.
\item 218. Id. § 1365.
\item 219. Id.
\item 221. Milwaukee v. Illinois, 451 U.S. at 326-29; Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. at 14-15; see also infra note 256.
\end{itemize}
General maritime law is not the same interstitial creature as federal common law. The federal judiciary has a far more expansive role to play in the development of maritime law than nonmaritime federal common law.\textsuperscript{222} General maritime law springs from a different portion of article III, section 2 than does federal common law; it originates in the grant of judicial power over "[c]ases of admiralty and maritime jurisdiction."\textsuperscript{223} Neither article I nor article III specifically addresses the power of Congress to enact legislation governing admiralty or maritime matters, or the federal courts' power to create substantive admiralty rules of law, but the courts interpreted article III as encompassing both the predominant power of Congress to legislate in admiralty or maritime matters\textsuperscript{224} and, in the absence of such legislation, the federal courts' power to declare substantive maritime law.\textsuperscript{225} Furthermore, courts determined that the subject matter—admiralty or maritime matters—was not within the lawmaking competence of the state legislatures or courts, except in very limited situations.\textsuperscript{226} Congress, for the most part, has left it to the federal courts to develop and articulate the substantive body of rules governing maritime matters. The response of the courts has been the development of a broad body of federal decisional law that touches on almost every aspect of every activity that occurs on the navigable waters or seas.\textsuperscript{227}

It should be remembered, however, that although Congress has acted infrequently in matters of maritime law, when it does act its statutory pronouncements supplant any judicially created law. In Milwaukee v. Illinois Justice Rehnquist provided a specific example of this process when he used *Mobil Oil Corp. v. Higgenbotham*\textsuperscript{228} to illustrate his point that once Congress addresses a question, the Court is not free to apply judicially created maritime principles that conflict with the congressional mandate.\textsuperscript{229} In *Higgenbotham* the plaintiff in a wrongful death action sought to recover for "loss of society," an item of damages recoverable in a wrongful death action under general mar-


\textsuperscript{223} U.S. Const. art. III, § 2.


\textsuperscript{225} *See generally G. Gilmore & C. Black*, supra note 21, at 45-51.

\textsuperscript{226} See, e.g., *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917); see also supra note 64. The area in which state legislatures and state courts may constitutionally prescribe rules of conduct for maritime matters fluctuates, depending on how broadly the Supreme Court defines the area of exclusive federal authority. The most extreme position foreseeing state action is represented by *Southern Pac. Co. v. Jensen*, a position that has been eroded over the years. See, e.g., *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1972); *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1953). Nevertheless, it still remains viable in certain circumstances. See, e.g., *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 344 (1972); *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961); see also *G. Gilmore & C. Black*, supra note 21, at 47-48; supra note 64.

\textsuperscript{227} The breadth of judicially created federal maritime law is easily seen in *G. Gilmore & C. Black*, supra note 21.

\textsuperscript{228} 436 U.S. 618 (1978).

\textsuperscript{229} Milwaukee v. Illinois, 451 U.S. at 315.
But not recoverable under the Death on the High Seas Act (DOHSA). Since plaintiff's husband's death occurred in the area of the sea covered by the DOHSA, the congressional legislation and not general maritime law was controlling. Thus, the answer to the question whether the FWPCA or the MPRSA supplants the general maritime law of public nuisance as they do the federal common law of public nuisance must be determined by an analysis of whether Congress intended to displace general maritime law as well as federal common law.

ii. No Presumption of Displacement of General Maritime Law by the FWPCA Is Justified

The presumption of the Supreme Court in Milwaukee v. Illinois and National Sea Clammers Association—when Congress moves to occupy an area previously governed by federal common law, federal common law is supplanted even though Congress may not provide a private damage remedy for violation of the federal statute—is not applicable to matters controlled by general maritime law. When federal common law is displaced, private parties are not left without a forum or remedy. Individual rights may be asserted in state courts and are protected by state law. If Congress legislates in an area previously governed by general maritime law, however, the state legislature and courts may lack the power to legislate or promulgate rules for maritime activities outside state territorial waters or the power to assert personal jurisdiction over nonresident defendants based upon extraterritorial activities. Therefore, it should not be presumed, in the absence of explicit language evidencing such an intent, that Congress intended to eliminate a preexisting private right under general maritime law, thereby leaving remediless persons damaged by the very conduct Congress finds reprehensible. The presumption in such a situation should be the opposite: Congress did not intend to disturb any portion of the preexisting law other than that with which it has

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234. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (no personal jurisdiction); Nielsen v. Oregon, 212 U.S. 315, 321 (1909) (state may not prosecute a person for activities that occur in another state's territorial waters and are permitted by the second state); G. GILMORE & C. BLACK, supra note 21, § 1-17, at 47-50.
235. In Oswoego Barge, however, the language and legislative history of the FWPCA foreclosed the government's general maritime claims for recovery of the costs of oil spill cleanups. 664 F.2d at 340-44.
specifically dealt.\textsuperscript{236}

The presumption that private damage actions based upon the general maritime law of public nuisance are not disturbed by FWPCA, and MPRSA is less strong when the activity that serves as the basis for the action occurs within state territorial waters. When the water pollution occurs in state territorial waters, the application of state law exists as an alternative, and state courts, which could assert long arm personal jurisdiction, stand as an alternative forum. Nonetheless, nothing in the legislative history of the FWPCA indicates that Congress intended to eliminate admiralty law as a basis for private damage actions arising in state territorial waters.

Furthermore, when Congress acts to occupy an area previously governed by federal common law, the displacement of federal common law, even in the absence of a congressionally provided damage remedy, occurs because the purpose for its existence has disappeared. The original primary purpose for its existence was to effectuate some national policy that goes beyond the interests of the parties.\textsuperscript{237} Provision of private injunctive relief or a private damage remedy is incidental to the primary purpose. The parties thus are simply tools in achieving a narrowly defined national objective, and when Congress provides new tools, the old may be discarded.

But maritime law, which grows out of the national interest in maritime activities, has as one of its objectives the provision of remedies to private parties for private maritime claims.\textsuperscript{238} Providing such remedies is the very reason for its existence. The fact that Congress has dealt with one aspect of a maritime relationship does not mean that another related aspect is extinguished, whatever effect similar congressional action has upon federal common law. For example, Congress passed DOHSA in 1923, creating a statutory wrongful death action for deaths occurring on the high seas.\textsuperscript{239} The existence of DOHSA precludes the recovery of "loss of society" damages in situations covered by the Act,\textsuperscript{240} but the existence of DOHSA does not preclude the creation of a general maritime wrongful death action for deaths occurring within territorial waters or the recovery of damages for loss of society in such cases.\textsuperscript{241} Nor did DOHSA extinguish the general maritime right to recover for wrongful death in territorial waters, thereby leaving recoveries for such deaths to be

\textsuperscript{236} See supra note 233.

\textsuperscript{237} See generally M. Redish, supra note 29, at 79-97. Maritime law is a branch of federal common law. Id. at 97-105. Also, as in all situations involving any form of federal common law, there is some federal interest present. In the case of maritime law that interest is generally one of uniformity of law. Thus, it can also be said that provisions for private damage or injunctive relief under maritime law are incidental to its primary purpose. But properly viewed, the primary purpose of maritime law is to provide a uniform set of rules for private parties engaged in an activity intrinsically bound with the national interest. It is the nature of this private activity that constitutes the national interest.

\textsuperscript{238} Id.


\textsuperscript{240} Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978).

controlled by state law. The same analysis would apply to the FWPCA and MPRSA. The acts deal with only one aspect of the maritime tort of water pollution, the ability to obtain injunctive relief; they do not deal, or even purport to deal, with the other aspect of the maritime tort, the ability to recover damages. That private consequence of the tort is left where it has always been: to be determined by general maritime law.

iii. General Maritime Law as "Common Law" Preserved by FWPCA and MPRSA Saving Clauses

Preservation of a private maritime damage action is also consistent with the language of the FWPCA and MPRSA "saving clauses." The saving clauses of the FWPCA and the MPRSA appear in provisions authorizing citizen suits for injunctive relief to enforce the substantive law of the respective acts. Each saving clause provides that the authorization of citizen enforcement suits "shall not restrict any right which any person . . . may have under any statute or common law to seek enforcement of any [effluent] standard or limitation or to seek any other relief." Both refer to "common law," not "maritime law," even though one, MPRSA, is legislating in an area in which, in the absence of legislation, maritime law is controlling. It can be argued that if Congress wished to preserve remedies under "general maritime law" it could have made express reference to it. Thus, the express inclusion of "common law" and the exclusion of "maritime law" arguably operates to save only "common law" remedies and not "maritime law remedies." But Congress probably was not focusing upon any differences that may exist between "federal common law" and "general maritime law." The use of "common law" in all likelihood was not intended to refer to a mode of trial—jury trial—or to a particular system of substantive law, but instead to refer to judge-made as opposed to statutory law. Nothing in the legislative history of either statute would indicate that Congress had in mind anything other than the distinction between statutory and judge-made law when it debated, drafted, and enacted the FWPCA and the MPRSA. This conclusion is consistent with the construc-

242. 436 U.S. 618.
244. Id. § 1365(e) (emphasis added). The MPRSA saving clause has wording similar to that of the FWPCA saving clause. The MPRSA saving clause reads as follows:

The injunctive relief provided by this subsection shall not restrict any right which any person (or class or persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Administrator, the Secretary, or a State agency).

Id. § 1415(g)(5).
245. See supra notes 143-62 and accompanying text.
246. The Court's statements in Milwaukee v. Illinois, 451 U.S. at 329 n.22, that Congress knows how to say what it means, and that courts should read an act as it is written, could be cited in support of this point.
247. The saving clause language of the MPRSA uses the term "common law," even though the legislation is in an area in which maritime law would otherwise apply. 33 U.S.C. § 1415(g)(5). Thus, "common law" as used by Congress in this instance probably refers to "judge-made" law, and not to a particular system of substantive law or to substantive rights to which a jury trial right is attached.
tion the courts have given similar language in the past. The phrase "common law" in a statute has been construed to refer to judge-made law and, therefore, to encompass "general maritime law."

Even if the legislative history provides no basis for concluding that the phrase "common law" excludes "general maritime law," the Supreme Court's construction of the phrase in *Milwaukee v. Illinois* does. In *Milwaukee v. Illinois* the Court implied that "common law" refers to a particular body of substantive law and not to judge-made law in general. In the Court's view, the most likely meaning of that phrase was "routine state common law," excluding "limited federal common law." The court implied that section 1365(e) of the FWPCA had similar limited meaning in its *National Sea Clammers Association* decision as well. In both cases this interpretation was dictum since the Supreme Court ultimately predicated its decision on an assumption that even if section 1365(e) of the FWPCA or section 1415(g)(5) of the MPRSA or both included federal common law, Congress intended that the FWPCA and the MPRSA preempt any right under the federal common law to seek an abatement of a public nuisance or any similar private right to damages. Thus, the avenue, albeit narrow, is still open for a construction of the phrase to include general maritime law remedies.

iv. General Maritime Law Preserved as a "Right . . . Under . . . [a] Statute" by Saving Clause of FWPCA

An alternative approach is to focus upon the phrase "any statute." The lower federal court's authority both to hear admiralty cases and to fashion principles of general maritime law have been given to them by Congress in 28 U.S.C. section 1333. Although the statute is jurisdictional in scope, because of the nature of general maritime law it is also a source of substantive judicial lawmaking authority. If the rights of commercial fishermen have their source in general maritime law created under the authority of 28 U.S.C. section 1333, then the rights are under a "statute," and are preserved by the sav-


used the phrase "use common law rules" in a generic sense, to mean the standards developed by the courts through years of adjudication [i.e., "judge-made law"] rather than in a technical sense to mean those standards developed by "common law" courts as opposed to courts of admiralty. Maritime law, the common law of seafaring men, provides an established network of rules and distinctions that are practically suited to the necessities of the sea, just as land based decisional law provides a body of rules adapted to the various forms of domestic employment.


250. *Id.*


252. *Id.* at 21-22; *Milwaukee v. Illinois*, 451 U.S. at 328-29; *see also In re Oswego Barge Corp.*, 664 F.2d at 343-44 (government maritime claims for reasonable cost of oil cleanup under a public nuisance theory were preempted by a detailed provision of FWPCA regarding government recovery of oil spill cleanup costs).


Absent any expression of congressional intent to eliminate preexisting rights under general maritime law, the FWPCA should not be viewed as preempting general maritime law, except to the limited extent of preempting any right to seek injunctive relief if prior to the passage of the 1972 amendments injunctive relief would have been available under general maritime law. The FWPCA does have explicit provisions for citizen suits seeking injunctive relief, and those provisions will override any judicially created right to such relief in maritime water pollution cases. With respect to claims for damages, however, the FWPCA and MPRSA saving clauses may be read as preserving such remedies under general maritime law, and the FWPCA and

255. The Supreme Court held in National Sea Clammers Ass'n, 453 U.S. at 19-20, that the express remedies provided by Congress precluded any remedy under 42 U.S.C. § 1983. See supra note 194.

The right under general maritime law to sue for pollution of fisheries does not necessarily involve a suit asserting the right to damages for a substantive violation of the FWPCA or MPRSA. Such statutory violations formed the basis of the plaintiffs' claims in National Sea Clammers under § 1983. This right is simply the maritime parallel of the state common-law right to recover damages in a public nuisance case, a right that the Court recognized as being preserved. Although a substantive violation of either the FWPCA or MPRSA may be relevant to the maritime claim, as it also may be to a state law claim, the existence of the right is no more dependent upon the FWPCA or MPRSA standard than is any state common-law claim. But see In re Oswego Barge Corp., 664 F.2d 327, 340-44 (2d Cir. 1981).

In National Sea Clammers the suit was against public officials and entities. The express enforcement provisions of FWPCA and MPRSA may well be the exclusive means of enforcing the acts against public officials and entities, but use of these enforcement provisions may not be necessary in damage actions brought against private parties that pollute fisheries. Private maritime actions against private parties do not raise the same concerns about federalism or about interference with the statutory enforcement schemes.

256. Historically, admiralty courts have been said to lack the jurisdiction of equity because of the common-law distinction between law, equity, and admiralty. G. Gilmore & C. Black, supra note 21, at 41. The Supreme Court held in Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A. that there is "no restriction upon admiralty by chancery so unrelenting as to bar the grant of any equitable relief even when that relief is subsidiary to issues wholly within admiralty jurisdiction." 339 U.S. 684, 691-92 (1950). In Vaughan v. Atkinson, 369 U.S. 527, 530 (1962) the Court (in discussing an award of counsel's fees) said, "Equity is no stranger in admiralty; admiralty courts are, indeed, authorized to grant equitable relief."

Lower federal courts have relied on these two cases, and on congressional extension of the Federal Rules of Civil Procedure to admiralty cases, in holding that admiralty can award whatever relief is appropriate in a given case, including equitable relief. In Lewis v. S.S. Baune, although the court denied injunctive relief because irreparable injury was not shown, it found after thoroughly reviewing the cases that "there should be little doubt today that courts of admiralty, in proper cases, may invoke the equitable tool of injunction." 534 F.2d 1115, 1121 (5th Cir. 1976). In Pino v. Protection Maritime Ins. Co., the First Circuit held that admiralty courts "may award injunctive relief in accordance with Fed. R. Civ. P. 65 in situations where such relief would be appropriate on land." 599 F.2d 10, 16 (1st Cir. 1979), cert. denied, 444 U.S. 900 (1980). In light of these cases and the unification of admiralty with other civil actions, it is doubtful that the traditional rule is still good law.

On the surface this development appears consistent with the trend in implied private remedy cases, in which courts have been more inclined to find a private injunctive remedy than a private damage remedy. See, e.g., Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979). The FWPCA citizen suit provision permits plaintiffs to enforce the FWPCA and MPRSA through injunctive suits even though their injuries are "‘non-economic’ and probably noncompensable," National Sea Clammers Ass'n, 453 U.S. at 16-17; see 33 U.S.C. § 1365(g) (1976). Thus, the FWPCA and MPRSA expressly permit injunctive suits by parties who could not bring a damage suit under federal common law, general maritime law, or state common law.

257. See supra note 255.
MPRSA may be perceived as not preempting any damage remedy under general maritime law.

IV. STATE LAW AND MARITIME LAW APPLIED CONCURRENTLY TO MARITIME WATER POLLUTION TORTS

A. State Law May be Applied to Increase the Rights of Commercial Fishermen but Not to Decrease Those Rights

The continued availability of a private damage remedy under general maritime law does not necessarily mean the unavailability of state law remedies when the maritime tort of water pollution occurs in state territorial waters. The two bodies of law are not always mutually exclusive. In some circumstances state law may be applied concurrently with maritime law. The instances in which this may occur are not completely clear, but there seem to be two general lines of cases on the issue. In some cases, the application of state law to a maritime tort was not permitted because the Court believed complete uniformity of maritime law was required. In other cases, the Court has permitted the application of state law, even though the result was a lack of uniformity, but only when the application of state law had the effect of increasing, not decreasing, the protection afforded the maritime interest. This principle would appear to be controlling in maritime water pollution cases and is consistent with the Supreme Court decision in *Askew v. American Waterways Operators, Inc.*

In *Askew* one issue was whether a Florida act that imposed strict liability upon vessels and shore facilities for oil pollution damages incurred by the State or private persons conflicted with the Water Quality Improvement Act of 1970. The Court held that the federal legislation did not purport to provide any remedies for damages experienced by private persons and, therefore, left the states free "to impose 'liability' in damages for losses suffered both by the States and by private interests." In the discussion of the relationship between state law and maritime activities, *Askew* makes no mention of *shore to sea* or *sea to sea* pollution

258. Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917); supra note 64.
260. 411 U.S. 325.
262. 411 U.S. at 336.
263. Id. at 337.
264. Id. at 337-38, 343.
cases—the types that would most likely involve fishermen. The discussion is limited to "shoreside injuries by ships on navigable waters," historically an area that, before the passage of the Admiralty Jurisdiction Extension Act of 1948, would have been within the jurisdiction of the states. In *Askew* the Court held only that the Admiralty Jurisdiction Extension Act did not "silently" deprive the states of the power to enact laws covering shoreside injuries.

There is language in *Askew* that would support the application of state law to claims of fishermen and shellfishermen. Among the private interests specifically mentioned in the case that a state might legitimately seek to protect consistently with the FWPCA were the interests of commercial fishermen and shellfishermen. Consideration of this language in light of the rest of the opinion and other Court decisions leads to the conclusion that state law may provide additional remedies, and not that state law is either the exclusive source of such rights or that state law may in any way diminish the rights that exist under general maritime law.

Prior decisions have established that state law may supplement the rights protected by maritime law by providing additional remedies or imposing a higher standard of care. In *Hess v. United States* the Court held that an Oregon wrongful death statute which imposed a higher duty of care upon maritime employers could be applied in the case of the death of a maritime worker. Maritime law recognized a claim for personal injuries, but because the Court believed that the general common-law rule—that a claim for personal injuries was extinguished by the death of the injured party—applied in maritime cases as well and could only be modified by legislative action, general maritime law did not provide a wrongful death action. To avoid the anomaly of a tortfeasor being in a better position if a person were actually killed as the result of a maritime tort rather than seriously injured, the courts applied state wrongful death statutes in these situations. In such cases, the application of the state wrongful death statute is consistent with the federal maritime interest.

The imposition of a higher standard of care is also consistent with the
federal maritime interest. Federal maritime law sets a minimum standard of care, and generally it is consistent with the purpose of that law to permit a state to increase the duties established by general maritime law. 274 On the other hand, in no case in the last forty years has the Court permitted the application of state law when it impairs the plaintiff's rights under general maritime law. 275 Thus, the Florida Act in Askew, which created strict liability for oil pollution, could be applied to claims of commercial fishermen and shellfishermen consistently with Hess and other maritime cases. It would be inconsistent with Askew and Hess, however, to apply state law when the effect would be to decrease the protection of the rights of commercial fishermen, as for example to permit a defendant to assert a defense not cognizable under maritime law. 276 The latter situation has not occurred, and in the decided cases other than Moore v. Hampton Roads Sanitation District Commission 277 state law has not been applied when the effect would be to limit the rights of recovery under maritime law.

B. The Application of State Law to Create Causes of Action Unrecognized by Maritime Law is Not Permissible if It Has an Adverse Indirect Effect upon Maritime Interests

There also arises the different but closely related problem whether state law may be applied to create a right of recovery for a maritime tort for a class of plaintiffs who do not have any compensable interest under general maritime law. The district court in the continuing litigation in the Kepone case, Pruitt v. Allied Chemical Corporation, 278 has confronted this issue and may have reached incorrect conclusions. In Pruitt a number of plaintiffs filed an action, relying on a variety of state law and federal law theories, against Allied Chemical to recover damages they allegedly suffered as the result of the 1976 dumping of the highly toxic chemical Kepone into the James River and Chesapeake Bay. 279 The plaintiffs may be divided into three groups: (1) those that directly engage in the harvesting of river and bay marine life (commercial fishermen, shellfishermen, and lessors of oyster beds); 280 (2) those that lost profits resulting from their inability to sell seafood contaminated by Kepone and from the

277. 557 F.2d 1030 (4th Cir. 1976).
279. Id. at 976.
280. In Pruitt the lessors of oyster beds sued a private corporation, not a state governmental unit. The district court did not mention Moore or dismiss the oyster bed lessor's admiralty claims on the ground that they were governed by state law and not maritime law. Perhaps claims by private lessors of oyster beds against private entities that pollute the beds are to be distinguished from claims against public entities.
decline in demand for seafood from the affected waters (seafood wholesalers, retailers, processors, distributors, and restaurateurs); and (3) those that lost profits because of the decline in sportsfishing on the affected waters (boat, tackle and bait shop owners, and marina owners). Defendant moved to dismiss the claims of all these plaintiffs other than those who directly engaged in harvesting river and bay marine life. The court granted that motion with respect to the admiralty claims of the second and third groups, but with respect to the state law claims, only the claims of the second group were dismissed. The maritime and state law claims of the second group were dismissed on the ground that plaintiffs sought recovery for indirect economic harm not compensable under either state law or maritime law. The third group's state law claims, which also involved claims for indirect economic harm, were retained, however, on the theory that boat, bait shop, and marina owners could stand as "surrogate plaintiffs" for recreational fishermen who no longer were able to use the affected waters. But admiralty claims of the group were dismissed on the ground that, under prevailing maritime princ-

281. 523 F. Supp. at 976.
282. Defendant argued that the first and second groups only suffered indirect harm to their property or businesses as a result of the Kepone pollution. The court acknowledged that the general rule is that plaintiffs cannot recover for such indirect economic harm, but since there was no Virginia law on the subject, see id. at 978, the court sought to find a "principled basis" for distinguishing between the various groups of plaintiffs who relied on the polluted waters for their livelihood to varying degrees. The commercial fishermen, shellfishermen, and oysterers of the first group posed no real problem. They made a lawful and direct use of the waters and, according to the court, had a legally cognizable right to recover damages as a matter of state law. Although the court did not cite any cases on the right of an individual to recover damages when he suffers a unique injury as a result of a public nuisance, the cases support the district court's holding with respect to this first group.

283. The claims of the second and third groups could have been treated similarly, but the court instead decided:

While commercial fishing interests are protected by allowing the fishermen themselves to recover, it is unlikely that sportsfishing interests would be equally protected. Because the damages each sportsman suffered are likely to be both small and difficult to establish, it is unlikely that a significant proportion of such fishermen will seek legal redress. Only if some set of surrogate plaintiffs is entitled to press its own claims which flow from the damage to the Bay's sportfishing industry will the proper balance of social forces be preserved. Accordingly, the Court holds that to the extent plaintiffs in . . . [the third group] suffered losses in sales of goods and services to sportsfishermen as a result of defendant's tortious behavior, they have stated a legally cognizable claim. Id. at 980 (footnotes omitted).

One interesting aspect of this holding is that in many jurisdictions, sportsfishermen do not have a legally cognizable claim for damages when public waters are polluted. W. PROSSER, supra note 83, at 590; cf. Meredith v. Triple Island Gunning Club, 113 Va. 80, 73 S.E. 721 (1912) (plaintiff had no claim against defendant who bought an island adjacent to his island in navigable waters and who shot ducks before they could reach plaintiff's island). Although they may suffer direct economic injury, the injury suffered is not sufficiently distinguishable from that experienced by the public at large as a result of the public nuisance. Therefore, it is not compensable in a public nuisance damage action. RESTATEMENT (SECOND) OF TORTS § 821C (1979). The district
ple, recovery of indirect economic loss was not permissible, even if recovery was sought through the use of a "surrogate plaintiff" theory.284

Each of the claims presented in Pruitt is a maritime tort within the federal court's admiralty jurisdiction. Some claims involve commercial activities and others recreational, but as an earlier discussion indicates, maritime jurisdiction does not hinge on whether the particular activity is commercial or recreational.285 In the present situation, the traditional maritime activity is fishing, and interference with either the recreational or commercial aspects of that activity would constitute a maritime tort within admiralty jurisdiction.286 The difference between the two aspects of that traditional maritime activity is not jurisprudential, but substantive. Maritime law permits commercial fishermen to recover damages for interference with their activities, but does not permit recreational fishermen to recover damages.287 The Court in the Kepone case, however, implied that sportsfishermen, if they could prove damages, would have a compensable claim in admiralty, an implication that is incorrect both as a matter of economic judgment and under principles of the maritime law of public nuisance. Sportsfishermen may have a sufficient interest to give them standing to seek an injunction to prevent or stop activities that interfere with the fishing, but this fact alone does not imply that the interest is one for which compensation may be received.

The maritime law distinction between the right of commercial fishermen and shellfishermen to recover their provable economic losses and the denial of any right of recovery to recreational fishermen and shellfishermen for the interference with their fishing activities or the loss of the use of navigable waters is a reasonable one. The commercial fishing industry is an important source of jobs and food. Destruction of fisheries by pollution thus means both a loss of a valuable food supply and of livelihoods.288 By contrast, a recreational fisherman experiences no economic loss. His ability to feed and clothe himself or his family is not affected; only a form of relaxation and pleasure is lost. The crucial question is whether that loss is one that should be individually compensable.

court's decision permits plaintiffs of the third group to act as "surrogate plaintiffs" for a class of people that have no independent legally cognizable right to recover damages.

284. When the court turned to the admiralty claims, the case took another interesting twist. Relying upon Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927), and Venore Transp. Co. v. M/V Struma, 583 F.2d 708 (4th Cir. 1978), the district court held that neither the second nor third groups were entitled to recover damages under admiralty law. These claims sought recovery of indirect economic damages and were therefore not cognizable under prevailing admiralty principles. Additionally, the "surrogate plaintiff" approach followed for the state law claims of the third group could not be applied in maritime law. 523 F. Supp. at 982. The decision might be summarized as permitting the third group: (1) to recover damages as surrogate plaintiffs under state law when under both state and admiralty law the persons for whom they are surrogates have no right to recover damages, and (2) to recover on state law principles when maritime law would bar any recovery.

286. See supra notes 70-76 and accompanying text.
287. See supra notes 96-99 & 101-02 and accompanying text.
Little justification exists for such compensation. The loss is difficult to measure in monetary terms. Also, the courts themselves are publically subsidized, and use of limited court time to determine such issues hardly seems to be a sensible use of a limited resource. Finally, there is always the question of how much of the damage that follows from any tortfeasor's activities the tortfeasor will actually be compelled to pay. Unless it is permissible to bankrupt industries that cause substantial environmental damage, limitations must exist.289 Even pollution-causing industrial activities employ people and are part of the economic environment, and most of the people they employ will be free of any fault for the pollution that occurs. Yet, imposition of all environmental cost upon the company responsible for the damage may result in the loss of jobs for its employees, whose only fault is association with the polluter. The ripple economic effect of this loss of jobs as the result of expansive liability for environmental damages should not be overlooked. As between the potential economic health of the company and its employees and the intangible losses experienced by the recreational fishermen, the equities clearly favor the company and its employees.

In the Keppone case the plaintiffs in the third group are not the sportsfishermen themselves, but those who sell fishing and boating supplies to sportsfishermen. The gist of this group's claim is that the pollution constituted a tortious interference with the maritime contractual relationships that existed between them and sportfishermen. Although the district court, by using a "surrogate plaintiff" theory, permitted the third group to remain in the case as plaintiffs on the state law claims, it held that the Robins Dry Dock & Repair Co. v. Flint290 decision precluded any right of recovery in admiralty on either a surrogate plaintiff theory or on a theory of interference with contract. In Robins, the plaintiff, a time charterer, was not permitted to recover damages for loss of the use of the vessel when it was damaged while in dry dock.291 Under the terms of the charter, the owner was not liable for the loss of use, so the charterer sued the dry dock. The court held that maritime law did not permit recovery by a person who suffers economic injury as the result of an unintentional tort committed by a third party against those with whom the plaintiff was doing business.292 Robins has been extended beyond its facts to encompass the general idea that those who suffer indirect economic maritime losses will not be permitted to recover the damages they experience.293 This basic idea caused dismissal of the state law claims of the plaintiffs in the second

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290. 275 U.S. 303 (1927).
291. Id at 307.
292. Id at 309.
293. See Venore Transp. Co. v. M/V Struma, 583 F.2d 708 (4th Cir. 1978). In Marine Navig. Sulpher Carriers, Inc. v. Lone State Indus., 638 F.2d 700 (4th Cir. 1981), aff'd in re Marine Navig. Sulpher Carriers, Inc., 507 F. Supp. 205 (E.D. Va. 1980) the court observed that the rule developed by the First and Ninth Circuits, permitting recovery for economic losses suffered by clam diggers and commercial fishermen because of oil spill injury to aquatic life, was a "special and narrow one," conceivably "at odds with" the general rule. Id. at 702.
group, and the specific holding of *Robins* resulted in the dismissal of the admiralty claims. The occupations of the plaintiffs in the third group and the legal theories underlying their claims do not change the role of the federal courts in deciding whether to permit recovery. The claims are maritime and the determination whether damages may be recovered is one for the federal courts to make. Concurrent application of state law to permit the recovery barred by maritime law could only be justified if the state interest in compensating plaintiffs of that group outweighs the federal maritime interest in denying compensation.

The state interest in pollution cases is threefold. First, it may have a general interest in the health and safety of its citizens. Second, it has an interest in compensating its citizens who are injured as a result of pollution. Third, it may be interested in limiting liability to protect a particular pollutor or class of pollutors despite the fact that others are injured. The state's interest in health and safety is adequately protected by the permit system of the FWPCA and the power of the state pursuant to the FWPCA to impose stricter water quality standards and effluent limitations than exist under EPA regulations. Any state interest in protecting water pollutors from liability would be contrary to both the congressional intent underlying the FWPCA and, when it would bar recovery by maritime interests, to the line of cases not permitting state law to be applied if it would result in a decrease in the protection of maritime interests. Finally, when the state's interest in compensating plaintiffs of group three is weighed against the effect that compensation would have upon the rights of commercial fishermen under maritime law, application of state law is improper. The effect of the "surrogate plaintiff" approach, however laudable the district court's motives, is the dilution of the possibility of actual recovery by those entitled to recover under maritime law. With only a finite amount of assets available to judgment creditors and the tremendous potential ripple economic effects of pollution activity, the larger the class of potential judgment creditors, the greater the likelihood that the maritime plaintiffs' claims will not be satisfied out of available assets.

Maritime law has protected maritime interests not only by special rules of substantive law but also by rules that give maritime creditors priority to assets

294. *See, e.g.*, Kossick v. United Fruit Co.; 365 U.S. 731 (1961); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). As Professors Gilmore and Black have said, "If there is any sense at all in making maritime law a federal subject, then there must be some limit set to the power of the states to interfere in the field of its working." G. GILMORE & C. BLACK, *supra* note 21, at 48. Professor Redish takes the view that "[i]n the absence of applicable congressional legislation, a federal court should in every case choose to apply state law, instead of creating its own maritime common law." M. REDISH, *supra* note 29, at 99. Nonetheless, he does concede that "[t]he federal courts have not hesitated to create and apply federal maritime common law," and that "this suggestion deviates dramatically from the current state of the law." *Id.* at 99, 105.

295. *See supra* note 290.


298. *See supra* notes 259-70 and accompanying text.
Many maritime claims, especially tort claims, result in maritime liens when a vessel is responsible for the injury. Those liens give the maritime claimant priority over all nonmaritime claimants. Thus, if a vessel were the source of pollution, commercial fishermen would have a claim to the vessel superior to the claims of nonmaritime interests. When the source of pollution is not a vessel and when no maritime lien would exist, Robins may be viewed as a decision that operates to assure the distribution of available assets in a manner consistent with the policies underlying maritime law. By disallowing the recovery of indirect economic losses, Robins conserves the available assets for those maritime interests whose losses are more immediate. Applying state law, when the effect would be the possible dilution of the protection of maritime interests, would both conflict with Robins and be impermissible under article III.

This conclusion does not always give an absolute priority to maritime claimants. When Executive Jet changed the standards for determining admiralty jurisdiction, it also complicated the analysis of problems such as these. If a land based polluter causes both maritime and nonmaritime injuries, for example, to fishermen and people who use the water in land based activities, maritime law will only govern the maritime injuries, and state law the nonmaritime claims. That result, however, is a product of the more complicated test of admiralty jurisdiction and the nature of a federal system in which some activities will inevitably cause injuries governed by state and federal law. This situation, however, is distinguishable from the one in Pruitt, because in Pruitt the plaintiffs in the third group had in their own right only a claim for interference with maritime contracts, a claim that would be governed by maritime law. Any other claim would not involve any distinct injury to them, but merely one that flowed from the maritime injury to sportsfishermen, for which no recovery is permissible under maritime law. Thus, Pruitt is not a case of both maritime and nonmaritime claims. Pruitt is simply a case requiring a determination of which maritime claims are compensable, a decision that is for the federal courts to make, applying traditional maritime principles.

CONCLUSION

Although the United States Supreme Court has never held that com-
Commercial fishermen have a right under general maritime law to recover damages when fisheries in territorial waters are destroyed by pollution, a strong argument can be made that such a right exists, thereby giving commercial fishermen both access to the federal courts and a uniform minimum level of protection. This right has not been supplanted by the FWPCA, as was the federal common law of water pollution, or by any other act of Congress. State law may be applied only when the effect of the state law would be to provide commercial fishermen even greater protection against the consequences of pollution damage than does present general maritime law. Finally, the states may not create a cause of action for maritime torts for which general maritime law does not recognize a right to recover when the effect of such state law would be to diminish indirectly the protection afforded commercial fishermen under general maritime law. The determination of which groups are entitled to recover damages as the result of a maritime pollution tort is one to be made by the federal courts after weighing the consequences in light of federal maritime interests.