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## Sabotage by Cabotage: The Jones Act's Attack on U.S. Energy

Kyle Mason

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# Sabotage by Cabotage: The Jones Act’s Attack on U.S. Energy

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## INTRODUCTION:

Although the average U.S. consumer may be unfamiliar with the Jones Act<sup>1</sup>—a century old U.S. maritime cabotage law—one has most likely been burdened by the law’s associated costs, which are estimated to be \$1.32 billion annually.<sup>2</sup> The law’s blatant protectionist scheme continues to throttle domestic port-to-port maritime trade, and has inhibited the U.S. maritime industry to a point where U.S. flag-bearing ships can no longer compete in the international market.<sup>3</sup> But worse, adverse effects of the law have now invaded other U.S. industries, notably choking the energy market, as the Jones Act continues to prevent effective transportation of new forms of natural resources being produced domestically.<sup>4</sup> The Jones Act is now in dire need of reevaluation, as it no longer serves its intended purpose, constrains economic growth in key sectors of the domestic marketplace, and continues to adversely impact U.S. consumers.

Formally, the Jones Act—which is named after its author, Senator Wesley L. Jones—is codified in Section 27 of the Merchant Marine Act of 1920,<sup>5</sup> and “has long been regarded as [the] cornerstone of U.S. maritime policy.”<sup>6</sup> More specifically, the Jones Act is the pinnacle of the U.S.’s broader scheme of “cabotage regulations,” which “are not unique to the maritime industry,” but just refers to “coastwise [or coastal]” transportation of goods and merchandise.<sup>7</sup> So, maritime cabotage regulations are the surrounding laws that govern domestic, port-to-port

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<sup>1</sup> Merchant Marine Act of 1920, 46 U.S.C. § 55102 (2012) (formerly cited as 46 App. U.S.C. §§ 861–889 (2002)) (commonly referred to as “the Jones Act”).

<sup>2</sup> U.S. INT’L TRADE COMMISSION, EFFECTS OF SIGNIFICANT U.S. IMPORT RESTRAINTS 122 (2d Ed., 1999).

<sup>3</sup> See *infra* Part III.A.2.

<sup>4</sup> See James Coleman, *Repeal the Jones Act for American Energy*, REGULATORY TRANSPARENCY PROJECT 1, 3 (Sep. 28, 2017), <https://regproject.org/paper/repeal-jones-act-american-energy/>.

<sup>5</sup> Note that Section 33 of the Merchant Marine Act of 1920, which “governs claims made by seaman for personal injuries suffered in the course of their employment,” is also sometimes referred to as “the Jones Act,” but the only focus of this paper is Section 27 (as codified in 46 U.S.C. § 55102), which will be referred to throughout as “the Jones Act.” See Constantine G. Papavizas & Bryant E. Gardner, *Is the Jones Act Redundant?*, 21 U.S.F. MAR. L. J. 95, 96–97 (2009).

<sup>6</sup> John F. Frittelli, *The Jones Act: An Overview*, CONGRESSIONAL RESEARCH SERVICE 1, 1 (July 8, 2003), <https://wikileaks.org/wiki/CRS-RS21566>.

<sup>7</sup> *Id.* at 1–2; see also Wakil O. Oyedemi, *Cabotage Regulations and the Challenges of Outer Continental Shelf Development in the United States*, 34 HOUS. J. INT’L L. 607, 611 (2012) (“cabotage regimes are laws regulating the transportation of persons and merchandise from one point to another along the coastal waters of a nation”).

trading in the U.S. The Jones Act operates similarly to most other countries maritime cabotage laws, generally aiming to (1) create a strong merchant marine that can quickly mobilize in times of national emergency and (2) “protect American sovereignty over domestic maritime commerce.”<sup>8</sup> Specifically, Section 1 of the statute states that:

It is necessary for the *national defense* and for the *proper growth of its foreign and domestic commerce* that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, in so far as may not be inconsistent with the express provisions of this Act, the Secretary of Transportation shall [. . .] keep always in view this purpose and object as the primary end to be attained.<sup>9</sup>

In order to ensure that this purpose is met, the Jones Act sets forth stringent requirements for ships that want to operate on U.S. domestic port-to-port routes, requiring that: “[A]ll waterborne shipping between points within the United State [must] be carried by vessels built in the United States, [be] owned by a U.S. citizen (at least 75%), and [be] manned with U.S. citizen crews.”<sup>10</sup> Thus, on a broader scale, the Jones Act protects the U.S. industry from foreign competitors, ultimately aiming to create a strong maritime industry that cannot easily be undercut. But, conflicting interests and changing economic landscape have brought the Jones Act under fire, as the Act struggles to continue serving its intended purpose and unintended consequences of the Act become more prevalent.

The Jones Act’s recent return to prominence in the wake of Hurricane Maria provides an excellent illustration of just how outdated the law is, reviving heated debate amongst economic experts and lawmakers alike on the statute’s relevance and applicability in modern times.<sup>11</sup> As “the fulcrum of the cabotage regulation in the United States [inclusive of the non-contiguous U.S. states and territories],”<sup>12</sup> the Jones Act’s stringent domestic shipping requirements became the center-point of discussion in Maria’s aftermath, hindering the Trump administration’s ability to quickly

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<sup>8</sup> Frittelli, *supra* note 6, at 2–3.

<sup>9</sup> 46 App. U.S.C. § 861 (2002) (emphasis added).

<sup>10</sup> Frittelli, *supra* note 6, at 1.

<sup>11</sup> See Niraj Chokshi, *Trump Waives Jones Act for Puerto Rico, Easing Hurricane Aid Shipments*, N.Y. TIMES ¶ 14–15 (Sep. 28, 2017), <https://www.nytimes.com/2017/09/28/us/jones-act-waived.html>.

<sup>12</sup> Oyedemi, *supra* note 7, at 608.

respond to one of the worst natural disasters in our nation's history.<sup>13</sup> Ultimately, the U.S. Department of Homeland Security (DHS) was forced to grant a waiver of the Jones Act,<sup>14</sup> which allowed foreign ships a rare opportunity to enter the U.S. domestic shipping realm to provide much needed aid for Puerto Rico recovery efforts (albeit only for a short, 10-day period).<sup>15</sup> Similarly, the Jones Act was waived during Hurricane Harvey for essentially identical reasons,<sup>16</sup> as the U.S. lacked sufficient Jones Act compliant ships to properly supply a devastated Houston with desperately needed resources, such as sufficient fuel to “restore services and infrastructure in the wake of the storm.”<sup>17</sup> Granting Jones Act waivers to foreign ships following natural disasters has in fact become common practice of DHS because the U.S. merchant marine, which was supposed to be bolstered by the Jones Act, lacks the necessary capacity and speed to effectively respond in emergency situations.<sup>18</sup>

The irony of this illustration is hard to miss, as one of the stated purposes of the Jones Act is to have a domestic fleet of seafaring vessels that can offer aid and quickly respond during any “national emergency.”<sup>19</sup> But, the DHS's repetitive grants of Jones Act waivers during national emergencies (e.g., natural disasters) perfectly exemplifies the law's ineffective and antiquated nature, succinctly showing one of the many

<sup>13</sup> See Alana Abramson & Jennifer Calfas, *What to Know About the Impact of the Jones Act on Puerto Rico Aid*, TIME ¶ 1–5 (Sep. 28, 2017), <http://time.com/4961159/what-is-jones-act-puerto-rico/>; see also Amber Phillips, *Trump just lifted the Jones Act for Puerto Rico. Here's what that does.*, WASH. POST ¶ 1–5 (Sep. 28, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/09/27/all-about-the-jones-act-an-obscure-shipping-law-thats-stalling-puerto-ricos-recovery/?utm\\_term=.5610a43eb561](https://www.washingtonpost.com/news/the-fix/wp/2017/09/27/all-about-the-jones-act-an-obscure-shipping-law-thats-stalling-puerto-ricos-recovery/?utm_term=.5610a43eb561) (showing the national coverage on the Jones Act's related to Hurricane Maria recovery efforts).

<sup>14</sup> DEP'T OF HOMELAND SECURITY, Waiver of Compliance with Navigation Laws, Jones Act Waiver (Sept. 28, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0928\\_AS1\\_Jones-Act-Waiver.pdf](https://www.dhs.gov/sites/default/files/publications/17_0928_AS1_Jones-Act-Waiver.pdf).

<sup>15</sup> See James Coleman, *Repeal the Jones Act to Speed Puerto Rico Recovery*, FOX NEWS ¶ 6 (Oct. 11, 2016), <http://www.foxnews.com/opinion/2017/10/11/repeal-jones-act-to-speed-puerto-rico-recovery.amp.html>.

<sup>16</sup> DEP'T OF HOMELAND SECURITY, Waiver of Compliance with Navigation Laws, Jones Act Waiver (Sept. 8, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0908\\_AS1\\_Jones-Act-Waiver.pdf](https://www.dhs.gov/sites/default/files/publications/17_0908_AS1_Jones-Act-Waiver.pdf).

<sup>17</sup> *U.S. waives Jones Act to secure fuel for hurricane responders*, REUTERS ¶ 5 (Sept. 8, 2017), <https://www.reuters.com/article/us-storm-irma-shipping/u-s-waives-jones-act-to-secure-fuel-for-hurricane-responders-idUSKCN1BJ2GE>.

<sup>18</sup> See Thomas Grennes, *An Economic Analysis of the Jones Act*, MERCATUS CENTER 3, 9 (2017), <https://www.mercatus.org/system/files/mercatus-grennes-jones-act-v2.pdf>.

<sup>19</sup> 46 App. U.S.C. § 861 (2002); see also Alexander Stevens, *The Jones Act: Distorting American Energy Markets Since 1920*, INST. FOR ENERGY RES. ¶ 1 (Sept. 29, 2017), <https://instituteforenergyresearch.org/analysis/jones-act-distorting-american-energy-markets-since-1920/> (“[t]he temporary suspension of the legislation [following Hurricane Maria] is noteworthy because one of the stated purposes of the Jones Act is to better prepare the country for natural disasters”).

reasons why the outdated law should be substantially relaxed or repealed, especially considering the law's permeation into other crucial areas of the U.S. economy.

This article will explore the ramifications that the Jones Act has on those other crucial areas of the U.S. economy, specifically looking at the U.S. energy market and analyzing how the Jones Act's interplay with the domestic energy transportation market has been affected. Because of the substantial burden the Jones Act places on the shipping of natural resources, the U.S. energy market has been hindered, as this law continues to adversely impact both U.S. consumers and energy industry development in general. Given the U.S.'s renewed interest in development of an independent energy market,<sup>20</sup> it is time to revise or repeal the overly-restrictive measures the Jones Act has imposed on transportation of natural resources to help fix the outdated U.S. maritime cabotage laws and promote necessary growth in the U.S. energy market.

Following this introduction, Part II will discuss the relevant historical background of U.S. cabotage laws and development of the Jones Act, considering how the domestic shipping trade developed in response to the stringent requirements of the law. This section will help to provide a better understanding of how stringent cabotage laws hinder domestic commerce and the transportation of natural resources. Part III will then discuss the current state of U.S. maritime cabotage law and the Jones Act, considering (1) the current economic effects of the Jones Act in detail, and (2) how the energy market currently deals with the Act. In Part IV, the Jones Act's substantial effects on the U.S. energy market and U.S. energy transportation is reviewed in detail. The pros and cons of the Jones Act are discussed in relation to all forms of transportation that the Jones Act has inadvertently influenced, such as the market for natural resource transportation by pipeline, airplane, and railway. Further, this section will discuss how the Jones Act hindered development of an independent U.S. energy market, explaining how weaknesses of the Jones Act encouraged the entry of foreign energy competitors into the domestic market, despite the Act's protectionist scheme. Part V will offer reasonable alternatives as to how the Jones Act can be brought up-to-date with the current U.S. policy trends, such as relaxing specific provisions of the Act to promote easier transport of domestically produced natural resources, or granting of a perpetual waiver to foreign maritime transporters operating in the energy industry. Finally, Part VI concludes by summarizing key points and offering suggestions as to next steps.

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<sup>20</sup> See *Promoting Energy Independence and Economic Growth*, Exec. Order No. 13,783, 82 Fed. Reg. 16,093, 16,093-94 (Mar. 31, 2017) (stating "[t]he heads of agencies shall review all existing regulations . . . that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources").

I. HISTORY & DEVELOPMENT OF U.S. MARITIME CABOTAGE LAWS

Maritime cabotage laws are not unique to the United States, as nations have historically placed an extremely high value on their domestic shipping industries.<sup>21</sup> As Thomas Grennes recognized in his economic analysis of the Jones Act, “Protection of domestic shipping is an age-old mercantilistic practice that came to the American colonies in the form of British Navigation Acts,”<sup>22</sup> which “date back to the 1600’s” when they protected British trading interests against foreign competitors like the Dutch.<sup>23</sup> Recognizing the importance of protecting a country’s shipping industry at the inception of the U.S.’s creation, domestic shipping laws were established “in the First Congress of 1789-1791.”<sup>24</sup> This law, which imposed the first maritime cabotage restriction, was actually a tax law entitled “An Act Imposing Duties on Tonnage,” and enforced higher taxes on foreign ships that “wished to engage in coastwise business, signaling the early American interest in protecting their domestic, port-to-port shipping trade from foreign competitors.”<sup>25</sup> Taxes were relatively high for foreign vessels under this law, as they were charged fifty cents per ton of cargo, compared to a “U.S. built and owned vessel,” which was only charged six cents per ton of cargo.<sup>26</sup> But, this early tax law still lacked ability to fully incentivize the use of “American built and owned ships and vessels” because it “did not prohibit foreign ships from participating in coastwise trades along the waters of the United States.”<sup>27</sup> Thus, because seafaring transport was the preeminent mode of travel and trade in the 18th and 19th century,<sup>28</sup> the newly-formed American government continued to maintain emphasis on strengthening its U.S. maritime industry, seeking

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<sup>21</sup> See Lisa Houssiere, *The Jones Act and export of crude oil and LNG from the USA*, NORTON ROSE FULBRIGHT ¶ 2 (Mar. 2016), <http://www.nortonrosefulbright.com/knowledge/publications/137945/the-jones-act-and-export-of-crude-oil-and-lng-from-the-usa> (explaining that most countries place restrictions on their coastwise trade).

<sup>22</sup> Grennes, *supra* note 18, at 4.

<sup>23</sup> Frittelli, *supra* note 6, at 2.

<sup>24</sup> Grennes, *supra* note 18, at 4.

<sup>25</sup> Oyedemi, *supra* note 7, at 613 (citing Act of July 20, 1789, ch. 3, § 1, 1 Stat. 27 (repealed 1790)).

<sup>26</sup> Frittelli, *supra* note 6, at 2.

<sup>27</sup> Oyedemi, *supra* note 7, at 614–15.

<sup>28</sup> KENNETH D. FREDERICK & ROGER A. SEDJO, *AMERICA’S RENEWABLE RESOURCES: HISTORICAL TRENDS AND CURRENT CHALLENGES* 28–30 (2011).

stronger maritime cabotage laws that would force American industries to use American-made and American-staffed ships.<sup>29</sup>

### A. Original U.S. Maritime Cabotage Restrictions

These original maritime cabotage restrictions put in place by the First Congress's tax law were soon followed by "An Act concerning the navigation of the United States" (the Navigation Act of 1817), which is "regarded as the direct predecessor to the Jones Act."<sup>30</sup> This Act was the first true maritime cabotage restriction in U.S. law, outright "barr[ing] foreign vessels from domestic commerce," and completely banning them from any coastal trade between U.S. ports.<sup>31</sup> After imposing this complete ban on foreign competitors in port-to-port trade, the American maritime shipping industry grew significantly and eventually "dominate[d] domestic shipping," successfully ousting foreign competitors.<sup>32</sup> But, growth in domestic shipping was not because U.S. ships were superior in quality; rather, success of the U.S.'s shipping industry was possible because of the protectionist nature of the Navigation Act,<sup>33</sup> as the Act specifically required that any and all domestic trade done by maritime transportation be on U.S.-flagged vessels.<sup>34</sup> Moving into the 20th century, even prior to the ultra-protectionist Jones Act, the U.S.'s policy on domestic shipping was still considered to be "the most restrictive, protectionist shipping policies in the world."<sup>35</sup>

The U.S. maritime industry operated under the Navigation Act up until and all the way through World War I (WWI), which brought to light some of the inherent issues regarding the quality of the U.S. domestic shipping fleet. Although the domestic coastal fleet had grown substantially, it consisted almost entirely of outdated, wooden vessels.<sup>36</sup> During WWI, steel had replaced wood as the primary shipbuilding

<sup>29</sup> *Id.*

<sup>30</sup> Papavizas & Gardner, *supra* note 5, at 98 (citing Act of Mar. 1, 1817, ch. 31, § 4, 3 Stat. 351).

<sup>31</sup> U.S. DEP'T OF TRANSP., MARITIME ADMINISTRATION POLICY PAPER ON U.S. CABOTAGE LAWS, <https://www.maritime.dot.gov/sites/marad.dot.gov/files/docs/resources/newsroom/fact-sheets/3626/cabotagelaws.pdf> ¶ 1–2 (last visited Jan. 24, 2017); see also Stephen Mihm, *Editorial: Why the U.S. Embraced the Jones Act a Century Ago*, BLOOMBERG ¶ 8 (Oct. 16, 2017), <http://gcaptain.com/why-the-us-embraced-the-jones-act-a-century-ago/>.

<sup>32</sup> See Mihm, *supra* note 31, at ¶ 13 (noting that "the American domination of domestic shipping rested on protectionism, not any real competitive advantage.").

<sup>33</sup> See *id.* at ¶ 12.

<sup>34</sup> RUSS KASHIAN, ET. AL., PERSPECTIVE: A SURVEY OF THE COSTS AND EFFECTS OF THE 1920 MERCHANT MARINE ACT 4 (eds. Keli'i Akina, Malia Blom Hill & Joe Kent, 2017).

<sup>35</sup> Mihm, *supra* note 31, at ¶ 13.

<sup>36</sup> Papavizas & Gardner, *supra* note 5, at 102; Mihm, *supra* note 31, at ¶ 14.



material, but U.S. shipyards could not afford to use it because of the high price and protectionist tariffs insulating the domestic steel industry (alas, the U.S. loves its protectionist laws).<sup>37</sup> Further, the U.S. fleet responsible for international shipping was roughly “a tenth of the size” of that responsible for domestic shipping and primarily dependent on foreign-flagged ships.<sup>38</sup> After the U.S.’s domestic shipping fleet was decimated in aiding war efforts, the low-quality of their merchant marine was suddenly revealed. Coastwise shipping became “prohibitively expensive” and maritime shipping laws had to be relaxed in an attempt to restructure and revitalize the shipping industry.<sup>39</sup> Only then did the U.S. government finally allow foreign vessels to participate in coastwise shipping to offset costs and rebuild their domestic fleet. This included multiple policies, including the Panama Act of 1912, the Shipping Act of 1916, and the Trading with the Enemy Act of 1917, which combined allowed the government to acquire young (less than five years old), foreign-built ships that were brought in to supplement the waning U.S. merchant marine fleet.<sup>40</sup>

With the weaknesses of the U.S. domestic merchant marine exposed by WWI, “the country realized that it needed to do more in order to have the merchant marine available in case of war.”<sup>41</sup> Thus, the Jones Act was established with that purpose in mind,<sup>42</sup> and with little debate in its passage, the Act became “the cornerstone of any future American maritime policy.”<sup>43</sup> Although the Jones Act was essentially a “continuation” of the aforementioned cabotage laws that had been continually passed since the First Congress,<sup>44</sup> the Jones Act still

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<sup>37</sup> See Oyedemi, *supra* note 7, at 615.

<sup>38</sup> Papavizas & Gardner, *supra* note 5, at 102.

<sup>39</sup> See Oyedemi, *supra* note 7, at 615–16.

<sup>40</sup> The restrictions on each acquired foreign ship were dependent on which one of these Acts it was acquired under. *Id.* at 616.

<sup>41</sup> *Id.*

<sup>42</sup> See 46 App. U.S.C. § 861 (explaining that the purpose of the Jones Act is to ensure that a strong domestic merchant marine exists for national security interest’s promotion of growth in international and domestic commerce).

<sup>43</sup> Papavizas & Gardner, *supra* note 5, at 105 (further noting that because the final version of the Jones Act was essentially the same in the House and the Senate at time of passage there is little legislative history on it, so more key in the Act is “the statutory language itself”).

<sup>44</sup> In an address to Congress regarding a proposed amendment to repeal the Jones Act with the passage of a bill to approve the Keystone XL Pipeline Act, Senator McCain stated: “As many of you know, the Jones Act is simply a continuation of laws passed through U.S. history addressing cabotage-or port-to-port coastal shipping. Those laws have been used to protect U.S. domestic shipping dating back to the very first session of Congress.” 161 Cong. Rec. S372-02 (Statement of Sen. McCain).

“represents some of the most restrictive cabotage policies among industrialized nations and in the world.”<sup>45</sup>

Since its passage, the Jones Act has required that to participate in U.S. coastwise transport (of merchandise), a vessel:

may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via a foreign port, unless the vessel—(1) is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade; and (2) has been issued a certificate of documentation with a coastwise endorsement . . . or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement.<sup>46</sup>

Although this language is already extremely restrictive of foreign competition, the especially stringent requirements of the Jones Act are exposed by looking at the details of its statutory language. For example, “coastwise” regulations include all U.S. territories and possessions, which includes Alaska, Hawaii, Guam, Puerto Rico, and the U.S. Virgin Islands.<sup>47</sup> This alone has created a plethora of issues regarding distribution of costs imposed by the Act, which are discussed in detail in Parts III and IV.<sup>48</sup> Further, obtaining a “coastwise endorsement” includes a controversial “U.S.-build requirement,” which “requires that [a] vessel [involved in domestic trade] be built in the United States except in certain circumstances.”<sup>49</sup> This build requirement is one-of-a-kind for cabotage laws, as it is not seen in any other modes of U.S. transportation, thus highlighting the extensive protectionism that the Jones Act promotes.<sup>50</sup>

### *B. Post-Passage History of the Jones Act*

Since its passage the Jones Act has only become more restrictive.<sup>51</sup> Notably, after an amendment to the Jones Act in 1956, any ship that is now “rebuilt” outside the United States, even if originally built within it, will no longer have the right to engage in domestic coastwise

<sup>45</sup> KASHIAN, *supra* note 34, at 5.

<sup>46</sup> 46 U.S.C. § 55102(b) (2012).

<sup>47</sup> *Id.* § 55101(a) (noting that “the coastwise laws apply to the United States, including the island territories and possessions of the United States.”).

<sup>48</sup> *See infra* Part III, Part IV.

<sup>49</sup> 46 U.S.C. § 55102 (2012) (Historical and Revision Notes); *see also* Joseph M. Conley, *The Jones Act: Its Effects on the U.S. Response to the 2010 BP Deepwater Horizon Oil Spill and its Relevance in International Law*, 11 WASH. U. GLOBAL STUD. L. R. 151, 154 (2012).

<sup>50</sup> *See* Conley, *supra* note 49, at 154 (citing Papavizas & Gardner, *supra* note 5, at 122); *see also* Frittelli, *supra* note 6, at 2 (stating that “[a]ir cabotage laws [have certain restrictions] . . . but there is no requirement that the planes be built in the [U.S.]”).

<sup>51</sup> *See* Papavizas & Gardner, *supra* note 5, at 106.

trade.<sup>52</sup> Additionally, other legislation and policy matters that have come after the Jones Act have felt its influence, as its widespread restrictions in the vital market of maritime shipping are intertwined with other methods of transportation.<sup>53</sup>

The first piece of legislation worth noting is the Outer Continental Shelf Lands Act of 1953 (OCSLA), which extended U.S. lands to “all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed.”<sup>54</sup> Since this act’s passage, the Jones Act now applies to “artificial islands, mobile oil drilling rigs, . . . drilling platforms” and the like.<sup>55</sup> Thus, after the passage of the OCSLA, only Jones Act compliant ships would be able to transport natural resources produced from an offshore rig if the resources were being returned to a domestic refinery, because the natural resources produced are considered “merchandise” under the current meaning of the Act.<sup>56</sup>

Just as the Jones Act’s influence on the OCSLA affects cabotage and transportation in the U.S. energy market, more “petroleum-related cabotage laws were passed in the 1970s” because of the Jones Act.<sup>57</sup> The first law was the Trans-Alaska Pipeline Authorization Act of 1973, which required that “any exports of [Alaskan] crude oil must be on [Jones Act compliant] U.S.-flag tankers.”<sup>58</sup> Because of the Jones Act, Alaskan oil had to be shipped pursuant to its stringent requirements, and could not be exported by cheaper and more convenient foreign vessels.<sup>59</sup> Additionally, the Competitive Shipping and Shipbuilding Act of 1983 attempted to impose a requirement that “[five] percent of imports and exports [of oil] . . . be carried by U.S. built and registered vessels.”<sup>60</sup> Although this bill eventually failed, it represents the concerted effort by Jones Act proponents to extend its restrictions into other domestic cabotage laws.

Despite how far reaching and influential the Jones Act had become, it remained relatively un-scrutinized until after World War II, as proponents and opponents began to take a harder look at the law’s effects on the overall economy.<sup>61</sup> The resulting studies on the Jones Act

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<sup>52</sup> P.L. 714, Act of July 14, 1956, ch. 600, 70 Stat. 544.

<sup>53</sup> *Id.*

<sup>54</sup> See Oyedemi, *supra* note 7, at 619 (citing 43 U.S.C. § 1333(a)(1) (2016)).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*; 46 U.S.C. § 55102(b) (2012).

<sup>57</sup> Robert Bradley, Jr., *Cabotage Cronyism: Some History of the Jones Act*, MASTERRESOURCE.ORG ¶ 9 (Oct. 2, 2017), <https://www.masterresource.org/jones-act-maritime-regulation/history-jones-act/>.

<sup>58</sup> H.R. Rep. No. 104–139, pt. 1, at 19; see also Bradley, *supra* note 57, at ¶ 10.

<sup>59</sup> See Bradley, *supra* note 57.

<sup>60</sup> *Id.* at ¶ 10 n.9.

<sup>61</sup> See Papavizas & Gardner, *supra* note 5, at 108.

subsequently revealed just how restrictive and protective the law truly was. The Act's influence was not only prevalent in domestic maritime transportation but it had subtly permeated into other domestic cabotage transportation laws.

## II. CURRENT STATE OF THE JONES ACT

Due to the Jones Act's heavily protectionist scheme, different groups and people have historically been affected in varying ways and degrees. When the Jones Act was passed in 1920, the U.S. had just come out of WWI, with national security interests still on the forefront of everyone's mind and maritime shipping still the primary and most broadly used method of transportation for both people and merchandise.<sup>62</sup> But, over the past century, new methods of transportation and changing industry processes have vastly shifted the economic landscape. Despite these changes, the Jones Act has remained stagnant, which has undoubtedly played a significant role in influencing the development of other methods of transportation.<sup>63</sup> But, whether the role the Jones Act had on domestic cabotage laws and transportation has been beneficial or detrimental is heavily disputed because "some producers suffer, while their rivals benefit."<sup>64</sup>

This Part will explore what the actual ramifications of the Jones Act have been on the present-day economy, especially in relation to the Act's intended purposes and the energy transportation market. It will first consider whether the Jones Act, in its current state, accomplishes its intended purpose and what the overall economic impact has been, considering both the benefits and the negatives alleged by proponents and opponents of the Act. The analysis will then turn to how the Jones Act has affected the U.S. energy market, primarily analyzing how it influences domestic "intermodal"<sup>65</sup> competition within energy transport. Lastly, it will turn to past and ongoing legislative and administrative actions related to the Jones Act, looking at the multitude of efforts that have attempted to

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<sup>62</sup> See Grennes, *supra* note 18, at 10. *But see* Frederick & Sedjo, *supra* note 28, at 28–30 (explaining that water transportation went into decline in 1840, but the author is referring to "inland" water routes as opposed to domestic shipping coastally and internationally).

<sup>63</sup> Nancy Ruth Fox & Lawrence J. White, *U.S. Ocean Shipping Policy: Going Against the Tide*, 553 ANNALS. AM. ACAD. POL. & SOC. SCI. 75, 83–85 (1997). This author aptly notes that "[t]he Jones Act protection of coastal trades, with its consequence of higher shipping rates, has surely caused some goods to be shipped over less efficient modes or not to be shipped at all." *Id.* at 83.

<sup>64</sup> *Id.*

<sup>65</sup> Intermodal transportation pertains to "transportation involving more than one form of carrier." *Intermodal Definition*, DICTIONARY.COM, <http://www.dictionary.com/browse/intermodal> (last visited Jan. 25, 2018).

change its strict protectionist requirements in order to open up (or, in some instances, further shelter off) the domestic marketplace.

*A. The Jones Act's Mixed Results in Accomplishing its Economic Purpose*

How and to what degree the Jones Act has impacted the U.S. economy has been the subject of heavy dispute,<sup>66</sup> as the multiple economic reports on the subject have come over a lengthy time span. Admittedly, pinpointing exact figures and numbers that can be directly linked back to the Jones Act is a difficult task, especially because gathering reference points in the short periods when the Jones Act has not been in effect in the last century (i.e., when Jones Act waivers have been in effect) provides only a limited view into the broad ranging influence it actually retains.<sup>67</sup> Additionally, Jones Act opponents allege that it has had a more significant impact on places outside the contiguous United States (e.g., Hawaii, Alaska, Puerto Rico, and Guam) because of the additional maritime travel that is required to serve those markets and “since a much greater proportion of their goods are supplied via ship.”<sup>68</sup> Thus, more of the research available on the economic impact of the Jones Act revolves around these states and territories, which explains why Jones Act scholars typically do not take a more holistic approach that considers the United States in its entirety. Nonetheless, all Jones Act critics (both supporters and opponents) seem to recognize that the protectionist policy is having a substantial economic effect in some form or fashion.<sup>69</sup>

1. The Jones Act's Successes

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<sup>66</sup> Elizabeth Chuck, *What is the Jones Act? Opponents to 1920 Law Argue it's Worsening Puerto Rico's Crisis*, NBC NEWS ¶ 5–7 (Sept. 28, 2017), <https://www.nbcnews.com/storyline/puerto-rico-crisis/what-jones-act-opponents-1920-law-argue-it-s-worsening-n805101> (identifying both the supporters and opposition to the Act). *But see The Jones Act is Critical to the Military Strategy of the United States, Which Relies on the Use of U.S. Flag Ships*, AM. MAR. PARTNERSHIP, <https://www.americanmaritimepartnership.com/u-s-maritime-industry/the-jones-act/>, ¶ 1–5 (last visited Jan. 27, 2018) (arguing that the Jones Act “is crucial to our country’s economic security”).

<sup>67</sup> See Mark Gius, *Regulatory restrictions and energy: The impact of the Jones Act on spot gasoline prices*, 62 ENERGY POL’Y 1058, 1059 (2013) (analyzing the spot gasoline prices during Jones Act waiver periods of the last ten years, which “have all been for petroleum and petroleum-based products”).

<sup>68</sup> KASHIAN, *supra* note 34, at 5 (explaining that the importing and exporting of “merchandise” via maritime transportation is more prevalent here because, in most instances, it is the only method of transportation these territories have available).

<sup>69</sup> See *supra* note 63.

Turning first to those who support the Jones Act, the proponents of the Act continually argue that it has been a resounding success and accomplishes its original goals.<sup>70</sup> Specifically, they argue that the Jones Act allows the U.S. to maintain a strong domestic merchant marine that can quickly respond to any “national emergency” (e.g., wartime or natural disaster), and has boosted domestic commerce by establishing and protecting an American shipping industry by insulating it from foreign intervention.<sup>71</sup> The Jones Act proponents who have proffered these arguments primarily consist of (1) pro-defense groups; (2) maritime unions; and (3) U.S. shipyards.<sup>72</sup> Collectively, they contend that the Jones Act is essential to national defense efforts, job creation, and the U.S. shipbuilding industry.<sup>73</sup>

In terms of “national emergency,” the ideology of Jones Act supporters can be attributed back to “Alfred Thayer Mahan’s 1890 work on naval warfare, *The Influence of Sea Power upon History*.”<sup>74</sup> Here, Mahan stressed that a strong merchant marine was the key to ensuring a strong navy and national defense.<sup>75</sup> Jones Act proponents have mostly stuck by this mantra, entrenched in their position that the current law is “vital to the national security.”<sup>76</sup> To counter the opposition’s argument that the U.S. has never actually engaged its Jones Act compliant fleet in a national emergency, proponents note that what the Jones Act provides is the “*ability* to meet any [national emergency]” with a strong domestic fleet at the ready.<sup>77</sup>

Less staunch supporters also retain the position that the Jones Act currently serves national security interests, but concede that in recent history, there is evidence the Act has not been the most proficient in this

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<sup>70</sup> See Samuel A. Giberga & John Henry Tab Thompson, *We and Mr. Jones: How the Misunderstood Jones Act Enhances Our Security and Economy*, 46 J. MAR. L. & COM., no. 4, 2015, at 493, 502–08. It is worth noting that other Jones Act scholars find that “the Jones Act has attracted few public defenses,” and when one does surface, it is usually authored by individuals that directly benefit from the it. See Coleman, *supra* note 4, at 6. For example, Samuel A. Giberga, the author of the above article, is “the executive office of ‘Hornbeck Offshore Services, Inc.,’ [which is] the owner and operator of one of the largest fleets of Jones Act qualified offshore service vessels.” *Id.* (internal citations omitted).

<sup>71</sup> Giberga & Thompson, *supra* note 70, at 502, 505.

<sup>72</sup> Frittelli, *supra* note 6, at 5–6; see *supra* note 63 and accompanying text.

<sup>73</sup> See Frittelli, *supra* note 6, at 5–6.

<sup>74</sup> Malia Blom Hill, *The Sinking Ship of Cabotage: How the Jones Act lets unions and a few companies hold the economy hostage*, CAP. RES. CTR. 1, 2 (Apr. 7, 2013), <https://capitalresearch.org/article/the-sinking-ship-of-cabotage-how-the-jones-act-lets-unions-and-a-few-companies-hold-the-economy-hostage/> (noting that “Jones used Mahan’s writings on national defense . . . to justify creating [the Jones Act]”).

<sup>75</sup> *Id.*

<sup>76</sup> Frittelli, *supra* note 6, at 5.

<sup>77</sup> See Giberga & Thompson, *supra* note 70, at 504 (emphasis added); see also Chuck, *supra* note 60, at ¶ 6 (explaining that the Jones Act has received bi-partisan support from past U.S. presidents, who “have touted it as crucial to national security because it reduces America’s dependency on foreign-owned vessels”).

area.<sup>78</sup> Supportive congressional research sums up the Act's deficiency in this area to changing dynamics of war, stating that because of "the long time needed to build new ships, the relatively brief duration of most recent wars, and the expanded inventory of government-owned sealift ships, the wartime importance of the shipbuilding industry has declined."<sup>79</sup> Proponents further contend that the Jones Act's national security purpose remains intact because in the event of a prolonged national emergency, the merchant marine developed by the Act still has the ability to provide government ships with reinforcements.<sup>80</sup> Although this hypothetical argument works on paper, the reality is that the Jones Act fleet is comprised of commercial vessels, not multi-purpose ones, and these vessels lack much of the capabilities that would be necessary to offer strategic military support.<sup>81</sup> Further, the commercial Jones Act fleet has diminished over time, and now contains only about ninety ships.<sup>82</sup> More national security concerns will be discussed below, but it remains relatively clear that the current state of the Jones Act struggles to continue serving this purpose.

The stronger point that proponents make in arguing that the Act has historically benefitted the U.S. economy rests in the Act's second stated purpose—that it boosts domestic commerce<sup>83</sup>—as it is undeniable that the Act has created jobs and continues to stand as the backbone to the domestic shipping industry.<sup>84</sup> Pursuant to the Act's basic requirements, Jones Act vessels must be built in U.S. shipyards, crewed by U.S. citizens, and used for all coastwise transport.<sup>85</sup> American jobs are created at each stage of this process, as they must be, or else there would be no way to

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<sup>78</sup> Most recently, the Jones Act had to be waived to assist in the wake of Hurricane Maria (as it has been for most natural disasters). See *supra* notes 10–17 and accompanying text. To provide a war time example, "more than one-fifth of dry cargo" deployed to the military during the Persian Gulf conflict was done so using foreign-chartered vessels as opposed to the domestic merchant marine. Nicolas Loris, Brian Slattery, & Bryan Riley, *Sink the Jones Act: Restoring America's Competitive Advantage in Maritime-Related Industries*, HERITAGE FOUND. 1, 1 (May 22, 2014), <https://www.heritage.org/government-regulation/report/sink-the-jones-act-restoring-americas-competitive-advantage-maritime>.

<sup>79</sup> Frittelli, *supra* note 6 at 3.

<sup>80</sup> *Id.*

<sup>81</sup> See Grennes, *supra* note 18, at 32 (stating "[t]he number of large Jones Act commercial ships was 193 in 2000, but by 2014 there were only 90").

<sup>82</sup> See Coleman, *supra* note 4, at 6.

<sup>83</sup> See 46 App. U.S.C. § 861 (2002).

<sup>84</sup> See Chris Schultz, *The Jones Act: Outdated or Vital?*, LAW STREET ¶ 3 (Jan. 22, 2015), <https://lawstreetmedia.com/issues/politics/jones-act-outdated-vital/>. See also Chuck, *supra* note 60, at ¶ 6 (stating "the law has found backers in the American maritime industry, which says it supports American jobs").

<sup>85</sup> Frittelli, *supra* note 6.

comply with the Act's strict provisions.<sup>86</sup> Proponents further argue that "the economic contribution of the Jones Act extends [even] beyond ship operations," as the Jones Act further requires that U.S. ships are built with U.S. products, which then creates additional jobs in the industries that supply the shipbuilding materials.<sup>87</sup>

Whether the Jones Act creates jobs is not in dispute, and opponents of the Act recognize that "Jones Act proponents . . . regularly claim[] that job creation is a major benefit of the [A]ct."<sup>88</sup> Jones Act opponents instead consider the price that we pay to create these jobs. As later analysis will discuss, the Jones Act is "poorly tailored" to meet its job creation goals.<sup>89</sup> The lack of foreign investment makes the Act's shortcomings and inefficiencies in job creation especially acute, as the only thing U.S. shipyards are still hired to construct are Jones Act compliant ships (because the law requires that these shipyards are used).<sup>90</sup> When further considering that U.S. built ships are rarely ever utilized for anything besides U.S. port-to-port travel, justification of the Act's economic viability becomes a progressively more onerous task.

## 2. The Jones Act's Failures

Directly contradicting the arguments of the proponents, detractors of the Jones Act argue that the law, in its current state, "hinders free trade, stifles the economy, and hurts consumers, largely for the benefit of labor unions."<sup>91</sup> This statement, made by Arizona Senator John McCain in his previous effort to repeal the Jones Act, has been echoed by other studies conducted on the economic effects of the Jones Act, one of which states:

Economic evidence abounds that the Jones Act harms business and the U.S. economy. Nearly every independent study of the act's effects finds it creates expensive barriers to trade. In 1995, a report from the U.S. International Trade Commission, an independent agency, found the Jones Act costs the U.S. economy at least \$2.8 billion annually and its removal would lower domestic shipping prices by 26% . . . [and] a 2013 report . . . describe[s] the Jones Act as the most restrictive of global cabotage laws and an anomaly in an otherwise open market like the United States.<sup>92</sup>

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<sup>86</sup> See *The Jones Act*, TRANSP. INST., <https://transportationinstitute.org/jones-act/> (last visited Jan. 29, 2018).

<sup>87</sup> *Id.*

<sup>88</sup> Grennes, *supra* note 18, at 38.

<sup>89</sup> Coleman, *supra* note 4, at 6.

<sup>90</sup> See *id.*

<sup>91</sup> 161 CONG. REC. S372-02 (statement of Sen. McCain), *supra* note 44.

<sup>92</sup> Hill, *supra* note 74, at 2-3 (internal quotations omitted).



In addition to the adverse economic effects, opponents routinely raise arguments that the Jones Act is an outdated law that does not, and has never, served its intended purpose.<sup>93</sup> Although most economic studies on the Jones Act note that its costs are dispersed to almost all of American consumers, the Act's most prominent opponents have historically been (1) bulk shippers; and (2) consumers in the non-contiguous U.S. territories and states.<sup>94</sup>

Again considering "national emergency," as was briefly discussed above,<sup>95</sup> Jones Act opponents argue that despite the Jones Act's stated purpose, the idea of contributing to military efforts with a domestic merchant marine ignores the realities of actual modern-day maritime operations.<sup>96</sup> It is argued that even if the U.S. wanted to send its merchant marine to contribute to U.S. military efforts abroad, it would not be able to because of the significantly diminished Jones Act compliant fleet capacity.<sup>97</sup> Outside of the Jones Act commercial vessels, the rest of the fleet is apparently made up of "ferries and tugboats, which would contribute little to distant military actions."<sup>98</sup> Further, there have been cited instances where military efforts succeed in spite of, rather than because of, the Jones Act, which again required waivers to be granted so that foreign ships could assist.<sup>99</sup> Similarly, as previously mentioned, the Jones Act is meant to extend to all "national emergencies," which include both "natural and human-induced [natural] disasters, such as hurricanes, floods, oil spills, loss of electrical power, and breaks in oil pipelines."<sup>100</sup> Most recently, for Hurricanes Harvey and Maria, Jones Act waivers had to be granted (which has become standard practice).<sup>101</sup> Rather than offer any assistance, the Act rather served to create "unnecessary legal roadblocks" when waiver was delayed or refused during these disasters.<sup>102</sup> Thus, although general "national emergency" assistance was one of the Jones Act's intended purposes, sparse evidence exists to justify keeping the Jones Act in its current state to actually assist in these situations, as it seems to create more trouble than it helps to alleviate.

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<sup>93</sup> See, e.g., Slattery et al., *supra* note 78, at 1–7 (analyzing in-depth why the Jones Act hinders national security and is harmful to the U.S. economy).

<sup>94</sup> Frittelli, *supra* note 6, at 4–5.

<sup>95</sup> See *supra* notes 78–79 and accompanying text.

<sup>96</sup> Slattery et al., *supra* note 78, at 1–2.

<sup>97</sup> See Grennes, *supra* note 18, at 32 (noting that the Jones Act commercial fleet has fallen from 193 ships in 2000 to just 90 in 2014).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 32.

<sup>100</sup> *Id.* at 34.

<sup>101</sup> *Id.*

<sup>102</sup> Slattery et al., *supra* note 78, at 4.

Turning to economic benefits of the Act, opponents offer statistics that stand in stark contrast to those on which proponents depend, summarily arguing that any positives the Act may bring are far outweighed by its negatives. Although originally intended to bolster domestic commerce, the Jones Act in today's environment acts more like a crutch by "keep[ing] otherwise uncompetitive elements of the American shipping industry afloat . . . [at] a stiff price [to] consumers."<sup>103</sup> The Jones Act, recognized as an "unabashedly protectionist" piece of legislation by the judiciary,<sup>104</sup> specifically acts as a crutch to the U.S. shipping industry, because it has been shielded from having to respond to competition for over a century and thus has not had motivation to innovate.<sup>105</sup> Consequently, U.S. shipping has become uncompetitive, as U.S.-flag bearing ships now account for only 0.4% of the world's fleet.<sup>106</sup>

Although the definitive net cost is disputed, some numbers given by opponents provide evidence that the Jones Act has hindered our domestic shipping industry to a point where it may cease to exist if the Jones Act were repealed, as the extreme costs imposed by the law would dissuade anyone from investing in a U.S. ship if the law did not require them to. Multiple studies have found that having a ship built or produced in the U.S. costs "four to five times higher" than what it would cost to build a ship abroad.<sup>107</sup> In addition to increased building costs, the "Congressional Research Service has shown that operating costs of American vessels bound to the Jones Act can be *more than twice as high per day* to comparable foreign ships."<sup>108</sup> Further, opponents are uniform in their agreement that "in far-flung domestic ports like Hawaii, Alaska, and Puerto Rico . . . the problem [of the Jones Act] is particularly salient."<sup>109</sup> The Jones Act has been cited directly as a major factor in

<sup>103</sup> *Id.* at 1; see Grennes, *supra* note 18, at 6 (stating that "[n]early all analytical studies of the Jones Act have found that it imposes net costs on the U.S. economy).

<sup>104</sup> *Marine Carriers Corp. v. Fowler*, 429 F.2d 702, 708 (2d Cir. 1970).

<sup>105</sup> See J.W. Wall III, *Wall: Want to Help Texas? Repeal the Jones Act*, HOUSTON CHRONICLE (February 20, 2018), <https://www.houstonchronicle.com/opinion/outlook/article/Wall-Want-to-help-Texas-Repeal-the-Jones-Act-12628472.php>; see also Grennes, *supra* note 18, at 10.

<sup>106</sup> *Id.* at 11; see also *How Protectionism Sank America's Entire Merchant Fleet*, ECONOMIST ¶ 1 (Oct. 5, 2017), <https://www.economist.com/news/finance-and-economics/21730034-jones-act-hurts-american-consumers-and-destroyed-countrys-shipping>.

<sup>107</sup> Stevens, *supra* note 19, at 3, ¶ 5; Grennes, *supra* note 18, at 21; KASHIAN, *supra* note 34, at 14; John Frittelli, *Shipping U.S. Crude Oil by Water: Vessel Flag Requirements and Safety Issues*, CONGRESSIONAL RESEARCH SERVICE, 1, 11 (July 21, 2014), <https://fas.org/sgp/crs/misc/R43653.pdf>.

<sup>108</sup> Stevens, *supra* note 19, at ¶ 5 (emphasis added).

<sup>109</sup> Coleman, *supra* note 4, at 5. Even Jones Act opponents cannot ignore the adverse costs that these regions feel because of their distance and lack of transportation options, stating that "[these areas] have a relationship with the Jones Act that differs from the continental United States . . . [and] have every right to be unhappy with higher prices" that the Act causes. Giberga & Thompson, *supra* note 70, at 507–08.

Puerto Rico's economic woes,<sup>110</sup> and various studies have estimated the Act's combined costs in these areas to range between \$2.8 billion to \$9.8 billion per year.<sup>111</sup>

It seems that the primary point that opponents of the Act hope to make is that, although the Jones Act does create jobs and keeps the U.S. shipping industry afloat, its costs undoubtedly exceed the benefits that it offers. It is indisputable that the Jones Act was not passed or put in place to be a "jobs program" that continues to employ "regardless of how little [employees] produce or what the ships cost," and it should thus not be justifiable to continue under this purpose.<sup>112</sup> Keeping it alive for this purpose has not only impeded the U.S. economy in terms of maritime transportation, but it has also begun to strangle other parts of the U.S. economy, significantly affecting areas that depend on fairly priced, reliable transport.<sup>113</sup> At the forefront of this is the U.S. energy market, as the Jones Act has distorted energy transportation and taken away domestic business.<sup>114</sup>

### B. *The Jones Act Effect's on the U.S. Energy Market*

As a protectionist domestic transportation law, the Jones Act has had its biggest influence (outside of maritime shipping) in the energy transportation market, which has become significantly more complex since the Jones Act's passage.<sup>115</sup> Because of the "[broad] scope of the [domestic energy market's] supply chain," the Jones Act's influence on cabotage laws within energy have been amplified, and has ultimately influenced everything in domestic energy from production of natural resources to how those resources are imported and exported.<sup>116</sup> Illustrating the depth of the relationship between the two industries, petroleum products accounted for, and continue to account for, the "lion's share" of

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<sup>110</sup> Editorial, *Puerto Rico Needs Debt Relief*, N.Y. TIMES (July 1, 2015), [https://www.nytimes.com/2015/07/02/opinion/puerto-rico-needs-debt-relief.html?\\_r=0](https://www.nytimes.com/2015/07/02/opinion/puerto-rico-needs-debt-relief.html?_r=0) (directly offering relaxation of the Jones Act by lawmakers as a way to pull Puerto Rico out of debt).

<sup>111</sup> See Opinion, Nelson Denis, *The Jones Act: The Law Strangling Puerto Rico*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/opinion/hurricane-puerto-rico-jones-act.html>; see also Coleman, *supra* note 4, at 5 (estimating combined savings to be "as much as \$15 billion per year.").

<sup>112</sup> Grennes, *supra* note 18, at 38.

<sup>113</sup> See *Puerto Rico Needs Debt Relief*, *supra* note 110.

<sup>114</sup> See Wall, *supra* note 105.

<sup>115</sup> See *id.*

<sup>116</sup> Stevens, *supra* note 19, at ¶ 7; see also Bradley, *supra* note 57 (exemplifying a time when the Jones Act had a direct effect on the cabotage laws of natural gas).

Jones Act cargos.<sup>117</sup> But, as transportation options have expanded, the energy industry has rallied against maritime shipping due to the prohibitively expensive price tag the Act carries, which has made it extraordinarily difficult for the energy industry to utilize maritime transportation.<sup>118</sup> As a result, “intermodal competition”<sup>119</sup> expanded throughout the domestic energy market, and other forms of transportation began to burgeon, which finally led to the substitution of shipping and maritime transport for more economical methods of transportation.<sup>120</sup> Today, these newer methods of transportation, which include “trucks, railroads, airlines, and pipelines,” have become an integral part of the domestic natural resource supply chain due to costs of the Jones Act.<sup>121</sup>

As an example of the Jones Act’s excessive costs, research assessing the domestic premium on natural resource shipments found that “shipping oil from Texas to New England costs about \$6 per barrel, while shipping to Europe costs just \$2 per barrel,”<sup>122</sup> resulting in total costs of “more than \$158 million every year” for the petroleum industry.<sup>123</sup> Thus, as alternative forms of transportation have become available, natural resource producers have jumped on the opportunity to utilize them in an effort to save both themselves and consumers from facing the adverse impact and significant price hikes of the Jones Act. But, despite the increasingly popular alternative forms of transportation, the Jones Act could not be fully ignored by the energy industry for long.

The first issues were realized in assessing the energy markets for the non-contiguous U.S. states and territories,<sup>124</sup> as it quickly became apparent that without the option to utilize these new methods of natural resource transport, U.S. states and territories separated by ocean would have to continue to rely on the “maritime energy commerce” that the forty-eight contiguous U.S. states had the luxury of avoiding.<sup>125</sup> Because the U.S. has refused to change or amend the Jones Act for its non-contiguous

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<sup>117</sup> Giberga & Thompson, *supra* note 70, at 504; *see also* JOHN FRITTELLI, CONG. RESEARCH SERV., REVITALIZING COASTAL SHIPPING FOR DOMESTIC COMMERCE 1, 2 (May 2, 2017), <https://fas.org/sgp/crs/misc/R44831.pdf> (noting that “oceangoing barges [in the U.S.] mainly carry petroleum products.”).

<sup>118</sup> *Id.*

<sup>119</sup> *See supra* note 63.

<sup>120</sup> Grennes, *supra* note 18, at 19–20.

<sup>121</sup> *See id.*

<sup>122</sup> KASHIAN, *supra* note 34, at 13; Wall, *supra* note 105 (stating that “[t]o ship Texas crude to Europe or Asia, it’s only \$2 per barrel; [but] it costs \$7 per barrel to ship to Philadelphia.”).

<sup>123</sup> Keli’i Akina, *How the Jones Act Drives up the Price of Food and Gasoline for Millions of Americans*, THE HILL (Apr. 10, 2017, 7:20 AM), <http://thehill.com/blogs/pundits-blog/international/328025-how-the-jones-act-drives-up-the-cost-of-food-and-gasoline>.

<sup>124</sup> KASHIAN, ET. AL., *supra* note 34.

<sup>125</sup> Loris, Slattery, & Riley, *supra* note 78, at 8–9.

states and territories, it has created a distortion in energy markets that “has a larger negative effect on [these] noncontiguous states and regions.”<sup>126</sup>

A second, more recent issue in the modern energy market arose with the “shale revolution,”<sup>127</sup> which has made the United States one of the biggest producers of domestic crude oil in the world since 1995.<sup>128</sup> The shale revolution, made possible by “[d]irectional drilling and hydraulic fracturing” (or “fracking”), has “transformed oil markets by dramatically increasing U.S. production of oil and gas from shale.”<sup>129</sup> But, the U.S.’s sudden increase in domestically produced oil has also reinvigorated the need to invoke maritime shipping because “the existing pipeline network is not designed to access the new sources of domestic crude.”<sup>130</sup> Due to the lack of accessible transportation because of the Jones Act making it prohibitively expensive to ship within the U.S, the producers seeking to capitalize on this shale boom have been unable to capitalize in the domestic energy market.<sup>131</sup> Instead, both producers and refineries have turned to foreign markets.<sup>132</sup> This makes the ineffectiveness of the law blatant because preventing these “absurd situations,” like the current one the energy industry finds themselves in (where it is cheaper to refine crude oil abroad than in the U.S.) is exactly what the protectionist Jones Act was created to do.<sup>133</sup> As a protectionist law that no longer protects domestic commerce, it is now time to relax or repeal the Jones Act so that growth in the domestic energy market can be promoted rather than prevented.

### III. THE JONES ACT’S DAMAGE TO DOMESTIC ECONOMIC DEVELOPMENT

Just as the Jones Act has not served its intended purpose in domestic shipping, it has also adversely affected cabotage laws in other industries, therefore, not serving its broader purpose in promoting and protecting domestic commerce. Because the antiquated Jones Act has

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<sup>126</sup> Grennes, *supra* note 18, at 19; Loris, Slattery, & Riley, *supra* note 78, at 1–2.

<sup>127</sup> Grennes, *supra* note 18, at 29 (explaining that “the shale revolution has reduced US crude oil imports and increased the importance of domestic trade that is subject to the Jones Act.”); *see* Coleman, *supra* note 4, at 3.

<sup>128</sup> Loris, Slattery, & Riley, *supra* note 78, at 8–9.

<sup>129</sup> Coleman, *supra* note 4, at 3.

<sup>130</sup> Stevens, *supra* note 19, at ¶ 6.

<sup>131</sup> *See* Grennes, *supra* note 18, at 19–20.

<sup>132</sup> *Id.*

<sup>133</sup> HILL, *supra* note 74, at 3 (providing another example of an “absurd situation” that the Jones Act forced, involving a lumber supplier being forced to truck wood from Maine to Florida in order to get it to Puerto Rico because, Maine had no Jones Act compliant ships available to ship the wood).

outlived the purpose it was originally intended to serve, its lasting protectionism has begun to seep into additional U.S. policy hurting both consumers and other industries vital to the success of the country.<sup>134</sup>

*A. The Domestic Energy Market Continues to Suffer at the Hands of the Jones Act*

The Jones Act has inadvertently hindered the growth of the domestic energy market.<sup>135</sup> For example, it has imposed major costs on the energy industry,<sup>136</sup> which in turn has been passed on to consumers. Senator McCain recognized as much in a recent effort to repeal the Jones Act via an amendment to Keystone XL Pipeline Act,<sup>137</sup> stating:

There is no doubt that these inflated costs [in domestic maritime shipping] are eventually passed on to shipping customers. In the energy sector, for example, the price for moving crude oil from the gulf coast [where it is produced] to the Northeastern United States [to refine the oil] on Jones Act tankers is \$5 to \$6 more per barrel, while moving it to eastern Canada on foreign flag tankers is about \$2 . . . [which could] mean an additional \$1 million per tanker in shipping costs for oil producers. This increased cost is why . . . more than twice as much gulf coast crude oil was shipped by water to Canada as shipped to Northeastern U.S. refineries . . . in an effort to avoid paying Jones Act shipping rates.<sup>138</sup>

This statement makes blatantly clear the adverse effect the Jones Act has had, not only on the domestic energy market, but on all U.S. industries that have an invariable dependence on transport in moving their merchandise.

Continuing to allow the Jones Act to have these absurd effects on energy transportation is directly contrary to the policy the Trump administration set forth this past March. In an Executive Order entitled “Promoting Energy Independence and Economic Growth,” the President and the executive branch clearly stated that any and all existing regulations and policies “that potentially burden the development or use of

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<sup>134</sup> *The Jones Act Has Outlived Its Reason for Existing*, AM. J. OF TRANSP. ¶ 11 (Dec. 14, 2017), <https://www.ajot.com/news/the-jones-act-has-outlived-its-reason-for-existing-editorial> (arguing “[r]arely has a law that costs so much and achieves so little survived [for] so long”).

<sup>135</sup> See Mark J. Perry, *U.S. Energy Boom Depends on Team Trump Continuing to Deregulate*, INVESTOR’S BUS. DAILY ¶ 1–5 (Mar. 22, 2017), <https://www.investors.com/politics/commentary/u-s-energy-boom-depends-on-team-trump-continuing-to-deregulate/>.

<sup>136</sup> See Stevens, *supra* note 19, at ¶ 6–7.

<sup>137</sup> This bill sought to approve construction of the Keystone XL Pipeline.

<sup>138</sup> Statement of Sen. McCain, *supra* note 44.

domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources” shall be reviewed in detail.<sup>139</sup> The Jones Act is preventing the U.S. from fully taking advantage of the shale boom taking place domestically,<sup>140</sup> and, therefore, is hindering domestic energy independence and economic growth, which is directly contrary to the Administration’s publicly stated policy.<sup>141</sup>

The Jones Act continues to hinder the energy market in the exact way Senator McCain describes,<sup>142</sup> preventing transport from the gulf coast, where the oil is produced, to the northeast, where the oil can be refined.<sup>143</sup> Despite the northeast having a fully capable crude oil refinery—in need of the oil being produced domestically<sup>144</sup>—the Jones Act effectively prevents unrefined petroleum products from getting there on a domestic port-to-port route.<sup>145</sup> This directly causes a hindrance to growth in the U.S. energy market in multiple ways, which illustrates how significant and influential the Jones Act is in the transportation of natural resources as a whole.

#### 1. Costs Imposed by the Jones Act Discriminate Against Domestic Maritime Transport of Crude Oil to U.S. Refineries

First and foremost, the prohibitive cost of the Jones Act itself has become a barrier to the efficient transport of shale oil, especially if shipping domestically from the south of the U.S. (i.e., Texas) to the east coast of the U.S. (i.e., Massachusetts and Pennsylvania).<sup>146</sup> It is estimated that “it now costs three times as much to ship oil from Texas to refineries on the U.S. East Coast as it costs to ship oil [from Texas to] Canada.”<sup>147</sup> This significantly higher price point is a direct result of the stringent requirements of the Jones Act, which has led to a smaller fleet of Jones

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<sup>139</sup> *Promoting Energy Independence and Economic Growth*, *supra* note 20, at 16093, Sec. 2(a).

<sup>140</sup> See Grennes, *supra* note 18.

<sup>141</sup> See *The Jones Act Has Outlived Its Reason for Existing*, *supra* note 134; see also Mark Green, *An Energy-Embracing Executive Order*, ENERGY TOMORROW ¶ 8 (Mar. 28, 2017), <http://energytomorrow.org/blog/2017/03/28/an-energy-embracing-executive-order>.

<sup>142</sup> See Hill, *supra* note 74, at 3.

<sup>143</sup> U.S. ENERGY INFO. ADMIN., POTENTIAL IMPACTS OF REDUCTIONS IN REFINERY ACTIVITY ON NORTHEAST PETROLEUM PRODUCT MARKETS 4–5 (2012); see also Wall, *supra* note 105, at ¶4–7 (explaining that the Jones Act is makes it more economical for Boston to buy its liquefied natural gas from Russia instead of Texas).

<sup>144</sup> *Id.*; Frittelli, *supra* note 107.

<sup>145</sup> Grennes, *supra* note 18, at 4–6.

<sup>146</sup> Coleman *supra* note 4, at 13.

<sup>147</sup> *Id.*; see Frittelli, *supra* note 107 (which notes that the specific price point for shipping oil from Texas to New England is \$6 per barrel).

Act compliant ships that cost significantly more to build and operate.<sup>148</sup> As a result, both northeastern refineries and Texas producers turn to foreign markets.<sup>149</sup> The inherent absurdity illustrated here (i.e., domestic shipping costing three times more than international shipping) presents an egregious example of how the Jones Act directly discriminates against the domestic energy market.

## 2. The Jones Act has Corrupted U.S. Energy Transportation

The first way the Jones Act impacts domestic energy directly effects the second, as its prohibitively expensive domestic shipping prices caused a destructive chain reaction to energy transportation as a whole. Due to the high prices imposed by the Jones Act, producers have historically sought out alternative ways to transport natural resources, which has led to the growth of other methods of transportation (such as transport by rail, truck, air, or most prominently in the U.S., pipeline).<sup>150</sup> But transportation is all interrelated, and because the Jones Act almost completely cuts off the economical use of maritime transportation, these other methods have become overburdened and overused.<sup>151</sup> The end result has been a drastic increase in price to use these alternative methods,<sup>152</sup> and “concerns about transportation safety and potential impacts to the environment.”<sup>153</sup> The Jones Act’s restrictive measures on transport have now “[had] a profound impact on where crude oil is sourced and how it is transported.”<sup>154</sup> The energy industry must not only comply with these inflated prices to use transportation alternatives—costs that consumers ultimately bear—but also utilize transport modes not typically suited to moving more refined natural resources.<sup>155</sup>

Focusing on the alternative transportation forms that the Jones Act adversely affected by making maritime transportation generally unavailable for domestically shipping natural resources, the energy market has turned to using pipelines and rail significantly more. Unfortunately, with pipeline development, “the existing pipeline network is not designed

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<sup>148</sup> Anna Louie Sussman, *Refiners seek Jones Act workarounds as crude export debate heats up*, REUTERS ¶ 1–7 (Aug. 21, 2014), <https://www.reuters.com/article/us-oil-shipping-jones/refiners-seek-jones-act-workarounds-as-crude-export-debate-heats-up-idUSKBN0GK0BT20140820> (noting that in 2014, “U.S. flag vessels cost about \$21,000 per day to operate, or three times as much as a comparable foreign-flag ship.”).

<sup>149</sup> Wall, *supra* note 105, at ¶ 4–7.

<sup>150</sup> Stevens, *supra* note 19, at ¶ 6–7.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> John Frittelli et. al., *U.S. Rail Transportation of Crude Oil: Background and Issues for Congress*, CONG. RES. SERV. 1, 1 (Dec. 4, 2014), <https://fas.org/sgp/crs/misc/R43390.pdf>.

<sup>154</sup> Grennes, *supra* note 18, at 29 (internal citations omitted).

<sup>155</sup> *See id.* at 29–30.



to access the new source of domestic crude,” again making alternative forms more expensive.<sup>156</sup> Moreover, extensive use of pipelines over the years has led to “strong opposition to the construction of new pipelines,” further inhibiting the overall energy supply chain.<sup>157</sup> Additionally, overuse of rail shipments has caused strong opposition and increased pollution, an abuse that has also furthered the importance (and price) of maritime shipping, which the Act continually stands to prevent.<sup>158</sup> Thus, the Jones Act has corrupted and continues to corrupt the entire transportation pattern of the U.S. energy trade.

### 3. The Jones Act’s Prevention of Domestic Transportation of LNG

Lastly, it is worth noting that the Jones Act can also be fully, not just merely, preventative, as the outdated fleet of Jones Act-compliant ships cannot transfer certain natural resources.<sup>159</sup> The most prevalent example, in relation to the non-contiguous U.S., is that no possible way exists to transfer Liquefied Natural Gas (LNG) domestically because currently no Jones Act-compliant ship can carry or transport it.<sup>160</sup> Even more concerning is the general thought that no one could build an LNG Jones Act compliant tanker under the current law because nothing could rationalize its price since it would only run U.S. domestic routes.<sup>161</sup> Considering LNG tankers cost billions to build, one used purely for domestic routes would never be economical or competitive in the international marketplace.<sup>162</sup> Further, even if one could finance the tanker, no U.S. ports currently have dock space available to support its construction.<sup>163</sup> This exemplifies the Jones Act’s restriction of transportation without offering any viable solutions, aptly illustrating the unchecked power the Act has on a key U.S. market.

Analyzing these issues ultimately shows a growing trend of the Jones Act’s outdated maritime restrictions to play a significantly greater role in the energy market’s development, adversely affecting the market’s development as it grows while the restrictions remain stagnant.

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<sup>156</sup> Stevens, *supra* note 19.

<sup>157</sup> *Id.* (referring to the Keystone XL Pipeline and the Dakota Extension).

<sup>158</sup> See Frittelli, *supra* note 155, at 25.

<sup>159</sup> Coleman, *supra* note 4, at 4–5.

<sup>160</sup> See Grennes, *supra* note 18, at 30; Coleman, *supra* note 4, at 5.

<sup>161</sup> See Coleman, *supra* note 4, at 5–6.

<sup>162</sup> See *id.* at 5.

<sup>163</sup> See Greg LaRose, *Report chills idea to link LNG exports to U.S.-built ships*, NOLA (Dec. 14, 2015, 12:56 PM), [http://www.nola.com/business/index.ssf/2015/12/report\\_chills\\_idea\\_to\\_link\\_lng.html](http://www.nola.com/business/index.ssf/2015/12/report_chills_idea_to_link_lng.html) (stating that although two U.S. shipyards might have docks large enough to support LNG construction, that space is occupied through the end of 2018).

*B. The Jones Act Imposes Major Costs that are Injurious to Consumers*

The costs the Jones Act imposes on the energy market are eventually passed back to the consumer—another reason this Act desperately needs re-evaluation. The Act’s defenders are historically well-organized, as its alleged benefits concentrate into this small group of supporters, while opponents’ losses reach the entire domestic population.<sup>164</sup> However, the Jones Act should not remain just to protect this small group that the law actually benefits, while all consumers suffer, especially those in the non-contiguous U.S.<sup>165</sup>

1. Inequitable Distribution of Jones Act Costs to the Non-Contiguous U.S.

Consumers in the non-contiguous areas of the U.S. predominantly bear the immediate costs of the Jones Act, rather than the dispersed effect, because they have no choice but to use maritime transport to import natural resources.<sup>166</sup> For example, because of the Jones Act, Puerto Rico “pays as much as 30[%] more for [LNG than the contiguous U.S. states],” affecting consumers’ electricity prices, while Hawaiians must pay significantly more for oil, as “75[%] of its electricity [comes] from petroleum,” which is all delivered by expensive Jones Act ships.<sup>167</sup> Because Hawaii is “the most petroleum-dependent state in the United States,”<sup>168</sup> not only do the Jones Act’s increased prices most significantly impact Hawaiian consumers when importing resources,<sup>169</sup> but also Hawaiian consumers would reap the most significant benefits from relaxing the Act’s requirements, as Hawaiians currently have “the highest cost of living and the highest energy prices in the Union.”<sup>170</sup> In Puerto Rico, researchers estimated that gas prices “[are] inflated by at least 15 cents per gallon due to the additional transportation costs.”<sup>171</sup> As a result, the Jones Act costs

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<sup>164</sup> See Grennes, *supra* note 18, at 31.

<sup>165</sup> *See id.*

<sup>166</sup> ALL. FOR INNOVATION & INFRASTRUCTURE, THE JONES ACT: PROTECTIONISM V GLOBAL TRADE 5–6 (2016).

<sup>167</sup> Loris, Slattey & Riley, *supra* note 78, at 7.

<sup>168</sup> Jenny Mandel, *Export prospects come with Jones Act questions*, E&E NEWS (Apr. 8, 2013), <https://www.eenews.net/stories/1059979019>.

<sup>169</sup> Brigham A. McCown, *Keeping Up With the Jones Act: Inconsistent Trade Policy Hinders Economic Growth*, FORBES (Jan. 19, 2016), <https://www.forbes.com/sites/brighamccown/2016/01/19/keeping-up-with-the-jones-act-inconsistent-trade-policy-hinders-economic-growth/2/#79f48f3f5b0d>.

<sup>170</sup> ALL. FOR INNOVATION AND INFRASTRUCTURE, *supra* note 166, at 6.

<sup>171</sup> McCown, *supra* note 169.

Puerto Rico “approximately \$537 million” in losses annually.<sup>172</sup> The federal government has even recognized how “detrimental” the Act is to Puerto Rico, having formerly recommended that Puerto Rico be granted “a temporary exemption . . . to alleviate the pressures from shipping costs . . . .”<sup>173</sup> Thus, especially in these areas, consumers must suffer an inequitable share of the Jones Act’s costs. Yet, the government is still reluctant to grant these areas waivers, despite its own findings that the law remains especially injurious to consumers in these areas.<sup>174</sup>

## 2. A Collective Net Loss for the Average Consumer

Beyond these states and territories that front most of the costs, the Jones Act significantly impacts the average consumer. Most prominently, “[t]he U.S. International Trade Commission found that in 1996, the Jones Act cost the U.S. economy an estimated \$1.3 billion [and a] subsequent study revealed . . . a \$656 million annual positive welfare effect . . . if the law were repealed.”<sup>175</sup> Although dispersed, these are still significant industry costs that are being passed to the consumers, and shedding them, or lessening them even slightly, would be beneficial to all. These substantial net losses to consumers simply do not outweigh the purported benefits of the Jones Act, as additional studies have revealed that “for each dollar gained by the protected parties [under the Jones Act], American consumers of the transported products lose more than a dollar.”<sup>176</sup> Thus, this protectionism put in place by the Jones Act has been a “collective net loss for Americans” in every respect (except the small domestic shipping industry it was designed to protect), and the wider the act spreads across other industries, the larger the losses become to consumers.<sup>177</sup>

In sum, the Jones Act’s overtly negative affect on the U.S. economy represents how removed from its original purpose the law truly is. In the following section, solutions are offered as to how the U.S. can start to rectify the injuries that the Jones Act has caused to both consumers and domestic commerce overall.

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<sup>172</sup> ALL. FOR INNOVATION AND INFRASTRUCTURE, *supra* note 166, at 6.

<sup>173</sup> *Id.*

<sup>174</sup> See U.S. GOV’T ACCOUNTABILITY OFF., GAO-13-260, PUERTO RICO: CHARACTERISTICS OF THE ISLAND’S MARITIME TRADE AND POTENTIAL EFFECTS OF MODIFYING THE JONES ACT (2013).

<sup>175</sup> ALL. FOR INNOVATION AND INFRASTRUCTURE, *supra* note 166, at 4.

<sup>176</sup> Grennes, *supra* note 18, at 5 (internal citations omitted).

<sup>177</sup> *Id.* at 5–6.

#### IV. THE JONES ACT SHOULD BE RELAXED IN PART OR REPEALED IN FULL

Turning back to the larger focus of the Jones Act, outside of the energy market specifically, the damages caused by the Jones Act could begin to be rectified either by partial relaxation or full repeal. But, considering how far removed it is from the purpose it was enacted to accomplish, it is clear that the law needs some substantial changes to be brought up to date with the modern economy. If the Jones Act is allowed to remain as is, it is highly likely that other industries cabotage laws will be adversely affected by its overly protectionist requirements, as the energy market inadvertently was.

The U.S. should still retain some form of maritime cabotage laws, as “there’s no faulting [the Act’s] professed goal.”<sup>178</sup> The issue with the Jones Act is purely the way it went about accomplishing its goals. America is a historically open-market economy that invites competition to spur innovation and investment in our marketplace. Thus, the Jones Act is out of touch and out of place with our current laws. The key to reframing the U.S. cabotage laws is to find a solution that protects U.S. shipping, but not to the detriment of the industry, as the current maritime laws have done.<sup>179</sup>

There are a number of ways that this law could be re-worked to remove some of its overtly protectionist measures, which would allow foreign vessels to enter the marketplace without injuring the strength of America’s own merchant marine fleet. First and foremost, it is crucial that the non-contiguous states be allowed to employ foreign vessels to save on costs when reasonable (especially in the energy market).<sup>180</sup> This should be the first priority because this is where the largest rift exists in which consumers front the cost of the Jones Act.<sup>181</sup>

Another key change to the Jones Act, which would likely be the easiest way to defray some of the immense costs it has created, would be to rid the Act of its “U.S.-built” provision,<sup>182</sup> as this is one of the more controversial areas of the law, and unnecessarily unique to maritime cabotage (meaning that no other form of transportation in the U.S. requires that all of the materials must be American made).<sup>183</sup> This provision is already somewhat seen as an “exaggeration” of sorts, because it is difficult

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<sup>178</sup> *Maritime Commerce Can Thrive Without the Jones Act*, BLOOMBERG ¶ 1 (Dec. 22, 2017), <https://www.bloomberg.com/view/articles/2017-12-22/maritime-commerce-can-thrive-without-the-jones-act>

<sup>179</sup> *How Protectionism Sank America’s Entire Merchant Fleet*, *supra* note 106, at ¶ 1.

<sup>180</sup> See Denise Krepp, *Splitting the Jones Act Baby*, MARITIME EXECUTIVE ¶ 8 (Feb. 10, 2015), <https://www.maritime-executive.com/features/splitting-the-jones-act-baby#gs.HuYCaW4>.

<sup>181</sup> See Frittelli, *supra* note 107, at 5–6, 11–12.

<sup>182</sup> *Maritime Commerce Can Thrive Without the Jones Act*, *supra* note 178, at 2.

<sup>183</sup> See *supra* notes 48–49 and accompanying text.

to track whether every piece of material used was made in America, and what is actually important is that the ship is “American-built” as opposed to having all American made parts.<sup>184</sup>

Short of full repeal, one final, non-controversial change to the Jones Act could be the more lenient granting of waivers. Currently, waivers are only granted either “in the ‘interest of national defense,’” or *sometimes* if “no qualified U.S.-flagged vessels are available to meet the need.”<sup>185</sup> But, this standard is historically hard to meet. A simple solution would be to begin granting waivers for economic hardship as opposed to just national emergency. This could then be applied in a broader range of situations, and could help to deal with ongoing situations that are not quite at the national emergency level. Thus, waivers would become more discretionary upon DHS’s judgment, and the Jones Act would automatically be a more flexible law that could account for the ever-changing economic marketplace of the U.S.

If all else fails, full repeal is still an option. Although Jones Act repeal efforts have failed in the past because of staunch lobby oppositions from the shipping industry,<sup>186</sup> it does not mean they will necessarily fail moving forward, especially with this new administration’s determination to rid the government of unnecessary regulation. If the current Executive were more closely following the plan set forth by their own Executive Order,<sup>187</sup> the Jones Act should have been one of the first pieces of legislation to be targeted. As has been noted by opponents of the Jones Act, if “the administration [pushed] to repeal the Jones Act—or, at the very least . . . make it less restrictive” billions could collectively be saved on shipping.<sup>188</sup> This would then make other forms of transportation more affordable, as transportation costs across the board would decrease in price with more options available,<sup>189</sup> and although dispersed, savings would then be felt by consumers across the U.S. Thus, anything from repeal to menial reform of the Jones Act would be in the best interest of the government, domestic commerce, and consumers alike.

## CONCLUSION

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<sup>184</sup> Grennes, *supra* note 18, at 17–18.

<sup>185</sup> Linda Chiem, *Oil Cos., Transporters Embrace Jones Act Waiver After Irma*, LAW360 ¶ 8 (Sept. 21, 2017), <https://www.law360.com/articles/966565/print?section=energy>.

<sup>186</sup> See Grennes, *supra* note 18, at 31.

<sup>187</sup> *Promoting Energy Independence and Economic Growth*, *supra* note 20 (referring to the Trump Executive Order that deregulates energy markets).

<sup>188</sup> Stevens, *supra* note 19, at ¶ 11.

<sup>189</sup> See *supra* notes 135–137 and accompanying text.

Although the Jones Act was enacted to promote domestic commerce, it is now nothing more than a crutch for the U.S. shipping industry and a drain on the rest of the economy. Simply put, the Jones Act has outlived its purpose, and as a century old law, it desperately needs to be brought up to modern times. As one critic stated, “[t]he world is much different than it was almost 100 years ago, when the Jones Act was passed [and] [t]echnology, innovation and the speed of transportation have vastly improved.”<sup>190</sup> Yet, the Jones Act has never been adjusted to account for these significant changes, and its protectionist measures have been allowed to remain since its inception. As a result, its overly restrictive provisions on domestic, port-to-port maritime transport have stretched into other markets, affecting industries where transportation is a crucial part of the supply chain.

Taking a critical look at the Jones Act, this article discussed how, in particular, the Act strangles the energy market. It revealed that because of the Jones Act, natural resource transportation has been pinched in a multitude of areas, and because foreign competitors have been completely banned from domestic shipping, competition has been stifled, causing U.S. seafaring vessels to fall behind in both quantity and quality. Further, it discussed how in some areas (like LNG), Jones Act compliant vessels do not even exist, which has forced transportation through other, riskier means. Or, in the instance of the non-contiguous U.S., forced states and territories to turn to foreign markets, thus highlighting how the Act’s discriminatory pressure on the energy market discriminates against growth in domestic commerce. Finally, this article proposed that, outside of full repeal, it would be beneficial to all parties involved to at least relax Jones Act regulations in the energy market, which would help to promote the current Executive trend towards deregulation and the growth of an independent energy market.<sup>191</sup>

Without relaxation or repeal of the Jones Act, growth in the energy market will remain stagnant, and our shipping industry will continue to lag. Further, because the Jones Act continues to discourage foreign investment, the Jones Act tankers becoming increasingly dated, less reliable, and less available every day. Moreover, without some sort of change in the law to account for a dynamic marketplace, prices to use Jones Act ships will only increase, a cost which will be forced back on unsuspecting consumers through energy prices.<sup>192</sup> These expansive detriments the Jones Act creates can no longer be ignored, and “as the U.S.

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<sup>190</sup> Wall, *supra* note 105, at ¶ 10.

<sup>191</sup> See *Promoting Energy Independence and Economic Growth*, *supra* note 20.

<sup>192</sup> See Grennes, *supra* note 18, at 3.

emerges on the international energy market, inconsistent policies such as the Jones Act should be reconsidered.”<sup>193</sup>

In order to prevent repercussions of the Jones Act from spreading further or influencing other areas of domestic law in other parts of the economy, it is imperative that the Jones Act be reevaluated in full, as recommended above, to assess how it functions and affects the broader scheme of domestic cabotage and transportation law. Outside of continuing to review its economic impact, which has been studied in significant detail,<sup>194</sup> the pertinent next step is to thoroughly review the Jones Act’s interplay with other areas of U.S. law. Understanding the full extent of the Jones Act’s influence on domestic cabotage law and transportation patterns would at least provide an opportunity for the legislature to revisit the antiquated law with a hard look, which would likely show that repeal or revision could provide the U.S. energy market with a much needed “economic shot in the arm.”<sup>195</sup>

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<sup>193</sup> McCown, *supra* note 169, at ¶ 9.

<sup>194</sup> *See, e.g.*, U.S. INT’L TRADE COMMISSION, *supra* note 2; Grennes, *supra* note 18; Stevens, *supra* note 19; KASHIAN, *supra* note 34; Gius, *supra* note 67 (noting just a few of the economic analyses that have been done on the Jones Act and cited in this article).

<sup>195</sup> Wall, *supra* note 105, at ¶ 11.