The BP *B1 Bundle* Ruling: Federal Statutory Displacement of General Maritime Law (Part I)

by John J. Costonis

John J. Costonis is Chancellor-Emeritus and Professor of Law, Paul M. Hebert Law Center, Louisiana State University.

Summary

Among the many unresolved legal questions posed by the Deepwater Horizon well blowout are whether and to what extent maritime tort negligence remedies escape displacement by relevant federal statutes, including, principally, the Oil Pollution Act of 1990. OPA jurisprudence over two decades holds that OPA displaces these remedies. Contrarily, however, the U.S. District Court for the Eastern District of Louisiana's decision in *In re Oil Spill by the Oil Rig "Deepwater Horizon"* (*B1 Bundle*) insists that general maritime law affords a parallel track to OPA's remedies for economic and property oil discharge losses suffered by private claimants. *B1 Bundle* premises its holding on two contentions. First, OPA's "silence," defined as the statute's failure expressly to displace maritime remedies, demonstrates the U.S. Congress' intent to quarantine OPA as a mere supplement to general maritime law. Second, the U.S. Supreme Court's decisions in *Exxon Shipping Co. v. Baker* and *Atlantic Sounding Co. v. Townsend* authoritatively establish OPA's nondisplacement of maritime law punitive damages specifically and of maritime remedies as a whole. As this Article explains, neither claim is persuasive.

All legislative Powers herein granted shall be vested in a Congress of the United States.[1]

I. Introduction

The latitude accorded federal judges to fashion law has engaged commentators at least since Judge [Henry] Friendly's endorsement of the "new federal common law."[2] The issue can be viewed vertically on the basis of the federalism issues resulting from the tension between incompatible federal and state substantive law. This Article borrows from the commentary's familiar distinction between decisions fashioning federal law and those merely filling in a federal statute's interstitial gaps. Unlike an *Erie*-centered framework, however, it stresses the horizontal axis by examining tensions between federal statutes and federal judge-made law, which bring separation-of-powers values to the fore.

The federal/state preemption inquiry[3] targets conflicts between the competing federal/state norms that threaten the United States Constitution's Supremacy Clause values. Outright conflict foretells federal common-law displacement by statute as well. But incompatibility between competing norms in the displacement arena is more nuanced because separation-of-powers values impose greater constraints on the judiciary's role. Hence, the "same sort of evidence of a clear and manifest purpose [of Congress' intent to displace] is not required," the Supreme Court has stated.[4] In displacement disputes, judges start with the assumption "that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law."[5]

The Court asks instead whether the judiciary has concurrently treated in a different manner the same issue addressed by Congress in what, in fact, is a competition opposing the respective *lawmaking* authority of the two

Author's Note: Professor Costonis is not a consultant to or affiliated with any party engaged in the BP MDL proceedings discussed in this Article. The author thanks his colleagues, Profs. Devlin, Richards, and Williams, for their comments on earlier drafts of this Article. The author also thanks the Law Center for summer research grant support for both Part I and Part II of this study. For a single consolidated version of the study, see John J. Costonis, The BP *B1 Bundle Ruling:* Federal Statutory Displacement and General Maritime Law, 38 Tul. Mar. L.J. 1 (2013).

1. U.S. Const., art. I, §1.
2. Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 422 (1964).
3. Although often used interchangeably in the literature, the terms "displacement" and "preemption" are accurately understood as referring, respectively, to supersession of federal common or general maritime law by federal statute and to supersession of a state legal norm by a federal norm in consequence of the Supremacy Clause.
4. City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304, 317, 11 ELR 20406 (1981).
5. *Id.*

branches. The judge-made rule risks displacement if it incompatibly addresses the same "question" or occupies the same "space" as the federal statute.[6] This standard safeguards the priority as lawmaker granted Congress by the Constitution. "Cases recognizing that the comprehensive character of a federal program is an insufficient basis to find pre-emption of state law are not in point [in displacement disputes]," the Court has observed in its leading displacement opinion, "since we are considering *which branch of the Federal Government is the source of federal law*, not whether that law pre-empts state law."[7]

The Supreme Court has cautioned lower federal court judges that "[a]lthough . . . there is a significant body of federal law that has been fashioned by the federal judiciary in the common-law tradition . . . federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers."[8] Its "'commitment to the separation of powers is too fundamental' to continue to rely on federal common law . . . when Congress has addressed the problem."[9] The federal common law's general maritime law sector enjoys somewhat greater latitude,[10] but the Court's respect for congressional primacy remains firm. "Even in admiralty . . . where the federal judiciary's lawmaking power may well be at its strongest, it is our duty to respect the will of Congress."[11] The Court's privileging of federal statutes over maritime law is engraved in its iconic declaration in *East River Steamship Corp. v. Transamerica Delaval Inc.*: "*Absent a relevant statute*, the general maritime law, as developed by the judiciary, applies."[12]

Adjudicating displacement disputes places the Court squarely, if uneasily, between Congress and the lower federal courts.[13] Despite its commitment to Congress' primacy as lawmaker, the Court is alert to the judiciary's common-law-making powers, particularly as the Admiralty Clause amplifies them in the maritime sphere.

Two different questions arise depending on whether or not Congress has adopted a statute that overlaps with the pertinent judge-made rule, which usually appears as a maritime cause of action or one of its substantive or procedural components. Absent a statute, the Court confines its inquiry to whether the matter engages admiralty jurisdiction at all. If it is a tort, the Court's view under a line of authority commencing with *Executive Jet Aviation, Inc. v. City of Cleveland*[14] requires, among other elements, that the event feature an activity that bears a "significant relationship to traditional maritime activity."[15]

If a federal statute overlaps judicial lawmaking, the focus shifts to the relationship between the two lawmaking exercises. This study features that shift by probing whether and to what extent the general maritime law oil pollution tort survives displacement by two federal statutes: OPA[16] and the Outer Continental Shelf Lands Act (OCSLA).[17]

6. *Accord* Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 618, 1979 AMC 1187, 1199-1200, 9 ELR 20237 (4th Cir. 1979) (stating that canons favoring preservation of "established precepts of maritime law . . . cannot prevail when Congress enacts a specific remedy that is contrary to judicially created remedies for the same wrong").
7. *Milwaukee II*, 451 U.S. at 319 n.14 (emphasis added).
8. Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 95 (1981).
9. *Milwaukee II*, 451 U.S. at 315 (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195, 8 ELR 20513 (1978)).
10. *Cf.* United States v. Oswego Barge Corp., 664 F.2d 327, 336, 1982 AMC 769, 778 (2d Cir. 1981) ("[T]he Supreme Court appears to have applied the presumption of statutory preemption somewhat less forcefully to judge-made maritime law than to non-maritime federal common law.").
11. *Nw. Airlines*, 451 U.S. at 96; *accord* Miles v. Apex Marine Corp., 498 U.S. 19, 36, 1991 AMC 1, 14 (1990) ("Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will . . . .").
12. 476 U.S. 858, 864, 1986 AMC 2027, 2032 (1986) (emphasis added).
13. Justice [Harry] Blackmun framed the challenge thusly: "Inevitably, a federal court must acknowledge the tension between its obligation to apply the federal common law in implementing an important federal interest, and its need to exercise judicial self-restraint and defer to the will of Congress." *Milwaukee II*, 451 U.S. at 339 n.8 (Blackmun, J., dissenting).
14. 409 U.S. 249, 268, 1973 AMC 1, 15-16 (1972).
15. *Id.* In earlier articles, the author has questioned whether admiralty jurisdiction appropriately attaches to the BP blowout and spill at all in light of, inter alia, the Outer Continental Shelf (OCS) petroleum development operations' dubious status as a "traditional maritime activity." *See* John J. Costonis, *The Macondo Well Blowout: Taking the Outer Continental Shelf Lands Act Seriously*, 42 J. Mar. L. & Com. 511, 512-24 (2011) [hereinafter Costonis, *The Macondo Well Blowout*]; John Costonis, *And Not a Drop to Drink: Admiralty Law and the BP Well Blowout*, 73 La. L. Rev. 1, 2-5, 15-18 (2012) [hereinafter Costonis, *And Not a Drop to Drink*].
16. Pub. L. No. 101-380, 104 Stat. 484 (codified as amended at 33 U.S.C. §§2701-2762 (2006 & Supp. III 2009)).
17. Pub. L. No. 83-212, 67 Stat. 462 (1953) (codified as amended at 43 U.S.C. §§1331-1356(a) (2006 & Supp. II 2009)). Despite this study's focus on OPA, OCSLA is hardly a bit player. The BP blowout featured the discharge of an estimated 4.9 million barrels of OCS-sourced oil. *See* Nat'l Comm'n on the Bp Deepwater Horizon Oil Spill & Offshore Drilling, Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling 167 (2011) [hereinafter President's Report]. The Deepwater Horizon contributed no more than 17,000 barrels of its own stored diesel oil, *id.* at 130, an infinitesimal *three ten-thousandths* of the BP well discharge. OCSLA, which Congress adopted under the Interstate and Foreign Commerce Clauses and the Property Clause, secures the federal government's sovereignty, control, and regulatory powers over the OCS and its resources. *See* Costonis, *The Macondo Well Blowout*, *supra* note 15, at 526-34. OCSLA also characterizes the OCS as an exclusive federal enclave, and specifies in §1333(a)(1) of its 1953 version that *nonadmiralty* law governs activity occurring on permanently attached drilling facilities. *Id.* at 530-34. The provision was revised in 1978 to add "temporarily attached" facilities, including Deepwater Horizon-type mobile offshore drilling units (MODUs), thereby calling into question MODUs' status as "vessels" for admiralty jurisdiction purposes. *Id.* at 545-49; Costonis, *And Not a Drop to Drink*, *supra* note 15, at 20-30. More problematic still is *B1 Bundle*'s claim that the OCS drilling operations are "substantial[ly related] to [a] traditional maritime activity." 808 F. Supp. 2d 943, 951, 2011 AMC 2220, 2228, 41 ELR 20340 (E.D. La. 2011); *see* Costonis, *And Not a Drop to Drink*, *supra* note 15, at 15-20; *see infra* notes 140-47. According to the OCSLA legislative conference report, the amendment, premised on Congress' power under the Property Clause, also introduced a "*new statutory regime* for the management of the oil and natural gas resources of the OCS." Costonis, *The Macondo Well Blowout*, *supra* note 15, at 541 (quoting H.R. Rep. No. 95-372, at 53 (1977), *reprinted in* 1978 U.S.C.C.A.N 1450, 1460 (approving environ-

Displacement disputes are also divided between those in which the general maritime lawmaking exercise precedes or follows the statute's adoption.[18] The BP dispute illustrates the former because the maritime pollution tort preceded OPA and OCSLA. Federal courts engage as directly in lawmaking when they conclude that a prior maritime rule survives a subsequent statute's enactment as when they initially formulated the rule in the absence of the statute.[19] Whether or not their conclusion properly aligns with separation-of-powers considerations frames the issue for the Supreme Court.

Mobil Oil Corp. v. Higginbotham[20] exemplifies the second pattern—prior federal statute/subsequent maritime rule. The judicial incorporation of a damages component—loss of society—in a general maritime law wrongful death action failed, the Court held, to respect the command of the prior Death on the High Seas Act (DOHSA)[21] that "speak[s] directly"[22] to the same issue by referencing "pecuniary" damages.

This study addresses displacement through the prism of the Complaint Order and Ruling in *B1 Bundle* issued by the United States District Court for the Eastern District of Louisiana in the BP multidistrict litigation (MDL).[23] At the heart of the ruling is the court's allocation of the roles of general maritime tort law and OPA in governing the claims of over 100,000 private plaintiffs for economic and property losses resulting from the discharge of an estimated 4.9 million barrels of oil from BP's Outer Continental Shelf (OCS) facility, the Macondo well. Included as defendants alongside BP,[24] the Macondo lessee, and Transocean,[25] owner of the Deepwater Horizon Mobile Offshore Drilling Unit (MODU), are Halliburton (participant in the cementing of the Macondo well) and Cameron (source of the operations' blow-out preventer) as well as a variety of other parties.[26] BP and Transocean were cited both as OPA §2702(a) "responsible parties" and, along with other defendants, as tortfeasors liable for the oil discharges under maritime negligence law.[27]

B1 Bundle ruled that substantive general maritime law and, with a minor exception, procedural maritime law survived OPA's enactment unscathed.[28] This holding conflicts with two mutually supportive rationales that call for displacement instead. The first focuses on conflicts between maritime law and specific OPA provisions that are sufficient by themselves to establish OPA's displacement of the maritime tort remedy.[29] A cumulative rationale targets OPA's duplication of the identical question addressed by the maritime tort: namely, *formulation of a remedial regime addressing private claims for economic and property losses resulting from seaborne oil discharges*.[30]

B1 Bundle ultimately stands or falls on its interpretation of OPA's lack of language *expressly proscribing* either the maritime pollution tort overall, or key specific components of it, and its related claim that rules announced in two non-OPA Supreme Court cases, *Atlantic Sounding Co. v. Townsend*[31] and *Exxon Shipping Co. v. Baker*,[32] should govern in *B1 Bundle* as well. *B1 Bundle* equates the absence of express proscription with "silence," and silence, so defined, with Congress' supposed embrace of the prior maritime norm.[33] In doing so, of course, it concedes at the same time that it overlooks that "silence" may prove as meaningful as verbal expression. In consequence, silence may as well signal Congress' negation as approval. By ignoring the step required to justify approval over negation, *B1 Bundle* begs the question that lies at the heart of this Article and *B1 Bundle* itself.[34]

The opinion targets four instances in which its concept of silence immunizes the maritime tort from displacement. They include OPA's silences respecting the direct displacement of the maritime tort overall,[35] the maritime tort compensatory damages that duplicate those enumerated in OPA §2702(b),[36] maritime punitive damages,[37] and the

mental goals and a *private* OCS oil pollution liability regime, subsequently revised and folded into OPA's single federal pollution regime)).

18. *See* United States v. Oswego Barge Corp., 664 F.2d 327, 337, 1982 AMC 769, 780 (2d Cir. 1981) ("[P]reemption of maritime law has occurred both as to prior judge-made law and the authority [of federal judges] to fashion new law.").
19. The *Delaval* court's statement that "[a]bsent a relevant statute, the general maritime law, as developed by the judiciary, applies," evidences that without OPA and OCSLA, admiralty jurisdiction, and hence admiralty substantive law, would govern the *B1 Bundle* maritime tort unhindered, assuming that the latter satisfies *Executive Jet* and its progeny. E. River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 864, 1986 AMC 2027, 2032 (1986). The presence of such statutes, on the other hand, modifies the equation in disputes where the general maritime rule precedes or follows them. *B1 Bundle*'s conclusion that OPA fails to displace the maritime tort is no less an exercise in maritime rulemaking than the federal judiciary's initial establishment of oil pollution as a maritime tort. The second ruling further defines and specifies the proper range of the maritime principle, this time with the relevant statutes—OPA and OCSLA—in place.
20. 436 U.S. 618, 1978 AMC 1059 (1978).
21. 46 U.S.C. §30303 (2006).
22. *Higginbotham*, 436 U.S. at 625, 1978 AMC at 1065.
23. 808 F. Supp. 2d 943, 2011 AMC 2220, 41 ELR 20340 (E.D. La. 2011).
24. The court refers to BP Exploration & Production Inc., BP America Production Company, and BP p.l.c. collectively as "BP."
25. The court refers to Transocean Ltd., Transocean Offshore, Transocean Deepwater, and Transocean Holdings collectively as "Transocean."
26. For an account of the Macondo blowout, see President's Report, *supra* note 17.
27. *Id.*
28. *B1 Bundle*'s Holding 7 states that "OPA does not displace general claims against non-Responsible parties" and that "OPA does displace general maritime law claims against Responsible Parties, *but only with regard to procedure* (i.e., OPA's [§2713] presentment requirement)." 808 F. Supp. 2d at 969, 2011 AMC at 2256 (emphasis added).
29. Two OPA provisions that meet this criterion are §2702(b)(2)(A)-(F) (OPA's "covered damages"), *see* Gabarick v. Laurin Mar. (Am.) Inc., 623 F. Supp. 2d 741, 744-46, 2009 AMC 1014, 1016-21 (E.D. La. 2009), and §2704 (OPA's "limitation of damages" provision), *see infra* Part III.C.
30. *B1 Bundle* identically characterizes the question addressed by OPA, 808 F. Supp. 2d at 947, 949.
31. 557 U.S. 404, 2009 AMC 1521 (2009).
32. 554 U.S. 471, 2008 AMC 1521 (2008).
33. *B1 Bundle*, 808 F. Supp. 2d at 962, 2011 AMC at 2245.
34. To sharpen the debate, I have provisionally accepted *B1 Bundle*'s claim that OPA is "silent" (under *B1 Bundle*'s definition of the term) regarding non-OPA legal remedies. In fact, OPA speaks expressly to such remedies or procedures in no less than three provisions: first, when it validates *state law remedies*, see OPA §2719(a), (c); second, when it validates *nonadmiralty legal sources* for instances in which OPA "otherwise provides" for the application of nonadmiralty/general maritime law norms, see OPA §2751(e); and third, when it approves recourse either to OPA or to "*another law*" to support contribution actions, see OPA §2709.
35. *Id.* at 960-61, 2011 AMC at 2241-43.
36. *Id.* at 962, 2011 AMC at 2244-45 (by implication).
37. *Id.*, 2011 AMC at 2245.

entitlement of private plaintiffs under general maritime law to bring direct actions against third-party defendants such as Halliburton or Cameron.[38]

B1 Bundle celebrates general maritime law as a parallel track rather than classifying it as a defeasible supplement to OPA. This interpretation is perceived to enable the liability associated with the OPA inventory of damages to be adjudicated under the Limitation of Liability Act[39] and associated Federal Rule of Civil Procedure Supplemental Rule F[40] procedures simply by switching tracks to accommodate the pollution tort's change of costume to admiralty garb.[41]

Later discussion details three *B1 Bundle* flaws that beset its nondisplacement outcome. The first has been noted: the opinion blandly asserts, rather than cogently establishes its outcome-shaping equation of congressional silence with congressional approval of matters not expressly proscribed. Credibility on a matter so central to the opinion demands a searching inquiry into OPA's language, objectives, legislative history, and pertinent background factors essential to an understanding of what legal realist Karl N. Llewellyn termed the individual dispute's "situation-sense."[42]

Second, *B1 Bundle* shuns engaging in this inquiry or, at least, in linking summary conclusions illuminated by it to the nondisplacement outcome. The court's posture is problematic given the lack of *any* pre-*B1 Bundle* OPA precedents sustaining its position as against both a brood of hostile OPA precedents[43] and the nondisplacement conclusion's pervasive influence on the design and phasing of the entire MDL proceeding. It is conceivable perhaps, although not very likely in my judgment, that *B1 Bundle*'s outcome would have proven more defensible had it chosen to take OPA seriously by attending systematically to the statute's origins and goals. Its decision to avoid doing so is suggestively evasive, however, and leaves OPA to languish at this stage of the MDL as an "undigested and indigestible lump in the middle of [the] Law," as Llewellyn would have put it.[44]

Finally, *B1 Bundle*'s skewed use of displacement jurisprudence's lexicon leaves unattended still another fundamental objection to its outcome: namely, that *OPA incompatibly addresses the identical question addressed by the maritime pollution tort*. Even if no less problematic, this defect is perhaps more understandable than the other two. Displacement jurisprudence's abstract, nonquantitative lexicon does not easily yield the precise measurements and cross-case statutory and general maritime law comparisons essential for cogency and predictability.

Certainty, these qualifications advise, is an illusory standard for displacement inquiries in which silence obscures congressional intent. The best that can be done is to identify the plausibility of reasoning bearing on the inquiries' many moving parts, aggregate the competing results, and propose an outcome premised on the weight and persuasiveness of the competing sides' totals.[45] I have chosen this course for an inquiry that addresses an opinion so committed to its silence canon and secure in *Townsend*'s and *Baker*'s supposed reflected grace that many of the most influential of the inquiry's moving parts barely surface, if at all.

This Article can be read simply as an inventory of *B1 Bundle*'s many unresolved questions, or, as I would prefer, a valuable discussion of how their evaluation bears on the persuasiveness of the opinion's outcome. Its terms of debate will discomfort those who share the United States Court of Appeals for the Fifth Circuit's self-confessed instinct for the "reflexive invocation of admiralty jurisdiction."[46] But *Delaval* tempers or, at least, should temper this instinct. Once the OPA statute's "relevance" is established, *Delaval* dictates, the burden of persuasion shifts to nondisplacement advocates because it is only "[*a*]*bsent a relevant statute*" that "general maritime law, as developed by the judiciary, applies."[47] OPA and OCSLA indisputably qualify as "relevant" statutes under this premise.

The point is not trivial. The reflexive instinct inclines toward focusing on *Delaval*'s second clause at the expense of the introductory proviso. For the same reason, it encourages a parsing of OPA's misleadingly named admiralty "[s]avings provision" that slights its *Delaval*-like introductory proviso, "[e]xcept as otherwise provided in this Act,"

38. *Id.*, 2011 AMC at 2244-45.
39. 46 U.S.C. §§30501-30512 (2006).
40. Fed. R. Civ. P. Supp. F.
41. An assessment of *B1 Bundle*'s device of converting treatment of OPA tort claims into general maritime claims for purposes of allocating liability under a Limitation of Liability Act concursus proceeding exceeds this Article's scope. It merits attention, however, that OPA precedents holding either that OPA displaces those general maritime principles to which it speaks directly or that OPA overrides the Limitation of Liability Act and Rule F, or both, undermine the device's legitimacy. *See, e.g.*, Bouchard Transp. Co. v. Updegraff, 147 F.3d 1344, 1998 AMC 2409, 29 ELR 20139 (11th Cir. 1998); Metlife Capital Corp. v. M/V Emily S., 132 F.3d 818, 1998 AMC 635, 28 ELR 20431 (1st Cir. 1997); Gabarick v. Laurin Mar. (Am.) Inc., 623 F. Supp. 2d 741, 2009 AMC 1014 (E.D. La. 2009); In re Jahre Spray II K/S, Nos. Civ. A. 95-3495 (JEI), Civ. A. 95-6500 (JEI), 1996 WL 451315, 1997 AMC 844 (D.N.J. Aug. 5, 1996). A number of the impediments besetting the effort are explored in Robert Force & Jonathan M. Gutoff, *Limitation of Liability in Oil Pollution Cases: In Search of* Concursus *or Procedural Alternatives to* Concursus, 22 Tul. Mar. L.J. 331, 341 (1998).
42. Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 121 (1960). Authoring a legal opinion and authoring commentary on a legal opinion are different enterprises, of course, each subject to the constraints of its respective purposes and appropriate length. But a legal opinion shares with legal commentary the expectation that its conclusions comport with persuasive analysis and precedent, whether or not the latter are detailed in the opinion.
43. *See* cases cited *infra* Part II.A.
44. Llewellyn, *supra* note 42, at 378.
45. An apt description of the challenge federal judges confront in assessing plausibility appears in Judge [Jon] Newman's masterful displacement opinion in *United States v. Oswego Barge Corp.*, 664 F.2d 327, 339, 1982 AMC 769, 783 (2d Cir. 1981):
    > [W]e recognize, as [*Milwaukee II*] instructs, that the doctrine of separation of powers creates a presumption that legislation preempts the role of federal judges in developing and applying federal common law, but we also recognize that it is not a simple task to determine the force and proper application of this presumption.
46. *See* Lewis v. Glendel Drilling Co., 898 F.2d 1083, 1087, 1994 AMC 600 (5th Cir. 1990) (AMC reporter summarizing case). The BP MDL was assigned to the Eastern District of Louisiana, located within the Fifth Circuit.
47. E. River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 864, 1986 AMC 2027, 2032 (1986) (emphasis added).

in favor of its statement that "this Act does not affect . . . admiralty and maritime law."[48]

The study's roadmap schedules two detours to provision itself for its journey. The first engages the BP dispute's "situation-sense" by probing OPA's background, content, and reception by commentators and federal courts. Deferred for the following article (Part II of the study) are, first, a detailed examination and reformulation of the Supreme Court's displacement lexicon and jurisprudence as both apply to the *B1 Bundle* controversy, and, second a critique of *B1 Bundle*'s misconceived reliance on *Townsend* and *Baker* to sustain the opinion's nondisplacement outcome.

Nine contentions define the framework for this Article's argument.

First, resolution of *B1 Bundle*'s displacement debate engages the interaction of three distinct legal spheres: the Supreme Court's meta-law[49] of displacement; OPA's and OCSLA's Property- and Commerce Clause-based environmental and OCS governance directives; and the general maritime law oil pollution tort.

Second, *B1 Bundle*'s silence canon misconceives the Court's displacement rules and policy, and pays insufficient heed to the goals, language, and structure of the OPA liability/compensation regime.

Third, the relation between Congress and the federal judiciary in the OPA/maritime tort pairing is one of competition between two separate lawmaking branches, which pursue the formulation, through different and largely incompatible means, of a liability/compensation regime for private economic and property losses suffered in consequence of seaborne petroleum discharges.

Fourth, the Court's displacement ground rules and lexicon are shaped by separation-of-powers values, principal among which is the Court's affirmation of Congress' constitutional primacy over the federal judiciary when congressional and judicial lawmaking overlap in ways that derogate from, or are otherwise incompatible with, Congress' primacy as lawmaker.

Fifth, an exercise in judicial lawmaking, *B1 Bundle* is not a collaborative effort by the court, as an agent of Congress, to fill interstitial gaps in an incomplete congressional statute. Rather, the opinion aggressively carves out an independent, parallel track, coequal with OPA, for a maritime regime that addresses the same question to which OPA speaks, but in a different and pervasively incompatible manner.

Sixth, OPA's occupancy of "space" previously claimed by the maritime tort warrants the latter's displacement absent evidence of Congress' contrary intent. Unlike the free-floating maritime remedy, moreover, OPA derives and communicates its values as but one facet of an integrated framework that encompasses environmental values, federal agency rulemaking and expertise, OPA itself, and a graduated program of non-OPA civil and criminal penalties. Baked into OPA's remedial regime, these elements robustly differentiate it from the maritime tort regime. Pinning the ill-fitting tail of admiralty's remedial donkey on the identical activity remediated by OPA complicates and laboriously extends an otherwise straightforward inquiry.

Seventh, OPA §2751(e), the misleadingly labeled admiralty "[s]avings provision," does not afford a plausible escape route from displacement. The clause's stubborn restriction on the scope of the admiralty law being "saved"—"[e]xcept as otherwise provided in this Act"[50]—deprives admiralty/maritime law of the sweeping immunity to displacement that state law enjoys from preemption pursuant to OPA §2718(a)'s proviso-free state law savings clause. Despite or, perhaps, because of its faux title, this admiralty *savings* clause weakens, rather than bolsters, the case for nondisplacement.

Eighth, the Court's bar on lower federal courts' rewriting statutory rules under the guise of filling interstitial gaps discredits *B1 Bundle*'s approval of the maritime tort law entitlement to bring direct actions against defendants who are not named as responsible parties under OPA §2702(a).

Finally, *B1 Bundle*'s bid for the survival of maritime law punitive damages is unpersuasive. OPA destroys the requisite survival platform by displacing maritime law's compensatory damages cause of action upon which punitive damages must be predicated. *B1 Bundle* also upsets Congress' deliberate compromise, engraved initially in the Federal Water Pollution Control Act (FWPCA) §311 and updated in OPA §2704, that accommodates industry, pollution tort victims, natural resource protection, and governmental interests through the statute's graduated damages limitation regime, as supplemented by draconian extra-OPA statutory civil and criminal penalties.

II. OPA: Recasting the Oil Pollution Tort for a Modern Age

A. *OPA's Reception by Commentators and Federal Courts*

Commentators and courts largely endorse Lawrence Kiern's overall appraisal of OPA as a "watershed event in the history of modern oil pollution law in the United States."[51] They recognize that the statutory tort both reconfigures and outdistances the prior maritime tort even as it addresses the same fundamental question of remedies spoken to by the latter. One jointly authored study, for example, observes that OPA "has introduced radical changes in the liability

48. OPA §2751(e); *see infra* Part II.A.3.

49. By the term "meta-law," I intend simply Court-fashioned standards premised on constitutional separation-of-powers values that govern the choice of the positive law to be applied in a displacement dispute. The candidates are federal statutory law, judge-made law (common or maritime), or some combination of both.

50. OPA §2751(e) provides in material part that "[e]xcept as *otherwise provided* in this Act, this Act does not affect—(1) admiralty or maritime law; or (2) the jurisdiction of the district courts of the United States with respect to civil actions under admiralty and maritime jurisdiction." 33 U.S.C. §2751(e) (2006) (emphasis added).

51. Lawrence I. Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the First Decade*, 24 Tul. Mar. L.J. 481, 482 (2000).

regime applicable to oil spills"[52] and departs from "past practice[s] in environmental legislation, [because] Congress expressly created a wide range of remedies that are available to private . . . persons . . . who sustain damage or loss as a result of the discharge of oil."[53] A second study affirms that the statute "vastly expands the scope and breadth of the rights, remedies and recoveries of . . . private claimants damaged by an oil spill."[54]

In a subsequent study updating OPA 90's status from 2000 through 2010, Kiern concludes that the statute has been "applied by the courts to restrict resort to traditional maritime remedies for oil pollution damages apart from OPA."[55] His conclusion goes far toward answering his decade-earlier query concerning the extent to which "the continued availability of both judge-made general maritime law and federal common law causes of action for relief in cases of environmental damages [have] been placed in doubt by [c]ongress[ional] enactment of comprehensive environmental legislation, including both the Clean Water Act (CWA) and OPA."[56]

Judicial portrayals of OPA other than *B1 Bundle* celebrate a vigorous statute as well. *Gabarick v. Laurin Maritime (America) Inc.*[57] affirms that OPA displaces maritime actions seeking damages that duplicate OPA §2702(b) "covered . . . damages." Congress, it asserts, adopted OPA to "encourage settlement and reduce litigation in oil spill cases through the enactment of comprehensive federal legislation that provides 'cleanup authority, penalties, and liability for oil pollution.'"[58] Another case also insists that "OPA establishes an entirely new, federal cause of action for oil spills"[59] and that "[a]lthough traditional maritime remedies for oil spills pre-date OPA, OPA creates a new, comprehensive federal scheme for the recovery of oil spill cleanup costs and the compensation of those injured by such spills . . . includ[ing] new remedies, which, in many respects, preempt traditional maritime remedies."[60]

Pre-*B1 Bundle* OPA jurisprudence discloses general support for the following positions.

1. Displacement

OPA displaces maritime law in whole or part in light of OPA's §2751(e) proviso requiring displacement when OPA provides "otherwise" for the same matter[61]; duplicates damages awarded under maritime law[62] in consequence of §2702(b)'s "covered damages" language; employs mandatory language in defining the oil pollution tort, damages, and procedures for claims presentation by private parties[63]; is rendered "redundant"[64] or "superfluous" by according maritime law status as a parallel track when OPA addresses the same injuries[65] more efficiently and is more properly attuned to contemporary scientific, engineering, environmental, and policy values; and implements Congress' intent to replace the prior "fragmented collection of Federal and State laws"[66] with a "single Federal law providing cleanup authority, penalties, and liability for oil pollution."[67]

This inventory calls to mind the story of the five blind men and the elephant, each of whom is in touch with the elephant but fails to grasp what lies beyond his particular point of contact. Without denying each contribution's value, the study consolidates their place within the larger

52. Force & Gutoff, *supra* note 41, at 341.
53. *Id.*
54. Thomas J. Wagner, *Recoverable Damages Under the Oil Pollution Act of 1990*, 5 U.S.F. Mar. L.J. 283, 285 (1993)
55. Lawrence I. Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the Second Decade*, 36 Tul. Mar. L.J. 1, 50 (2011).
56. Kiern, *supra* note 51, at 493.
57. 623 F. Supp. 2d 741, 2009 AMC 1014 (E.D. La. 2009).
58. *Id.* at 750, 2009 AMC at 1026 (quoting S. Rep. No. 101-94, at 9 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 730.
59. Tanguis v. M/V Westchester, 153 F. Supp. 2d 859, 867, 2001 AMC 2652, 2661 (E.D. La. 2001).
60. *Id.* In *United States v. Bodenger*, No. Civ. A. 03-272, 2003 WL 22228517, at *1 (E.D. La. Sept. 25, 2003), the court denied remand back to a state court and explained that pre-OPA,

> existing federal and state laws provided inadequate cleanup and damage remedies, required large taxpayer subsidies for costly cleanup activities, and presented substantial barriers to victims' recoveries such as legal defenses, corporate forms, and burdens of proof unfairly favoring those responsible for the spills. Congress also recognized that, pre-OPA, the costs of cleanup and damage from spill were not high enough to encourage greater industry efforts to prevent spills and develop effective techniques to contain spills that did in fact occur. Congress' intention is manifest, that the new law would effect compensation for victims, quick and efficient cleanup with minimization of damages to natural resources, and the internalization of the costs of oil spills within the oil industry.

Id. at *2 (citation omitted) (paraphrasing S. Rep. No. 101-94, at 2, *reprinted in* 1990 U.S.C.C.A.N. at 723).
61. *See, e.g.*, In re Settoon Towing LLC, No. 07-1263, 2009 WL 4730971, at *3 (E.D. La. Dec. 4, 2009); Nat'l Shipping Co. of Saudi Arabia v. Moran Mid-Atl. Corp., 924 F. Supp. 1436, 1447, 1996 AMC 2604, 2618 (E.D. Va. 1996), *aff'd sub nom. per curiam* Nat'l Shipping Co. of Saudi Arabia v. Moran Trade Corp. of Del., Nos. 96-1741, 96-1824, 1997 WL 560047, 1998 AMC 163, 27 ELR 21504 (4th Cir. Sept. 9, 1997).
62. *See, e.g.*, S. Port Marine, LLC v. Gulf Oil Ltd. P'ship, 234 F.3d 58, 65, 2001 AMC 609, 617, 31 ELR 20344 (1st Cir. 2000); *Gabarick*, 623 F. Supp. 2d at 748, 2009 AMC at 1024-25; Clausen v. M/V New Carissa, 171 F. Supp. 2d 1127, 1133 (D. Or. 2001).
63. OPA §§2713, 2702(a), 2702(b), and 2713(a), respectively, each of which is cited in *Gabarick*, 623 F. Supp. 2d at 744-45, 2009 AMC at 1017-21.
64. In re Jahre Spray II K/S, Nos. Civ. A. 95-3495 (JEI), Civ. A. 95-6500 (JEI), 1996 WL 451315, at *4, 1997 AMC 844, 851 (D.N.J. Aug. 5, 1996) (declaring OPA's provisions for legal defenses and damage limitations would be "redundant" unless OPA displaces maritime law).
65. *Clausen*, 171 F. Supp. 2d at 1134 ("Why should plaintiffs' attempt to prove negligence when success on their OPA claim will provide identical remedies and not require proof of negligence?"); *accord In re Settoon*, 2009 WL 4730971, at *3 ("[T]he United States' general maritime law damages claims are preempted by its identical OPA 90 damages claims."); *cf.* Am. Electric Power Co. v. Connecticut, 131 S. Ct. 2527, 2530-31, 41 ELR 20210 (2011) ("The [Environmental Protection] Act . . . provides a means to seek limits on emissions of carbon dioxide from domestic power plants—the same relief the plaintiffs seek by invoking federal common law. There is no room for a parallel track.").
66. S. Rep. No. 101-94, at 2 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 723. Amplifying the Report's confirmation of OPA's displacement of other sources of federal law is the statement during debate in the [U.S. House of Representatives] that "[t]he whole idea of a Federal oil spill legislation is to have one coordinated and comprehensive legislation, not a patchwork of State and Federal laws which have turned out to be inadequate." 135 Cong. Rec. 26956 (1989) (statement of Rep. William Frenzel).
67. S. Rep. No. 101-94, at 9, *reprinted in* 1990 U.S.C.C.A.N. at 730; *accord Gabarick*, 623 F. Supp. 2d at 748, 2009 AMC at 1024; Tanguis v. M/V Westchester, 153 F. Supp. 2d 859, 867-68, 2001 AMC 2652, 2661-64 (E.D. La. 2001).

framework of displacement jurisprudence defined by the Supreme Court.

2. OPA's "Silence"

By itself, OPA's "silence" does not signal maritime law's survival because congressional intent can be communicated by a statute's "structure and purpose"[68] or by the "text of the statute read as a whole."[69] OPA is not "silent" as to particular displacing elements, moreover, when it "speak[s] directly" to them in a manner that is incompatible with maritime law, even though in doing so, OPA does not expressly call for their displacement, as *Gabarick* pointedly observes.[70]

Again, each observation is useful, if blandly predictable. As often occurs in displacement decisions, however, the larger framework remains incoherent with respect to the positioning of such concepts as "structure or purpose," "speak[ing] directly," "comprehensive," or "occup[ation of a field]." These constructs, Part III clarifies, are not a random collection of independent variables, but incremental locations along what is, in fact, a single, orderly continuum.

3. OPA §2751(e) Admiralty Savings Clause

Pre-*B1 Bundle* decisions expressly acknowledge the syntactical parallelism employed by the Supreme Court in *Delaval* and by Congress in OPA's admiralty "saving[s] clause."[71] *Delaval* and OPA §2751(e) each feature an introductory proviso, the purpose of which is to withdraw from or deny to maritime law a competence that it might otherwise enjoy. The proviso is followed by an independent clause, which secures to maritime law competences that are not reserved by the proviso.[72]

In re Settoon Towing LLC mirrors these arrangements in its statement that OPA §2751(e):

> does not permit the [claimant] to assert its general maritime law damage claims . . . in this matter. *A court will only apply the general maritime law in the absence of a relevant federal statute*. OPA 90 specifically provides for the damages sought by the [claimant]. . . . *OPA 90's admiralty and maritime law savings clause evidences [the latter law's] preemption in that it permits the admiralty and maritime law claims "except as otherwise provided in [the] Act."*[73]

Significant consequences attend this verbal architecture. It is enough for now to observe how far short of OPA §2718(a) (OPA's state law savings clause) §2751(e) falls in shielding maritime law from displacement because, among a host of considerations, the latter state law savings clause is *not* preceded by a disabling proviso.

4. OPA and the FWPCA[74]

Because OPA is modeled on the FWPCA with respect to certain key provisions,[75] FWPCA case law and practice merit deference in the interpretation of these provisions.[76] However, when comparing FWPCA and OPA provisions, parallelism in the function and language of the provisions is imperative to support any specific claim's credibility in order to avoid what this Article terms a "category error."[77] The issue is tested in two investigations. One addresses whether the character of the OPA and FWPCA damages limitation provisions warrants citing FWPCA jurisprudence favoring maritime law's displacement as a basis for a similar result under OPA.[78] The second, discussion of which is deferred to the successor article, is whether *B1 Bundle* properly invokes the FWPCA, *Baker*, and *Townsend* as a basis for concluding that OPA does not displace punitive damages.

5. Claimants' Direct Actions Against Third-Party Defendants

Common to the pre-*B1 Bundle* decisions is the understanding that Congress sought to expedite private claimant recovery by shifting from maritime law's burdensome and time-consuming procedures to OPA's streamlined alternative.[79] Among the pre-*B1 Bundle* OPA precedents, *Gabar-*

68. *See Gabarick*, 623 F. Supp. 2d at 748-49, 2009 AMC 1024-25 (citing Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008)). *Gabarick* was responding to the assertion that "because the statutory language of OPA does not contain an explicit preemption cause [sic] or otherwise expressly preempt the general maritime law, . . . preemption of general maritime claims . . . was not the intent of Congress." *Id.* at 748, 2009 AMC at 1024.
69. *See Tanguis*, 153 F. Supp. 2d at 867, 2001 AMC at 2661.
70. *See supra* note 68 and accompanying text. In its reference to "speak[ing] directly," *Gabarick* invoked *Miles v. Apex Marine Corp.*, 498 U.S. 19, 31, 1991 AMC 1, 10 (1990). *Gabarick*, 623 F. Supp. 2d at 747, 2009 AMC at 1021. For an example of the kind of explicit statutory language demanded by *B1 Bundle*'s silence canon, see Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §905(b) (2006) ("This subsection shall be exclusive of all other remedies except the remedies available under this chapter.").
71. *See, e.g.*, In re Settoon Towing LLC, No. 07-1263, 2009 WL 4730971, at *3 (E.D. La. Dec. 4, 2009); Nat'l Shipping Co. of Saudi Arabia v. Moran Mid-Atl. Corp., 924 F. Supp. 1436, 1447, 1996 AMC 2604, 2619 (E.D. Va. 1996), *aff'd sub nom. per curiam* Nat'l Shipping Co. of Saudi Arabia v. Moran Trade Corp. of Del., Nos. 96-1741, 96-1824, 1997 WL 560047, 1998 AMC 163, 27 ELR 21504 (4th Cir. Sept. 9, 1997); *cf. Tanguis*, 153 F. Supp. 2d at 867, 2001 AMC at 2661.
72. One difference between the two formats is that OPA §2751(e) displaces maritime law by nonadmiralty (statutory) law, while the *Delaval* proviso speaks to displacement by any federal statute, admiralty or otherwise.
73. 2009 WL 4730971, at *3 (emphasis added) (citations omitted).
74. Ch. 758, 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. §§1251-1387 (2006 & Supp. II 2009)). Although the Act was retitled as the Clean Water Act in consequence of its amendment in 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§1251-1387 (2006)), the former FWPCA §1321 title is retained in this study except when quoting other sources or where a particular context favors either the FWPCA, the "Clean Water Act" (CWA), or "§311 of the Clean Water Act" (CWA §311).
75. The "body of law already established under §311 of the Clean Water Act is the foundation of the reported bill. Many of that section's concepts and provisions are adopted directly or by reference." S. Rep. No. 101-94, at 4 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 726.
76. Metlife Capital Corp. v. M/V Emily S., 132 F.3d 818, 822, 1998 AMC 635, 640-41 (1st Cir. 1997); United States v. Bodenger, No. Civ. A. 03-272, 2003 WL 22228517, at *2 (E.D. La. Sept. 25, 2003).
77. The phrase in text denotes ascription of precedential authority to an opinion whose material facts or rationale contravene those of the instant controversy.
78. *See infra* Part II.C.
79. OPA §2713(a) states: "[A]ll claims for removal costs or damages [pursuant to OPA §§2702(a) and (b)] shall be presented first to the responsible party or [its] guarantor." OPA §2702(a) precedes its definition of the statutory tort's elements with the language "[n]otwithstanding any other provision

ick speaks to the point with the greatest clarity. It dismissed a suit brought by an OPA claimant against a third-party defendant, reasoning:

> In light of Congress's intent to minimize piecemeal lawsuits and [OPA's] mandatory language [in §§2702(a)-(b) and 2713(a)] it appears that Claimants should pursue claims covered under OPA only against the responsible party and in accordance with the procedures established by OPA. Then, the responsible party can take action to recover from third parties.[80]

Subsequent discussion will introduce two elements suggested, but not specifically addressed, by *Gabarick*. The first is that OPA's "silence" regarding claimants' direct suits in this instance does not give rise to an interstitial statutory "gap" that invites the final carpentry of judicial completion. The second links OPA's remedial substitute to environmental innovations during the 1980s that were designed to secure accelerated cost recovery, including, in particular, the procedures and status liability assigned to "potentially responsible parties" under CERCLA Superfund legislation.[81]

6. OPA and Maritime Law Punitive Damages

South Port Marine, LLC v. Gulf Oil Ltd. Partnership,[82] in tandem with *Clausen v. M/V New Carissa*,[83] denies that OPA itself provides for punitive damages and asserts that OPA displaces the maritime law doctrine that does. It advances three *independent* grounds for displacement. The first, as clarified in *Clausen*,[84] is that punitive damages are not themselves a cause of action and therefore require the latter as a necessary predicate. In displacing the maritime tort, OPA severs the requisite link between these damages and an underlying cause of action. The second looks to the Supreme Court's decision in *Miles v. Apex Marine Corp.*,[85] which denied recovery for loss of society when it was not provided for in the statute.[86] The third insists that approving maritime punitive damages upsets the balance Congress sought by tempering its support of expanded private relief with a damages limitation regime appreciative of petroleum development's contributions to national security, economic health, and public revenues.

This study does not take issue with *B1 Bundle*'s *Miles*-based objection, but advises that *South Port Marine*'s first and third contentions, which *B1 Bundle* largely ignores or misconceives, merit very careful attention indeed.

B. *The Oil Discharge Tort's Transition From a Maritime to a Statutory Remedy*

OPA's birthing was preceded by a decade or more of congressional frustration with pre-OPA governmental and private remedies, whose inadequacies were further amplified by a succession of pre-1990 oil spills.[87] With the 1989 Exxon Valdez disaster as the last straw, Congress ended a political deadlock by unanimously approving OPA 90 as its champion to replace the prior "fragmented collection of Federal and State laws"[88] with a "*single* Federal law providing cleanup authority, penalties, and liability for oil pollution."[89] In reconfiguring oil pollution regulation, Congress added OPA's coverage of *private* claims for economic and property loss, an element conspicuously absent from the FWPCA. "[F]ollowing enactment of this Act," the Committee advised, "liability and compensation for petroleum oil pollution damages caused by a discharge from a vessel or facility will be determined in accordance with this Act."[90]

Congress placed OPA's liability/compensation regime within a larger framework featuring three additional components: environmental protection as the framework's lodestar[91]; oil spill prevention and cleanup oversight through regulation by multiple federal agencies[92]; and a calibrated

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or rule of law, and subject to the provisions of this Act." OPA §2702(b), entitled "[c]overed removal costs and damages," identifies the damages inventoried in §2702(b)(2)(A)-(F) as the "damages referred to in [§2702(a)]." Section 2715(a) authorizes subrogation actions against third parties by responsible parties or by the Oil Spill Liability Trust Fund when the Fund has paid the damages of a claimant who elects under §2713(b) to seek recourse against the Fund rather than to sue the responsible party.

80. Gabarick v. Laurin Mar. (Am.) Inc., 623 F. Supp. 2d 741, 750, 2009 AMC 1014, 1027 (E.D. La. 2009).
81. *See* Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§9601-9675 (2006). *Compare* OPA §2701(32) (definition of a "responsible party"), *with* 42 U.S.C. §9607(a) ("[c]overed persons," also termed potentially responsible parties).
82. 234 F.3d 58, 2001 AMC 609, 31 ELR 20344 (1st Cir. 2000).
83. 171 F. Supp. 2d 1127 (D. Or. 2001).
84. *Id.* at 113.
85. 498 U.S. 19, 1991 AMC 1 (1990).
86. *Id.* at 31, 1991 AMC at 9-10.
87. General maritime law's inability to keep stride with the oil pollution discharge problem was appreciated prior to OPA's adoption. Addressing the FWPCA's cleanup liability regime a decade before this event, for example, *United States v. Bear Marine Services*, 509 F. Supp. 710, 1982 AMC 2197, 11 ELR 20659 (E.D. La. 1980), lamented that the "magnitude of the problem had outstripped the viability of available legal remedies, *particularly the traditional concept of the maritime tort*." *Id.* at 713, 1982 AMC at 2199 (emphasis added).
88. S. Rep. No. 101-94, at 2 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 723; *see also* discussion *supra* note 66; 135 Cong. Rec. 26956 (1989) (statement of Rep. William Frenzel).
89. S. Rep. No. 101-94, at 9, 1990 U.S.C.C.A.N. at 730 (emphasis added).
90. *Id.* at 24-25, *reprinted in* 1990 U.S.S.C.A.N. at 746-47.
91. "OPA's essential elements are built on the basic framework of the environmental legislation Congress enacted during the 1970s and 1980s, since OPA was enacted to address the major deficiencies in the preexisting legislation." Kiern, *supra* note 51, at 507. [E. Donald] Elliott and [Mary Beth] Houlihan add that OPA "was deeply influenced by . . . the prevailing legal culture of the 1980s and 1990s" and that its "key provisions . . . were borrowed from . . . the 1980s [statute CERCLA, commonly known as] Superfund." E. Donald Elliott & Mary Beth Houlihan, A Primer on the Law of Oil Spills 1-2 (2010), *available at* http://ssrn.com/abstract=2007604. Congress likewise provided for environmental values that it ignored in OCSLA's original (1953) version by pervasively rewriting the statute in 1978 to fill this void. *See* Costonis, *And Not a Drop to Drink*, *supra* note 15, at 7.
92. Illustrative, inter alia, are the rule-making responsibilities allocated, first, to the United States Coast Guard to govern Oil Spill Liability Trust Fund obligations and agreements pursuant to OPA §2716(a) and to oversee the financial liability of responsible parties for certain vessels and offshore facilities under OPA §2712(e), and second, to the National Oceanic and Atmospheric Administration in conjunction with the United States Environmental Protection Agency and the United States Fish and Wildlife Service under OPA §2706(e) for the assessment of natural resource damages.

set of deterrence-incentivizing civil and criminal penalties that implement OPA's "polluter pays" philosophy.[93]

OPA's radical departure from the judge-made, negligence-based maritime oil pollution tort, however, confirms the statute as a creature of an entirely different era and legal mindset. OPA endorses strict liability and its correlative indifference to fault and an array of negligence-based defenses.[94] It embraces a "polluter pays" vision that, nonetheless, respects a limitation/breakable caps regime.[95] It imposes status liability on responsible parties[96] who, whether or not ultimately found liable, must front response and damages costs,[97] a requirement designed to compensate public and private claimants with minimum delay. Responsible parties are relegated to contribution or subrogation actions to secure recompense against other liable parties.[98] OPA's compensation and liability provisions are intricately crafted to pair with a command and control regulatory program on the one side,[99] and a variety of civil and criminal fines and penalties on the other.[100]

OPA's §2713 procedures governing private claims lie at the heart of a system that Congress dedicated to avoiding lengthy delays in damages payments experienced by pre-OPA claimants. Claimants and responsible parties are given the opportunity to resolve the matter between themselves within ninety days of the claim's presentation, failing which the claimants may seek satisfaction by presenting their claims either in court or before OPA's §2712 Oil Spill Liability Trust Fund.[101]

E. Donald Elliott, the EPA's General Counsel during the federal government's deliberations on the legislative proposals that became OPA, cites these and related OPA provisions in a coauthored article observing that OPA is "deeply influenced by . . . the prevailing legal culture of the 1980s and 1990s" and that its "key provisions . . . were borrowed from . . . the 1980s [statute CERCLA, commonly known as] Superfund."[102] Also borrowed was the "essence of EPA's policy at the time for implementing the 1986 Superfund amendments—do not delay clean-up while the [potentially responsible parties] argue about shares, but threaten to give one of them an administrative order to clean-up the site and then that responsible party may sue the others for contribution."[103] Elliott describes this claims procedure as "unique, with no analogous procedure under Superfund, the CWA or any other major federal environmental statute,"[104] or, needless to say, under general maritime law.

These features were neither perceived nor embraced when admiralty judges extended general maritime tort principles to petroleum discharges earlier in the twentieth century.[105] Like OPA itself, they and the comprehensive framework they support are creatures, first, of post-1950 political, technological, and economic forces that drove petroleum development in territorial and OCS waters,[106] and, second, of the post-1970 environmental age,[107] which was itself shocked into existence by the 1969 Santa Barbara oil spill. The values shaping the maritime tort speak to earlier eras; indifference to, or ignorance of, environmental values[108]; and, with a single dissonant exception, the cabining of oil pollution liability on behalf of shippers, insurers, and a nineteenth-century nation eager to protect its infant merchant marines.

Maritime tort values translate into an evidentially burdensome negligence standard, with the Limitation of Liability Act's scant damages caps, delays associated with the concurrent disposition of primary and third-party claims, and other complications bearing on parties and types of injuries for which compensation may be awarded. Among the complications is the tort's incorporation of the *Robins Dry Dock & Repair Co. v. Flint* doctrine, which denies recovery to oil discharge victims (other than commercial

93. Civil and criminal penalties fall outside OPA's scope for the most part. Among the best known is FWPCA §1321(b)(7)(D) (as modified by 40 C.F.R. §19.4 (2010)), authorizing civil penalties up to $4,300 per barrel of oil for violations resulting from "gross negligence or willful misconduct." Assuming that published figures placing the BP discharge at 4.9 million barrels are correct, the penalties under this section against BP could mount to $20 billion. For a detailed review of the various civil and criminal penalties associated with OPA-related violations, see Elliott & Houlihan, *supra* note 91, at 16-23.
94. OPA §§2701(17), 2702(a).
95. *Id.* §2704. This provision's role in contributing to OPA's displacement of general maritime law is detailed in *In re Hokkaido Fisheries Co.*, 506 F. Supp. 631, 634, 1981 AMC 1468, 1472, 11 ELR 20657 (D. Alaska 1981).
96. *See* OPA §§2701(32), 2702(a). Removal costs and damages are compensable "regardless of the source of a spill." S. Rep. No. 101-94, at 5 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 726. Relatedly, the Oil Spill Liability Trust Fund provides compensation for damages "regardless of the liability of the spiller." *Id.* at 5, *reprinted in* 1990 U.S.C.C.A.N. at 727.
97. *See* OPA §§2702(d)(1)(A)-(B).
98. *See id.* §§2702(d)(1)(B) (subrogation), 2708 (recovery by responsible parties), 2709 (contribution by any "person").
99. Elliott has observed in a coauthored study that OPA was adopted "[a]gainst [an] existing regulatory backdrop" framed largely by the United States Department of the Interior's Mineral Mining Service (since renamed Bureau of Ocean Energy Management, Regulation and Enforcement) that "mandat[es] specific drilling practices and technological controls as well as government oversight and review and approval of drilling plans." Elliott & Houlihan, *supra* note 91, at 2.
100. *Id.* at 16-23.
101. OPA §2713(c).
102. Elliott & Houlihan, *supra* note 91, at 1-2.
103. *Id.* at 4 n.22; *see* S. Rep. No. 101-94, at 10 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 732.
104. Elliott & Houlihan, *supra* note 91, at 13.
105. *See* Kiern, *supra* note 51, at 490-502. Robert Peltz portrays maritime case law through the late-1960s as "not particularly concerned with the possibility of oil pollution disasters [because] early environment-related cases were limited largely to local fishing and other similar conservation issues." Robert D. Peltz, *The Myth of Uniformity in Maritime Law*, 21 Tul. Mar. L.J. 103, 126 (1996). Post-1950s admiralty courts' evident struggle to rationalize remedial options within the maritime tort rubric appears in, e.g., *Oppen v. Aetna Insurance Co.*, 485 F.2d 252, 256-57, 1973 AMC 2165, 2171-72 (9th Cir. 1973) (construing *Executive Jet* incorrectly as requiring that the activities of the oil pollution *victim*, rather than of the *tortfeasor*, be substantially related to a traditional maritime activity); *California v. S.S. Bournemouth*, 307 F. Supp. 922, 927-29, 1970 AMC 642, 647-51 (C.D. Cal. 1969) (resting admiralty jurisdiction on a nonstatutory lien derived by an obviously forced analogy from nonpollution scenarios featuring injury to property by conversion); and *Maine v. M/V Tamano*, 357 F. Supp. 1097, 1973 AMC 1131, 3 ELR 20567 (D. Me. 1973) (improvising a state's standing to sue for injury to its natural resources by categorizing the action as an expression of the state's "quasi-sovereign" capacity to function as the *parens patriae* of these public resources).
106. *See* President's Report, *supra* note 17, at 55-87.
107. *See* Peltz, *supra* note 105.
108. Recognizing the fundamental difference between the two pursuits, Peltz endorses separating environmental law issues from admiralty's uniformity concerns. Environmental law poses problems that "traditional maritime law simply does not address" because they "did not exist in the past or were not considered important." *Id.* at 126.

fishermen) absent injury to their physical property.[109] Contrarily, the maritime pollution tort borrowed the award of punitive damages from maritime general negligence law,[110] a feature that reflects the tort's randomness when measured against its pro-shipper/industry cast. Overall, however, federal judges formulated a largely parsimonious tort totally unequipped for the sweeping technological and economic changes lying ahead and for the ever more calamitous blowouts and spills they portend.[111]

Judicial awareness of either would not have made much of a difference in any event. Congress and multiple federal agencies have struggled for a half-century to overcome oil pollution regulation's political, technological, economic, and public revenue-gathering dimensions, which place the effective resolution of its remedial challenge well beyond maritime lawmaking's competence or inclination. Absent congressional protection of private economic and property interests,[112] however, it fell to admiralty judges to improvise as best they could to protect the federal interest in the governance of private torts occurring on the nation's navigable waters. Despite its evident drawbacks, the maritime tort merits praise as a *placeholder*[113]; pending Congress' restructuring of the private (and public) dimensions of the tort through OPA's enactment.

With OPA, however, Congress succeeded in fusing the liability and compensation provisions of four prior site-specific oil pollution acts[114] into a modern, precisely coordinated program. Congress also fashioned a private remedy that absorbs and dwarfs the maritime tort in scope and procedural detail,[115] while speaking to the identical question that the earlier maritime tort struggled so unsuccessfully to address.

C. *Oil Pollution Act of 1990 Preamble: "An Act [t]o [E]stablish [L]imitations on [L]iability for [D]amages [R]esulting [F]rom [O]il [P]ollution . . . ."*[116]

OPA's reforms undoubtedly advantage private claimants. But OPA's preamble establishes that OPA is also a *damages limitation statute*, as Kiern properly counsels.[117] Congress sought to temper these private advantages, as monetized, to accommodate vital national security, economic, and public revenue values served by the offshore oil industry, and, undoubtedly, to facilitate OPA's passage. The compromise takes form in the CWA's §311(b)(2)(f)(1)-(3)'s damages limitation provisions.

The provisions' legislative history and judicial reception merit scrutiny because "[t]he body of law already established under §311 of the Clean Water Act is the foundation of the reported [OPA] bill."[118] They illuminate both the structure of the compromise Congress struck in seeking a balanced damages limitation regime[119] and the federal courts' agreement that the regime's implementation in CWA §311 displaces the federal government's maritime cause of action against owner/operators.[120]

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109. *See* 2 Thomas J. Schoenbaum, Admiralty and Maritime Law §§11-12, 14-7, 18-4 (5th ed. 2011) (citing Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 1928 AMC 61 (1927)).
110. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 2008 AMC 1521 (2008).
111. Summarizing the failure of the maritime oil pollution tort as a vehicle for remedying the economic and property losses of tens of thousands of the Alaskan victims of the Exxon Valdez spill, Joseph Kelo, Richard Hildreth, Alison Reiser, and Donna Christie state:

> Based on the vast extent of litigation and multi-billion-dollar judgments awarded against Exxon, a casual observer might acquire the impression that the legal system fully compensated the losses suffered by those impacted by the oil spill. However, the [maritime tort] legal system in fact denied redress to many plaintiffs . . . . For individual plaintiffs, the tort system acted to exclude most plaintiffs and to severely restrict the kinds of injury compensated.

Coastal and Ocean Law 775-76 (3d ed. 2007).
112. Pre-OPA federal pollution statutes going as far back as 1924 lacked a private cause of action for petroleum discharges.
113. Placeholding by the judicial formulation of federal maritime or common law rules, in the absence of Congress' resolution of issues of national concern is acknowledged in the United States Court of Appeals for the Fourth Circuit's view of the maritime pollution tort as a placeholder pending Congress' adoption of the FWPCA which, in turn, displaced the maritime tort. *See* Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 1979 AMC 1187, 9 ELR 20237 (4th Cir. 1979). Holding that FWPCA §1321(f)(1) displaced the maritime tort, the court stated that the maritime tort was "inferred from the . . . maritime law *precisely because no adequate statutory remedy existed*." *Id.* at 618, 1979 AMC at 1200 (emphasis added).
114. *See* OCSLA ch. 345, 67 Stat. 462 (1953) (codified as amended at 43 U.S.C. §§1331-1356(a) (2006 & Supp. 2009); Deepwater Port Act of 1974, Pub. L. No. 93-627, 88 Stat. 2126 (1975) (codified as amended at 33 U.S.C. §§1501-1524 (2006)); Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 576 (1973) (codified as amended at 43 U.S.C. §§1651-1656 (2006)); Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948)
(codified as amended at 33 U.S.C. §§1251-1387 (2006 & Supp. 2009)).
115. OPA, through subchapter I and with the inclusion of §2751(e) of subchapter II, requires approximately twenty-three pages and includes twenty-two provisions, the greater part of which govern both the private and the public statutory tort, and discerningly address the various matters reviewed in this Article. Representative of the provisions' content are OPA's §2701 (a four-page definitions section of fundamental substantive import), §2702(a) (cause of action), §2702(b) (covered damages), §2703 (responsible party/sole fault third party defenses), §2704 (liability limitation schedule and requirements), §2705 (interest awards, partial claims payments), §§2709 and 2715 (actions for contribution and subrogation), §2710 (indemnification agreements), §2712 (Oil Spill Liability Trust Fund), §2713 (claimant recovery procedure), §2716 (vessel and facility owners' financial responsibility), §2717 (litigation, jurisdiction, venue, and independent statutes of limitations for actions for damages, for removal costs, for contribution, and for subrogation), §2718(a) (state law savings clause), and §2751(e) (admiralty savings clause). A statute's length alone is a crude gauge for assessing its comprehensiveness, of course. But as illuminated by their evaluation throughout this Article, the provisions' content, precision, and scope manifest statutory density of an order, Parts III.A-B affirm, that is more than sufficient to support OPA's displacement of the maritime tort on the several different grounds there discussed.
116. Oil Pollution Act of 1990, Pub. L. No. 101-380, pmbl., 104 Stat. 484.
117. *See* Kiern, *supra* note 55, at 54 ("[T]he first expressed purpose of OPA is to 'establish limitations on liability for damages resulting from oil pollution. . . .'" (quoting Oil Pollution Act of 1990, Pub. L. No. 101-380, pmbl., 104 Stat. 484, 484)).
118. S. Rep. No. 101-94, at 4 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 726.
119. CWA §§311(b)(2)(f)(1)-(3) address owners of vessels, of on-shore facilities, and of offshore facilities, respectively, all of whom are subject to a remedial regime of limited defenses, strict liability for oil discharge incidents in the amount of actual removal costs, caps that may reduce owner liability to an amount less than actual costs, and an increase of liability to the full amount of the costs in the event of owner willful negligence or willful misconduct.
120. *See, e.g.*, United States v. Oswego Barge Corp., 664 F.2d 327, 1982 AMC 769 (2d Cir. 1981); United States v. Dixie Carriers, Inc., 627 F.2d 736, 1982 AMC 409, 10 ELR 20935 (5th Cir. 1980); Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 1979 AMC 1187, 9 ELR 20237 (4th Cir. 1979); Frederick E. Bouchard, Inc. v. United States, 583 F. Supp. 477, 1985 AMC 668 (D. Mass. 1984); In re Hokkaido Fisheries Co., 506 F. Supp. 631, 1981 AMC 1468, 11 ELR 20657 (D. Alaska 1981).

Steuart Transportation Co. v. Allied Towing Corp.[121] lists, as values shaping the compromise, §311's impacts on maritime commerce; insurance availability and premiums; economic needs of shippers, vessel owners, and consumers; and the federal government's fiscal needs.[122] The United States House of Representatives and United States Senate bills went in different directions, the House proposing liability based on fault and an absolute limit on removal costs, while the Senate instituted strict liability within a maximum limit subject to certain defenses.[123] "The final bill," *Steuart* continues, "embodied the Senate's strict liability proposal, but imposed unlimited liability only in cases where the government could show willful negligence or willful misconduct within the privity and knowledge of the shipowner."[124]

CWA litigation centered on the federal government's effort to employ a maritime remedy to obtain the difference between the §311 cap and the government's actual recovery costs. Impeding this outcome was not only its rejection by the courts, of course, but also the Limitation of Liability Act's strictures. Over a period of a century and a half, the Act has fused with the maritime negligence actions as tightly as the CWA and OPA damages limitation provisions intertwine with their statutory hosts. When pleaded to limit shipowners' damages in a maritime tort action, the Act reduces the damages to the Act's salvage value/freight pending formula if the simple negligence occurs without the shipowner's knowledge or privity.[125]

But the federal courts rebuffed the CWA parallel track claim for government/owner-operator suits,[126] citing the outright conflict between the CWA remedy, as conditioned by its §311 damages limitation requirement, and the maritime negligence remedy as qualified by the Limitation of Liability Act. *United States v. Oswego Barge Corp.* pinpoints the displacement-creating objection in a rationale that speaks for an entire generation of §311 opinions:

> If the FWPCA means what it says in permitting recovery of full cleanup costs upon proof of "willful negligence or willful misconduct" within the knowledge and privity of the owner, such a remedy would be inconsistent with a maritime negligence remedy, since the latter would avoid the limits of the Limitation Act simply upon proof of ordinary negligence within the privity or knowledge of the owner. While alternative remedies with dissimilar characteristics can sometimes coexist side by side, when two remedies differ on such an essential element of a cause of action as the degree of negligence that must be demonstrated in order to permit unlimited recovery, the remedies become inconsistent. To permit a judge-made remedy so significantly different from the one Congress has expressly provided would amount to rewriting the rule that Congress has enacted.[127]

Oswego's "inconsistency" will differ according to which of the four ascending scenarios it engages. Under the first, a nonnegligent oil discharger is strictly liable under CWA §311, but escapes both maritime tort negligence liability and the elements of the Limitation of Liability Act discussed below. Second, the Limitation of Liability Act could reduce the federal government's recovery well below §311's cap due to the Act's application of its vessel salvage value/pending freight formula to ordinary negligence incidents beyond the "privity or knowledge" of the owner/operator.[128] The third scenario is posed in *Oswego* itself, in which §311's caps fall below damages that would be recoverable in a maritime tort simple negligence incident in which knowledge and privity are attributed to the owner/operator who has not engaged in gross negligence or willful misconduct.[129] The §311 caps apply, that is, even if they are less than the full amount of recovery costs, but the maritime tort subjects the owner/operator to liability for the full (compensatory) amount of the cost on the basis of ordinary negligence alone.

The fourth scenario features an owner/operator who has engaged in willful negligence or misconduct sufficient to trigger both cancellation of §311's caps and the award of maritime law punitive damages. CWA §311(b)(2)(f)(1)-(3) provides only for compensatory relief—termed in these subsections as the "full amount of such costs." The maritime award, on the other hand, would include both this compensatory amount and some additional multiple of the latter as punitive damages.

The scenarios' inconsistency with maritime law does not plague §311 because the section's damages limitations regime engages the United States alone, the sole §311 plaintiff in the scenario. In the United States Court of Appeals for the Ninth Circuit's view, the same reason explains why *Exxon Shipping Co. v. Baker* (which allowed a maritime remedy for a private claimant recovering maritime punitive damages) is not inconsistent with *Oswego* (which allowed

121. 596 F.2d at 609, 1979 AMC at 1187.
122. *Id.* at 617, 1979 AMC at 1198-99.
123. *Id.* at 613, 1979 AMC at 1191-92.
124. *Id.*, 1979 AMC at 1192.
125. Limitation of Liability Act, 46 U.S.C. §30505(a)-(b) (2006).
126. The maritime track did survive actions engaging CWA §311(h)(2) against either sole-fault or partial-fault third parties because this section sets forth a generous savings clause that preserves "any rights" the United States may have "against any *third party* whose actions may . . . have caused or contributed to the discharge of oil." (emphasis added). *See, e.g.*, United States v. Bear Marine Servs., 509 F. Supp. 710, 1982 AMC 2197, 11 ELR 20659 (E.D. La. 1980); *cf.* United States v. M/V Big Sam, 681 F.2d 432, 1983 AMC 2730, 12 ELR 20994 (5th Cir. 1982) (affirming that the right to a maritime suit against a CWA §311(g) sole-fault third-party is preserved under CWA §311(h)(2)).
127. United States v. Oswego Barge Corp., 664 F.2d 327, 343-44, 1982 AMC 769, 790 (2d Cir. 1981) (quoting FWPCA, 33 U.S.C. §1321(F) (2006)).
128. *See* In re Hokkaido Fisheries Co., 506 F. Supp. 631, 633, 1981 AMC 1468, 1469, 11 ELR 20657 (D. Alaska 1981) (allowing only $46,589 for salvage value/freight pending as against government response costs of $2,238,000; the total amount of the CWA §311 caps is not disclosed in the opinion but likely substantially exceeded the value/freight pending amount).
129. *Cf.* Nat'l Shipping Co. of Saudi Arabia v. Moran Mid-Atl. Corp., 924 F. Supp. 1436, 1447, 1996 AMC 2604, 2617-18 (E.D. Va. 1996), *aff'd sub nom. per curiam* Nat'l Shipping Co. of Saudi Arabia v. Moran Trade Corp. of Del., Nos. 96-1741, 96-1824, 1997 WL 560047, 1998 AMC 163, 27 ELR 21504 (4th Cir. Sept. 9, 1997). *Moran* demonstrates the restraint OPA's damages limitation regime imposes upon private claimants. An OPA claimant whose status liability of approximately $1,269,000 as an oil discharger was transferred to a nonwillful/nongrossly negligent third party, namely, a party liable solely for ordinary negligence, was nonetheless denied approximately $769,000 of this payout in its contribution action against the third party because OPA §§2702(d)(2)(A) and 2704(a) capped the third party's liability at $500,000.

no maritime remedy to the United States for recovery of response costs against an owner/operator).

> [*Oswego*] read[s] [§311] as we do, and concluded that its remedies section "preempted *the Government's* non-FWCPA [sic] remedies against a discharging vessel for cleanup costs." It does not speak at all to private remedies for private harms, just to whether the government can seek remedies unfettered by the limitations on the government's own remedies promulgated in [§311].[130]

If maritime rules were deemed displaced by §311, moreover, private victims of oil spills would be unfairly disadvantaged when, as in *B1 Bundle*[131] or under general maritime preemption principles, state remedies prove to be unavailable. Solicitous of the plight of the remediless private plaintiff in its *Baker* ruling, the Ninth Circuit declared that the "absence of any private right of action in the [Clean Water] Act for damage from oil pollution may more reasonably be construed as leaving private claims alone than as implicitly destroying them."[132]

But the harmony gracing *Baker*'s CWA/maritime law pairing flees with OPA's embrace of *private* claimants. The impressive benefits conferred on the private claimant under the OPA statutory tort remedy come at the price of the restrictions that OPA's §2704 damages limitation regime imposes on the dollar amount owed them by responsible parties.[133]

Other than its extension to private claimants, the OPA regime mirrors its CWA §311 counterpart, despite changes that broadened the statute's scope. *Metlife Capital Corp. v. M/V Emily S.* confirms that the FWPCA cases sustaining §311's displacement of maritime remedies are "persuasive [under OPA as well] because '[n]either the language of OPA nor its legislative history suggests that OPA's provisions should be construed contrary to the settled law applicable to FWPCA when OPA was enacted.'"[134] OPA §2702(b)'s damages were added to supplement pollution removal costs, for example, and damages caps were increased under OPA §2704. But *Metlife*, OPA's legislative history,[135] and OPA §2704 itself confirm that Congress remains as committed in OPA as it was in the CWA to balancing remedies with restraint.

Replicated in OPA, therefore, is CWA §311's familiar framework of strict liability, limited defenses, caps for removal costs as well as for OPA §2702(b)'s newly inaugurated *private* (and governmental) damages, and cancellation of these caps in the event, inter alia, of the discharger's "gross negligence" or "willful misconduct." With either gross negligence or willful misconduct, liability increases from the cap set by OPA to actual (namely, *compensatory*) removal costs or damages.[136] Additionally, Congress left no doubt that OPA expressly supersedes the Limitation of Liability Act.[137] The statute, its legislative history discloses, would "*virtually eliminate[ ] any meaningful liability on the part of the owner or operator and would unravel the balance of liability set forth herein*."[138]

Oswego ultimately premised the maritime pollution tort's displacement on the "inconsistencies" between the damages limitation requirements of the tort and of CWA §311. *Baker* escapes the inconsistencies *only* because the exclusion of private claimants as CWA plaintiffs also excluded the latter from the demands of the §311 regime. Were private claimants similarly excluded from OPA, *Baker* would persuasively have carried the day for *B1 Bundle* on this narrow question.

D. OCSLA and OPA: The Nonadmiralty Statutory Dimension of the Mixed Admiralty/Nonadmiralty BP Blowout

OPA and OCSLA do not take kindly to maritime law's supposed access to a parallel track coequal with these stat-

130. In re Exxon Valdez, 270 F.3d 1215, 1231, 2002 AMC 1, 18, 32 ELR 20320 (9th Cir. 2001), *aff'd sub nom.* Exxon Shipping Co. v. Baker, 554 U.S. 471, 2008 AMC 1521 (2008) (quoting *Oswego*, 664 F.2d at 344, 1982 AMC at 791). General maritime law's displacement in governmental actions under CWA §311 comports with numerous federal decisions holding that §311 impliedly or expressly supersedes the Limitation of Liability Act. *See, e.g.*, *In re Hokkaido*, 506 F. Supp. 631, 1981 AMC 1468 (expressly overriding); United States v. Dixie Carriers, Inc., 627 F.2d 736, 1982 AMC 409, 10 ELR 20935 (5th Cir. 1980) (impliedly overriding); *accord* 2 Schoenbaum, *supra* note 109, §18-3, at 293 n.27. Eschewing *B1 Bundle*'s silent canon error, *Dixie Carriers* grounded its holding on congressional intent as evidenced by this body's commitment to "achieve a balanced and comprehensive remedial scheme . . . by matching limited recovery with strict liability and unlimited recovery with proof of willful conduct." *Dixie Carriers*, 627 F.2d at 739, 1982 AMC at 413.

131. *See B1 Bundle*, 808 F. Supp. 2d 943, 951-58, 2011 AMC 2220, 2227-38, 41 ELR 20340 (E.D. La. 2011) (finding that BP's oil pollution source was outside of state territorial waters, hence, state law was preempted by general maritime law; alternatively, BP's discharge not being "within" a state leaves it unprotected by OPA §2718(a)(1)(A)'s savings provision).

132. *In re Exxon Valdez*, 270 F.3d at 1231, 2002 AMC at 17; *cf.* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 14 ELR 20077 (1984). *Silkwood* held that the Atomic Energy Act, 42 U.S.C. §2011, did not preempt state punitive damages remedies given "Congress's failure to provide any private federal remedy for persons injured by [Kerr-McGee's] conduct." *Id.* at 354. "It is difficult to believe," the Court continued, "that Congress would, without any comment, remove all means of recourse for those injured by illegal conduct." *Id.*

133. See the discussion *supra* note 129 concerning the denial to a nonnegligent discharging OPA claimant of more than half of its payments for response costs and discharge victim damages claims because OPA's damages limitation regime capped the negligent third party's liability at less than half of the claimant's OPA payout.

134. Metlife Capital Corp. v. M/V Emily S., 132 F.3d 818, 821, 1998 AMC 635, 639 (1st Cir. 1997) (quoting William M. Duncan, *The Oil Pollution Act of 1990's Effect on the Shipowner's Limitation of Liability Act*, 5 U.S.F. Mar. L.J. 303, 316 (1993)).

135. S. Rep. No. 101-94, at 13-14 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 735-36; H.R. Rep. No. 101-653, at 105 (1990) (Conf. Rep.), *reprinted in* 1990 U.S.C.C.A.N. 732, 783-85; In re Jahre Spray II K/S, Nos. Civ. A. 95-3495 (JEI), Civ. A. 95-6500 (JEI), 1996 WL 451315, at *4, 1997 AMC 844, 851 (D.N.J. Aug. 5, 1996) ("[V]arious government bodies devised modern legislative schemes that would supersede the Limited Liability Act and set liability limits that are more realistic when addressing an oil spill with a major environmental impact.").

136. OPA's text leaves no doubt that the "damages" to which OPA §2702(b) refers are *compensatory* damages only. See OPA §2701(3), which defines a "claim" as a "request . . . for compensation for damages or removal costs resulting from [a §2702(a)] incident"; OPA §2701(4), which defines "claimant" as "any person . . . who presents a claim for compensation under this subchapter"; and OPA §2701(5), which defines "damages" as "damages specified in §2702(b) of this title."

137. *See, e.g.*, OPA §2718(a), (c).

138. S. Rep. No. 101-94, at 13-14 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 736 (emphasis added); *cf.* In re Hokkaido Fisheries Co., 506 F. Supp. 631, 634, 1981 AMC 1468, 1472, 11 ELR 20657 (D. Alaska 1981) ("In the face of a Congressional design so clearly expressed, it would be incongruous to hold that the 130 year old Limitation Act could frustrate the entire scheme.").

utes.[139] The proviso to OPA's admiralty savings clause is hostile to maritime rules that offer solutions "otherwise [than those] provided" for by the statute's provisions. Moreover, OCSLA's legislative history, as confirmed by the Supreme Court in *Rodrigue v. Aetna Casualty & Surety Co.*[140] and *Herb's Welding, Inc. v. Gray*,[141] denies camaraderie between admiralty law and OCS petroleum development. *Executive Jet* amplifies the tension with its counsel that the fit is best when the issue falls within admiralty law's core interests and experience, and least when it does not.

These observations, detailed at length elsewhere,[142] need detain us only briefly here. Congress disdained admiralty law's fitness to govern OCS drilling platform activity as well as the OCS itself as far back as the 1953 debates on OCSLA's adoption. It rejected a bill that proposed the admiralty law option in hearings, which included testimony that "[m]aritime law in the strict sense has never had to deal with the resources in the ground beneath the sea, and its whole tenor is ill adapted for that purpose."[143] In *Rodrigue*, the Supreme Court invoked this statement to conclude that "the most sensible interpretation of Congress' reaction to this testimony is that admiralty treatment was eschewed altogether"[144] and added that "maritime law [is] inapposite" as a governance vehicle for OCS activities occurring on OCS drilling platforms.[145] In its subsequent decision in *Herb's Welding*, the Court excoriated as "untenable" the claim that "offshore drilling is maritime commerce."[146] The Court cited *Rodrigue* as establishing that OCSLA's legislative history "at the very least forecloses the . . . holding that offshore drilling is a maritime activity,"[147] and added for good measure that "exploration and development of the Continental Shelf are not themselves maritime commerce."[148]

Executive Jet endorses in more contemporary form Justice [Oliver Wendell] Holmes' demystifying recognition a half-century earlier that admiralty law is not a "*corpus juris*," but rather "a very limited body of customs and ordinances of the sea."[149] The opinion frowns on admiralty law's governance of matters that are "only fortuitously and incidentally connected to navigable waters and [bear] no relationship to traditional maritime activit[ies]."[150] It applauds admiralty law's governance of matters that it is competent to address on the basis of its accumulated expertise and experience. Hence, its observation: "Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage."[151] In a subsequent iteration of the "substantial relation" test, the Court commented that justification for admiralty law's application exists if "a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that *the reasons for applying special admiralty rules would apply in the suit at hand*."[152]

Executive Jet's point, like that of this Article overall, is straightforward and quite obvious. Core rationality calls for choosing the tool most fitting for the task at hand, and most squarely aligned with the Court's displacement law and policy.

139. OCSLA finds its constitutional footing in the Commerce Clause. *See* Smith v. Pan Air Corp., 684 F.2d 1102, 1107 n.12, 1983 AMC 2836, 2842 n.12 (5th Cir. 1982) (finding that OCSLA "depends on national sovereignty and the commerce clause"). Congress' 1978 Amendment of OCSLA confirmed the statute's shared footing under the Property Clause. *See* Costonis, *The Macondo Well Blowout*, *supra* note 15, at 541. OPA provisions falling outside of admiralty law pursuant to OPA §2751(e) are rooted in the Commerce Clause; the Property Clause is also engaged in the Macondo OCS blowout insofar as OPA governs the tortious consequences of oil discharges associated with OCS drilling activities. *See* OPA §2701(25) (defining "Outer Continental Shelf facility"); *id.* §2701(20) (defining "natural resources" to include "such resources belonging to, managed by . . . or otherwise controlled by the United States"); *id.* §2704(c)(3) (barring damages limitations for an "OCS facility or vessel"). OPA's nonadmiralty roots also appear in the statute's indifference to "uniformity," as this admiralty concept is venerated in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 1996 AMC 2076 (1917), an opinion *B1 Bundle* cited alongside *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), as "still retain[ing] 'vitality.'" 808 F. Supp. 2d 943, 954 n.7, 2011 AMC 2220, 2232 n.7, 41 ELR 20340 (E.D. La. 2011) (quoting Askew v. Am. Waterways Operators, Inc., 411 U.S. 325, 344, 1973 AMC 811, 825, 3 ELR 20362 (1973)); *accord* Peltz, *supra* note 105, at 126. OPA authorizes the application of (1) the differing laws of *all* states experiencing tortious impacts from a single oil discharge incident within their waters, *see* OPA §2718(a), (2) federal nonadmiralty statutory law pursuant to OPA/OCSLA; *and* (3) general maritime law that often conflicts with OPA, if *B1 Bundle*'s nondisplacement position is correct. "Admiralty uniformity" in such a setting is illusory. The species of "uniformity" that *is* appropriate in the *B1 Bundle* context occurs on the *federal* plane alone in relation to OPA's status as a "single *uniform* federal law," see authority cited *supra* note 67, which necessarily excludes general maritime law's supposed status as an additional federal law track.

140. 395 U.S. 352, 1969 AMC 1082 (1969).

141. 470 U.S. 414, 1985 AMC 1700 (1985).

142. *See* Costonis, *The Macondo Well Blowout*, *supra* note 15, at 523-24.

143. *Outer Continental Shelf: Hearings Before the S. Comm. on Interior & Insular Affairs on S. 1901 & S. 1901 Amendment*, 83rd Cong. 668 (1953) (statement of Richard Young, Esq., Member of the New York State Bar).

144. 395 U.S. at 365 n.12, 1969 AMC at 1091 n.12.

145. *Id.* at 363, 1969 AMC at 1090.

146. 470 U.S. at 421, 1985 AMC at 1705.

147. *Id.* at 422, 1985 AMC at 1706.

148. *Id.* at 425, 1985 AMC at 1708-09. Despite the Fifth Circuit's former resistance, *see* Costonis, *And Not a Drop to Drink*, *supra* note 15, at 15-20, it now acknowledges that under Supreme Court precedent, offshore OCS drilling is not a "maritime activity," nor is it considered "maritime commerce." *See* Barker v. Hercules Offshore, Inc., 713 F.3d 208, 216, 230, 2013 AMC 946, 955, 978 (5th Cir. 2013) (refusing to remand to state court an action for injury to a worker atop an OCS jack-up rig).

149. S. Pac. Co. v. Jensen, 244 U.S. 205, 220, 1996 AMC 2076, 2087 (1917) (Holmes, J., dissenting).

150. Exec. Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 273, 1973 AMC 1, 19 (1972).

151. *Id.* at 270, 1973 AMC at 17.

152. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 539-40, 1995 AMC 913, 922-23 (1995) (emphasis added).