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

by John J. Costonis

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Summary

Part I of this two-part study[1] probed within the context of the 2010 BP Macondo Well blowout whether and to what extent the Oil Pollution Act of 1990 (OPA) displaces general maritime law negligence tort remedies for private economic and property losses. Part I disagreed with the U.S. District Court's ruling in *In re Oil Spill by the Oil Rig Deepwater Horizon* (hereinafter *B1 Bundle*) that these remedies survive OPA essentially unscathed. Part II's province is twofold. It critiques the ruling's "silence means approval" canon on the basis of a framework it constructs to illuminate otherwise indeterminate U.S. Supreme Court displacement jurisprudence and policy. It then turns to *B1 Bundle*'s reliance on the Supreme Court's rulings in *Exxon Shipping Co. v. Baker* and *Atlantic Sounding Co. v. Townsend*, exposing palpable inconsistencies—termed here "category errors"—that undermine the precedential force attributed to them by *B1 Bundle*.

I. Introduction

Reading the *B1 Bundle* opinion is akin to arriving at a theater after the first act, and observing what the actors are doing without quite understanding why. *B1 Bundle*'s conclusions on displacement are transparent enough, but how are we to understand the Oil Pollution Act's (OPA's)[2] abandonment in the wings when the U.S. Congress blasted through a two-decade stalemate to award OPA the starring role? It's like expecting to find Hamlet on stage and getting Banquo's Ghost instead. The current Article (Part II) seeks to reconstruct the missing "first act" by stepping back from the opinion's conclusions to survey prior issues of displacement jurisprudence and policy that frame the original choices available for the play's narrative. The trip backstage is necessary to decode *B1 Bundle*'s selective and often puzzlingly elliptical narrative.

In both anticipating and preceding consideration of *Exxon Shipping Co. v. Baker*[3] and *Atlantic Sounding Co. v. Townsend*,[4] the current section undertakes four related tasks. The first employs the concepts of "silence" and "speaking directly" to a "question" to establish guidelines pertinent to various dimensions of the displacement lexicon. The second brings greater precision to the manner in which the U.S. Supreme Court identifies and gauges overlap or cohabitation of the same "space" by a federal statute and its paired common-law/general maritime law rule. The third highlights the threat to separation-of-powers values that such overlapping norms often pose. The last attends to the differing roles of the judge when acting as an autonomous lawmaker, on the one hand, and as an agent of the legislature filling interstitial gaps, on the other.

II. Making Sense of the Displacement Lexicon

The displacement lexicon's key terms include "silence"; "comprehensive"; statutory "scope"; "speaking directly" to a "matter," "question," or "subject"; "fields," whether "entire"

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1. John J. Costonis, *The BP* B1 Bundle *Ruling: Federal Statutory Displacement of General Maritime Law (Part I)*, 44 ELR 10022 (Jan. 2014) (hereinafter *Ruling I*). For the consolidated publication in single-article form of this Article and of *Ruling I*, see John J. Costonis, *The BP* B1 Bundle *Ruling: Federal Statutory Displacement of General Maritime Law*, 38 Tul. Mar. L.J. 1 (2013) (hereinafter *BP Bundle*).
2. 33 U.S.C. §§2701-2761, ELR Stat. OPA §§1001-7001.
3. 554 U.S. 471, 2008 AMC 1521 (2008).
4. 557 U.S. 404, 2009 AMC 1521 (2009).

or otherwise, being "occupied"; "judicial law making" and "interstitial gap filling" or, in Justice Oliver Wendell Holmes' memorable phrase, "molar to molecular motions"[5]; and, finally, the statutory "windows," wide or narrow, through which maritime law seeks passage and cohabitation with its paired statute. Dispersed throughout federal court displacement decisions like the shards of a shattered window, these terms challenge the following paragraphs to discern and give order to what on closer examination is, happily, what turns out to be the core sense of their seemingly random use.

A. *Silence*

1. Dueling Canons

Silence, it has been observed, "is susceptible to other interpretations. . . . 'Silence may indicate that the question never occurred to Congress at all, or it may reflect mere oversight . . . or it may demonstrate deliberate obscurity to avoid controversy that might defeat the passage of legislation . . . .'"[6] *B1 Bundle* interprets OPA's silence as approval of matters not expressly negated, observing with respect to the statute's muteness on punitive damages, for example, that "Congress knows how to proscribe punitive damages when it intends to."[7] Of course, one might as easily embrace the opposite outcome, taking refuge in the sonorous Latin of *expressio unius est exclusio alterius*.

In one of his best-known forays into legal realism, Karl Llewellyn demonstrated that, by themselves, such canons are simply another way of stating a conclusion, not of credibly establishing or proving one. In line with Llewellyn's exercise of "opposing canons,"[8] but limiting it to two examples only, consider the following pairings:

- *For non-displacement of prior law*: "Congress thus demonstrated that it was capable of pre-empting a particular area when it chose to do so."[9]

- *For displacement of prior law*: "[I]t is obvious that, if Congress believed punitive damages necessary to eliminate discrimination in employment based on age, it knew exactly how to provide for them."[10]

- *For non-displacement of prior law*: "Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."[11]

- *For displacement of prior law*: "In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remed[y] it considered appropriate."[12]

F. Scott Fitzgerald offers us an exit from the futility of starting, rather than ending, a displacement inquiry with such canons: "Begin with an individual, and before you know it you find that you have created a type; begin with a type, and you find that you have created—nothing."[13] The canon is a "type"; the particular dispute is the "individual." Only when the canon is tethered to and deeply informed by the dispute does the canon qualify as a guide for plausibly decoding statutory silence. But to begin with the canon—the "type"—is to create "—nothing."

2. "Speaking Directly"

B1 Bundle inaccurately portrays the Supreme Court's "speak[ing] directly" condition as requiring, again, that Congress must expressly proscribe prior federal common or maritime law. But "speaking directly" requires instead that *Congress address in a manner incompatible with the prior judge-made law the same question or matter spoken to by that law*. Hence, the Court's quotation in *Milwaukee II* from its prior admiralty decision in *Mobil Oil Corp. v. Higginbotham*: the issue is "not whether Congress had *affirmatively proscribed* the use of federal common law," but instead "whether the legislative scheme 'spoke directly to [the] question.'"[14]

Higginbotham held that the U.S. Court of Appeals for the Fifth Circuit overstepped its admiralty law making bounds by approving loss-of-society damages under a maritime law wrongful death track when, under the Death on

5. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221, 1996 AMC 2076, 2087 (1917) (Holmes, J., dissenting).
6. In re Tug Allie-B, Inc., 114 F. Supp. 2d 1301, 1304, 2001 AMC 89, 92-93 (M.D. Fla. 2000) (alteration in original) (quoting Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1085 (5th Cir. 1980)).
7. In re Oil Spill by the Oil Rig "Deepwater Horizon" (*B1 Bundle*), 808 F. Supp. 2d 943, 962, 2011 AMC 2220, 2245 (E.D. La. 2011).
8. Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals, app. C. (1960).
9. City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304, 341 n.11, 11 ELR 20406 (1981) (Blackmun, J., dissenting).
10. Dean v. Am. Sec. Ins. Co., 559 F.2d 1036, 1039 (5th Cir. 1977).
11. Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783, 1952 AMC 1283, 1286 (1952).
12. Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 15 (1981).
13. F. Scott Fitzgerald, *The Rich Boy*, *in* All the Sad Young Men 1, 1 (1926).
14. *Milwaukee II*, 451 U.S. at 315 (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625, 1978 AMC 1059, 1065 (1978) (emphasis added)). The Court likewise does not require express statutory language to establish the statutory *creation* of a remedy. Hence, the Court's statement: "It is unnecessary to discuss at length the principles set out in recent decisions concerning the recurring question whether Congress intended to create a private right of action under a federal statute without saying so explicitly. The key to the inquiry is the intent of the Legislature." *Middlesex Cty. Sewerage Auth.*, 453 U.S. at 13; *accord* Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16 (1979).

the High Seas Act (DOHSA),[15] Congress permitted only pecuniary damages.[16] DOHSA, the Court reasoned, spoke incompatibly to the same question that the maritime law tort addressed: the elements appropriate for inclusion in a wrongful death award.[17] But DOHSA contains no language making an express proscription a condition precedent to a displacement outcome. That is, DOHSA does not state that a "maritime law remedy, whether enacted prior to or following DOHSA's enactment, that fails to respect section 30303's 'pecuniary' limitation is hereby displaced."[18] This is the sense in which DOHSA is "silent" on the issue. The outcome was the work of the Court, which, sensitive to Congress' law making priority under separation-of-powers principles, declared that the statutory/maritime law difference *by itself* was sufficiently indicative of Congress' intent to justify the Court's ruling.[19]

This analysis undergirds the Court's subsequent *Milwaukee II* declaration that "the question whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the *scope* of the legislation and whether the *scheme* established by Congress addresses the problem formerly governed by federal common law."[20] "Scope" and "scheme" are not themselves express congressional directives requiring displacement. Rather, they are intermediate elements that may support this outcome despite the "silence" created by the absence of an express congressional demand for displacement.

Milwaukee II and *Higginbotham*'s three lessons for the OPA/*B1 Bundle* displacement inquiry are straightforward. First, *B1 Bundle* begs the question in its insistence that anything short of Congress' express proscription of the maritime oil pollution tort or any of its components creates a "silence," which in and of itself saves the tort from displacement. Second, the meaning of silence can only be determined by disciplined scrutiny of OPA's background, goals, and language, undertaken with a full appreciation of the thumb-on-the-scale impact of the separation-of-powers values at stake. Third, express repudiation certainly affords one route to displacement, but it is hardly the only route. In fact, the "speaking directly" condition itself is but one of various alternatives for implementing the Court's overall interpretative standard of "tak[ing] . . . the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and giv[ing] to it such a construction as will carry into execution the will of the Legislature."[21]

B. Gauging the Statutory/General Maritime Law Overlap

The spatial imagery common to the displacement lexicon calls to mind a two-circle Venn diagram that plots the space occupied by the federal statute and the general maritime rule, and maps their area of overlap. The federal statute's dimensions are measured by the familiar terms "comprehensive"; "scope"; "field" ("entire" or otherwise); "window"; and "matter," "subject," or "question." Each of the last three terms serves the common function of locating a subfield or even a single "point" at which the statute and maritime rule converge, rather than a statutory "field" so expansive or "entire" that it necessarily subsumes the likely more limited space claimed by the maritime rule.

Appreciating the variability of boundary-setting for the "question" is essential because the "question" may present itself as narrowly as *Higginbotham*'s "loss of society" damages in a wrongful death action,[22] or as broadly as the U.S. Environmental Protection Agency's responsibility to ensure the health of the nation's waters[23] or to abate carbon dioxide emissions into the atmosphere.[24] If the "question" is narrow, a statute speaks directly to it simply by naming the topic or its equivalent, as witnessed by *Higginbotham*'s restricted focus on DOHSA's reference to "pecuniary damages."

Setting the boundaries of the "question" is more demanding when it engages an entire field, as in the foregoing examples regarding abatement of carbon dioxide emissions or the pollution of the nation's waters. The task commences by confirming that the question at hand is indeed the federal statute's subject. Then, following *Milwaukee II*'s language above, further confirmation is necessary that the legislative scope and scheme, as the pertinent act defines both, engage the same "matter" or "question" as that targeted by the judge-made rule.[25]

15. 46 U.S.C. §30303 (2006).
16. *Higginbotham*, 436 U.S. at 623-26, 1978 AMC at 1064-66.
17. *Id.*
18. For an example of a statutory provision that, in addressing remedies available under the Longshoremen and Harbor Workers' Compensation Act, ch. 509, 44 Stat. 1424 (1927) (codified as amended at 33 U.S.C. §§901-950 (2006) *does* contain such language, see 33 U.S.C. §905(b) (2006) ("The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.").
19. *Higginbotham*, 436 U.S. at 623-26, 1978 AMC at 1064-66.
20. 451 U.S. at 315 n.8 (emphasis added). In a setting closer to the Macondo scenario, *United States v. Oswego Barge Co.*, 664 F.2d 327, 1982 AMC 769 (2d Cir. 1981), defines the "question" posed by the FWPCA oil pollution tort, OPA's predecessor, in its statement that "the FWPCA legislates on the subject of recovery by the United States of its costs of cleaning up oil spilled into American waters. Section 1321(f) establishes a comprehensive remedial scheme providing for both strict liability up to specified limits and recovery of full costs upon proof of willful negligence or willful misconduct within the privity and knowledge of the owner." *Id.* at 339-40, 1982 AMC at 784. Adjusting for OPA's greater detail and its addition of the private action for property and economic loss, the FWPCA definition of the "question" is an apt model for OPA as itself occupying a subfield akin to that of the FWPCA's §1321(f). *Gabarick* handles the task more modestly because the "space" it focuses on—duplication by maritime law of OPA's "covered damages"—is more modest. Hence, *Gabarick*'s declaration that "OPA defines its scope explicitly through its statutory text. It defines what damages are covered and the process for pursuing a claim, and allows suit in federal court should that process be unsuccessful." Gabarick v. Laurin Mar. (Am.) Inc., 623 F. Supp. 2d 741, 748, 2009 AMC 1014, 1024 (E.D. La. 2009).
21. Kokoszka v. Belford, 417 U.S. 642, 650 (1974) (quoting Brown v. Duchesne, 60 U.S. (19 How.) 183, 194 (1857) (internal quotation marks omitted)).
22. *See Higginbotham*, 436 U.S. 618, 1978 AMC 1059.
23. *Milwaukee II*, 451 U.S. 304.
24. *See* Am. Electric Power Co. v. Connecticut, 131 S. Ct. 2527, 41 ELR 20210 (2011).
25. For an instance of a legislative scheme that failed to meet the test in text, see *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 236-41 (1985) (explaining that the Non-Intercourse Acts did not "speak directly" to the elimination of a tribe's federal common-law right to bring possessory land actions).

1. "Windows": A Bar to the Maritime Tort as a Parallel Track to OPA

"Windows" in a federal statute offer salvation for maritime rules only if the law making rules can "fit" through them in order to take up residence alongside the statute. As Judge Jon O. Newman portrays the metaphor in *United States v. Oswego Barge Corp.*[26]

> In determining whether statutes leave room for judge-made law, courts sometimes confront a narrow "window." Judge-made law may be fashioned when Congress has provided "enough federal law" so that a legislative purpose is clear, but not when Congress has provided so much federal law that its detail or comprehensiveness would be undermined by common law supplements.[27]

This image, which is spatially simple but conceptually subtle, appears to apply to gap-filling and to law making. If the former, the image is of less interest here because the general maritime law tort exalted in *B1 Bundle* is indisputably a maritime law making exercise.

Oswego and *Higginbotham* advise that OPA lacks sufficient space through which the maritime tort can pass as it must to supplement OPA's statutory tort. *Oswego* fixes the window's lower and upper heights in its direction that Congress must provide "'enough federal law' so that a legislative purpose is clear," but must avoid providing "so much federal law that its detail or comprehensiveness would be undermined by common law supplements."[28] By these measures, OPA lacks a window of requisite size because OPA not only addresses the same question as the maritime tort, but OPA's "answer" overwhelms the maritime tort's "answer" in breadth and often incompatible detail.[29]

Higginbotham's phrasing differs somewhat from *Oswego*'s, but its meaning is more pointed still for this Article's purpose:

> There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.[30]

One way to explore the implications of this language and its link to the windows metaphor is to suppose that OPA *preceded* the attempt by lower federal court judges to establish the very maritime pollution tort under discussion. Would this post-OPA judicial law making exercise survive the objection that Congress has "provided 'enough federal law' so that a legislative purpose is clear"? The hypothetical is the stuff of fantasy, of course. It is difficult to believe that, post-OPA, the lower federal courts would attempt to stitch the threadbare maritime tort over OPA's elaborate tapestry, or that the Supreme Court would hesitate to declare the tort displaced if they did.

2. "Comprehensiveness": The Spatial Continuum and Its Increments

"Comprehensive," the workhorse of the lexicon, deserves its own category in light of the frequency of its use and the variety of meanings assigned to it. In countless decisions, it merely describes a statute of substantial breadth or detail.[31] Alternatively, it may be used neutrally in this sense, but the opinion that employs it may nonetheless categorize the pertinent statute as occupying essentially an entire field.[32] Or it may be used to justify a displacement conclusion on its own footing, despite acknowledgement that the statute occupies less than an entire field.[33]

The root offense posed by the comprehensiveness objection is that the maritime rule trespasses upon the legislative powers vested in Congress by Article I, Section 1 of the U.S. Constitution. Behind the trespass, the Supreme Court reminds us in *Milwaukee II*, lies the issue of "*which branch of the Federal Government is the source of federal law*."[34] Obviously, the content of a judge-made rule that openly conflicts with a statute would not survive displacement. But this is because conflict affords the most brazen instance of judicial trespass. Outright conflict, of which

26. 664 F.2d 327, 1982 AMC 769 (2d Cir. 1981).
27. *Id.* at 339 n.15, 1982 AMC at 783 n.15 (citation omitted) (quoting United States v. Republic Steel Corp., 362 U.S. 482, 492, 1961 AMC 545 (1960) (AMC reporter summarizing case)).
28. *Id.* (quoting *Republic Steel*, 362 U.S. at 492).
29. *See Ruling 1*, *supra* note 1, at p. 24 n.115 (2013) (inventorying OPA's key substantive and procedural requirements).
30. *See* Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625, 1978 AMC 1059, 1065 (1978).
31. *B1 Bundle* would appear to fall within this category in view of its acknowledgements both that "OPA is a comprehensive statute addressing responsibility for oil spills, including . . . liability for . . . economic damages incurred by private parties," *B1 Bundle*, 808 F. Supp. 2d 943, 959, 2011 AMC 2220, 2240 (E.D. La. 2011), and that the U.S. Senate report characterized OPA as a "single Federal law providing . . . liability for oil pollution." *Id.* A non-displacement ruling in the face of what would appear to be extraordinary concessions to the contrary evidences the iron grip of the opinion's silence canon and to problematic claims favoring the precedential value of *Baker* and *Townsend*.
32. *See Milwaukee II*, 451 U.S. 304, 317 (1981).
33. This usage is routine in opinions favoring OPA's preemption of the maritime tort, which reason that OPA does not cover the entire field because it excludes such additional concerns as personal injury, death, or vessel collisions. *See, e.g.*, Gabarick v. Laurin Mar. (Am.) Inc., 623 F. Supp. 2d 741, 745-46, 748, 2009 AMC 1014, 1019-21, 1024-25 (E.D. La. 2009); Nat'l Shipping Co. of Saudi Arabia v. Moran Mid-Atl. Corp., 924 F. Supp. 1436, 1447, 1450, 1996 AMC 2604, 2618, 2622 (E.D. Va. 1996), *aff'd per curiam sub nom.* 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). I prefer a different view of the matter by defining the space, subfield, or field on the basis of what Congress *intended the statute to cover*. Because no statute covers everything, a test that requires that it do so as a condition of occupying a field can never be met. The proper question is whether the statute exhausts all pertinent points of the field or subfield Congress selected for its attention. From this perspective, the OPA statutory tort, which exhaustively establishes a remedial regime for economic and private losses attendant upon tortious oil discharges, is not rendered less comprehensive because it does not cover other matters (for example, personal injury, death, or collision) that Congress never intended for it to cover. For the view that, within the range of its intended coverage, OPA is arguably even more comprehensive than pre-OPA §311 of the FWPCA as to particular elements, see *infra* notes 35 and 36 and accompanying text.
34. 451 U.S. at 319 n.14 (emphasis added).

there is a great deal in the OPA/maritime rule pairing, is only one form of incompatibility. *Milwaukee II*'s language warrants opposition to various forms of judicial law making that derogate from Congress' primacy, in addition to blatant inconsistency or conflict.

The term "comprehensive," like the foregoing terms "windows" and "question" (to which a statute "speaks directly"), engages various *incremental points along a single continuum*, rather than isolated elements, each with its own axis. The capacity for displacement exists, therefore, whether a statute occupies an entire field or a subfield, if you wish, or is viewed as "speaking directly" to some specific remedial component. The purpose at hand is to determine Congress' intent, not to make a fetish of one or more of these labels, as *B1 Bundle* does, by exiling OPA to a nondisplacement no-man's-land somewhere between "occupation of an entire field" and "speaking directly" to some particular feature of the maritime tort.

Moreover, the same statute or statutory element may occasionally target *multiple points* along the continuum, depending upon whether the inquiry's target is the statute overall or one of its discrete elements. *Milwaukee II*, for example, describes the Federal Water Pollution Control Act (FWPCA)[35] *both* as occupying its entire field[36] *and* as speaking directly to the question addressed by the displaced common-law rule.[37]

Consider the alternative configurations of OPA that are in play in *B1 Bundle* in light of this continuum. If OPA's §2702(b) "covered damages" is the target, it makes perfect sense for *Gabarick v. Laurin Maritime (America) Inc.*[38] to describe OPA as "speaking directly" to this discrete component on the same basis that *Higginbotham* described DOHSA §30303 as "speaking directly" to "pecuniary damages." If the continuum is accessed at its uppermost point—occupation of an "entire field"—*B1 Bundle* correctly excludes OPA because, unlike the FWPCA, for example, OPA limits its coverage to a single pollutant.[39]

But OPA also accesses the continuum at the "subfield" level in a space earlier defined as *liability and compensation for private economic and property losses occasioned by seaborne petroleum discharges*. This subfield, which precisely duplicates the content of the *B1 Bundle*-certified claims litigated in the eponymous proceeding, is amply occupied by OPA §2702 and its associates. *Gabarick* rightfully emphasizes that the language of §§2702(a), 2702(b), 2713(a), and various associated provisions is categorical and mandatory.

Depending upon the element chosen for comparison, moreover, OPA is either *more* or as inclusive as the FWPCA within OPA's subfield. OPA's categories of economic and property injuries go well beyond the FWPCA's narrow focus on governmental cleanup cost recovery. OPA radically oversteps the FWPCA, moreover, by embracing the *private* claimants and *private* remedies. OPA aggressively *proscribes* virtually any actual or threatened private petroleum discharge, while the FWPCA *allows* discharge, by permit, of a broad range of pollutants.[40] OPA and the FWPCA join together, however, in their vast geographic range: their respective writs run to the nation's inland waters, the OCS' living and nonliving resources, ocean waters out to 200 miles offshore, and all discharges into or along navigable waters, adjoining shorelines, and even the ambient air above both.[41] It is unlikely that there are many other subfields defined as sweepingly in the *United States Code*.

C. Congress and the Federal Judiciary as "Lawmakers"

In the absence of a constraining statute, the Admiralty Clause's grant of jurisdiction elevates general maritime law over other forms of federal common-law making in displacement disputes.[42] Under appropriate circumstances, the authority may afford "[a] narrow exception to the limited law making role of the federal judiciary," the Supreme Court declared in *Northwest Airlines, Inc. v. Transp. Workers Union of Am.*, because "[w]e consistently have interpreted the grant of general admiralty jurisdiction to the federal courts as a proper basis for the development of judge-made rules of maritime law."[43] Nor can the resilience of at least some "long-established" admiralty or general maritime principles be ignored.[44] None are as

35. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
36. *Id.* at 318 ("Congress' intent" was to create "an all-encompassing program of water pollution regulation.").
37. *Id.* at 313, 315 (applying the *Higginbotham* "speaking directly" standard to the FWPCA). *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 2008 AMC 1521 (2008), likewise appears to regard as compatible options the "occup[ation of] the entire field" with "speak[ing] directly" on displacement gauges. *See id.* at 489, 2009 AMC at 1532.
38. 623 F. Supp. 2d 741, 2009 AMC 1014 (E.D. La. 2009).
39. *B1 Bundle*, 808 F. Supp. 2d 943, 961, 2011 AMC 2220, 2244-45 (E.D. La. 2011).
40. *See* Michael P. Healy, *Still Dirty After Twenty-Five Years: Water Quality Standard Enforcement and the Availability of Citizen Suits*, 24 Ecology L.Q. 393 (1997).
41. *See* S. Rep. No. 101-94, at 11 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 733. Among the various reasons why OPA is premised in part, and OCSLA in whole, on Congress' nonadmiralty constitutional powers is their application to the OCS, which effectively constitutes U.S. public *lands*, and to the *airsheds* above the waters adjacent to the OCS. Control of ambient air quality above OCS facilities is prescribed by OCSLA §1334(a)(8).
42. *See* Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 285, 1952 AMC 1, 3-4 (1952); United States v. Oswego Barge Corp., 664 F.2d 327, 335-39, 1982 AMC 769, 777-83 (2d Cir. 1981); Henry M. Hart Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 496-97 (1954).
43. Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 95-96 (1981). In *United States v. Reliable Transfer Co.*, 421 U.S. 397, 1975 AMC 541 (1975), the Court approved the substitution of the general maritime law rule of proportional fault for the former maritime rule of divided damages, stating that "the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and 'Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law.'" *Id.* at 409, 1975 AMC at 550 (quoting Fitzgerald v. U.S. Lines Co., 374 U.S. 16, 20, 1963 AMC 1093, 1097 (1963)).
44. 343 U.S. 779, 1952 AMC 1283 (1952), in which the Court accompanied its ruling that a shipowner's expenses could not be set off against a seaman's wages and transportation allowance, with the observation, "Statutes which invade. . . general maritime law [respecting maintenance and cure] are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Id.* at 783, 1952 AMC at 1286.

venerated as rules pertaining to the welfare of seamen, the "wards of admiralty."[45]

But federal judges' law making powers are no match for those of Congress when their exercise threatens or breaches separation-of-powers boundaries. *Northwest Airlines* counsels that "[e]ven in admiralty . . . where the federal judiciary's law making power may well be at its strongest, it is our duty to respect the will of Congress."[46] *East River S.S. Corp. v. Transamerica Delaval, Inc.* drives the nail home with its iconic statement that only "[a]bsent a relevant statute, [does] the general maritime law, as developed by the judiciary appl[y]."[47]

Maritime law principles that Congress concludes no longer reflect the technological, environmental, or other needs of the age, moreover, are not shielded from displacement simply by reason of their vintage. Otherwise, Congress would have exceeded its powers in displacing the federal government's former maritime remedies by CWA §311. The *Robins Dry Dock & Repair Co. v. Flint*[48] rule and the 1851 Limitation of Liability Act, moreover, boast longevities of decades or over a century and a half, respectively. In the 1990 OPA statute, however, Congress scuttled both,[49] demonstrating that vintage alone hardly guarantees nondisplacement, and may well preordain it. One might argue, however improbably, that both survive OPA on their supposed maritime parallel track, but certainly *not* on the ground that Congress lacks power to displace or modify them simply because they predate OPA. What counts is not age, but Congress' assessment of the former rule's concordance with current values.[50] This principle is amplified when Congress expressly *excludes* admiralty law's governance of those OPA elements falling within the OPA §2751(e)'s proviso as matters for which OPA "otherwise provides."

Pertinent to the discussion as well is the Court's endorsement in appropriate instances of judicial law making as a *placeholder*, terminable upon Congress' later passage of legislation speaking to the same issue. Illustrative are the Court's recurring portrayals of judicial law making as a response to necessity or compulsion created by congressional inaction,[51] and its willingness, if not enthusiasm, to have the federal courts bow out as the congressional cavalry takes charge of the battle. *Milwaukee II* installs this theme as a staple of the Court's displacement jurisprudence.

> We have always recognized that federal common law is "subject to the paramount authority of Congress." It is resorted to "[i]n [the] absence of an applicable Act of Congress," and because the Court is compelled to consider federal questions "which cannot be answered from federal statutes alone." Federal common law is a "necessary expedient," and "when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of law making by federal courts disappears."[52]

These sentiments inform the modern Court's understanding of the federal statute/general maritime rule pairing as well.[53] Hence, *Milwaukee II*'s reliance on a prior admiralty decision, *Higginbotham*, to accord primacy to congressional law making. Adverting to the unavailability of legislative codes and statutes,[54] *Higginbotham* repeats that the absence of a "comprehensive maritime code" compels general maritime law making.[55] But it too insists that the rule formulated in this exercise must yield upon Congress' adoption of a statute that "speak[s] directly" to the matter addressed by the maritime rule.[56]

45. The Court's solicitude for seamen anchors the entire body of its remedial jurisprudence dealing with this distressed employee class.
46. *Nw. Airlines*, 451 U.S. at 96.
47. *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864, 1986 AMC 2027, 2032 (1986); *accord* Miles v. Apex Marine Corp., 498 U.S. 19, 24, 1991 AMC 1, 4 (1990); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 624-25, 1978 AMC 1059, 1064-66 (1978).
48. 275 U.S. 303, 1928 AMC 61 (1927).
49. *See* OPA §2702(b)(2)(E) (eliminating the *Robins* requirement that the claimant's *own* property must be damaged); *id.* §2718(a), (c) (immunizing state or federal liability additional to OPA liability from restriction by the Limitation of Liability Act). *B1 Bundle* agrees that OPA itself supersedes both elements, but only under the OPA track. *See* 808 F. Supp. 2d 943, 959, 2011 AMC 2220, 2240, 41 ELR 20340 (E.D. La. 2011).
50. As the principle was classically formulated by the Court: "It cannot be supposed that the framers of the Constitution contemplated that the [admiralty] law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed." The Lottawanna, 88 U.S. (21 Wall.) 558, 577, 1996 AMC 2372, 2381 (1874). More recently, the Court has held that agreements concerning transportation arrangements are not disqualified as "maritime" contracts in consequence of their multimodal character. *See* Norfolk S. Ry. Co. v. James N. Kirby Pty Ltd., 543 U.S. 14, 25, 2004 AMC 2705, 2712 (2004).

> While it may once have seemed natural to think that only contracts embodying commercial obligations between the "tackles" (*i.e.*, from port to port) have maritime objectives, the shore is now an artificial place to draw a line. Maritime commerce has evolved along with the nature of transportation and is often inseparable from some land-based obligations. The international transportation industry "clearly has moved into a new era—the age of multimodalism, door-to-door transport based on efficient use of all available modes of transportation by air, water, and land." . . . *Contracts reflect the new technology*, hence the popularity of "through" bills of lading, in which cargo owners can contract for transportation across oceans and to inland destinations in a single transaction.

Id. at 25-26 (emphasis added) (quoting 1 Thomas J. Schoenbaum, Admiralty and Maritime Law 589 (4th ed. 2004)).

51. *See, e.g.*, Illinois v. City of Milwaukee, 406 U.S. 91, 107 n.9 (1972); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 469 (1942) (Jackson, J., concurring); *cf.* Comm. for the Consideration of the Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1008 (4th Cir. 1976) (en banc).
52. *Milwaukee II*, 451 U.S. 304, 313-14 (1981) (first alteration in original) (citations omitted) (quoting New Jersey v. New York, 283 U.S. 336, 348 (1931); Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943); *D'Oench, Duhme & Co.*, 315 U.S. at 469; *Train*, 539 F.2d at 1008).
53. Because "[t]he Court has frequently stated that 'Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law,'" Judge Sloviter observed: "[T]he absence of statutory law [obligates] the Court . . . to make law, and it deems itself free to formulate flexible and fair remedies in the law maritime." Glus v. G.C. Murphy Co., 629 F.2d 248, 261 (3d Cir. 1980) (Sloviter, J., dissenting) (quoting United States v. Reliable Transfer Co., 421 U.S. 397, 409, 1975 AMC 541, 550 (1975)).
54. *D'Oench, Duhme & Co.*, 315 U.S. at 470 (Jackson, J., concurring) (stating that federal common law's necessity derives from the "recognized futility of attempting all-complete statutory codes").
55. Mobil Oil Co. v. Higginbotham, 436 U.S. 618, 625, 1978 AMC 1059, 1065 (1978).
56. *Id.*

D. The Federal Judiciary's Dual Roles: "Law Making" and "Interstitial Gap-Filling"

The distinction between judicial law making and interstitial gap-filling is a staple of federal jurisprudence and the "new federal law." "In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions," the Supreme Court observed in *Northwest Airlines*, "[b]ut the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt."[57] Elaborating on Judge Henry Friendly's four-part division of federal common-law modes,[58] Judge Dolores K. Sloviter adds: "[T]he judicial task of establishing, formulating or discovering federal common law is qualitatively different from the judicial task of filling in the interstices of congressional acts."[59]

Vulnerability to displacement increases when the common/maritime rule opposes a statute covering the same or greater territory. Here, Judiciary as lawmaker takes on Congress as lawmaker, certainly an unpromising contest in which congressional consent is imperative for joint occupation of the same law making space.[60] It redirects the judicial inquiry from questions (and responses) appropriate for a judicial gap-filling exercise to those focused on judicial law making's propriety. Seconding *Northwest Airlines* within the FWPCA oil pollution remedy context, Judge Newman observed: "'Interpreting' a statute to determine its preemptive effect upon federal common law analytically differs from the task of determining the meaning of statutes in order to apply their often general terms to specific situations."[61]

The degree of latitude allowed federal judges in performing the respective tasks differs in the two cases. Gap-filling leaves substantial play for judicial inventiveness, both in framing and selecting among the choices open to it when fashioning a judicial patch for Congress' incomplete draftsmanship. But the displacement inquiry does not countenance similar inventiveness. A detailed federal statute such as OPA that comprehensively occupies a subfield or that has spoken directly to an issue also addressed by a maritime rule should prevail in a displacement contest unless Congress has indicated otherwise.

The Court, therefore, discourages federal judges from confusing displacement adjudications with the entitlement to cure a statute's perceived "deficiencies" by judicially decreeing what they believe is demanded by "common sense and the public weal."[62] In *Higginbotham*, for example, the Court cautioned that even if the judiciary could do a "better job" than Congress in formulating a wrongful death remedy, "we have no authority to substitute our views for those expressed by Congress in a duly enacted statute."[63] Having determined that the maritime rule is displaced, that is, the judicial task is at an end.

E. Direct Claimant Actions Against Third-Party Defendants

OPA is an exercise of Congress' law making power. Its "primary goal" has been described as "delivering expanded compensation quickly to victims without requiring them to wait for years while the courts sorted out who was responsible."[64] "The heart of OPA 90 is the concept of a 'responsible party,'"[65] moreover, "who would have to pay for everything regardless of fault, but then could re-allocate ultimate responsibility by contract and contribution actions."[66]

Pre-*B1 Bundle* OPA jurisprudence endorsed this model, which aligned claimants directly with responsible parties as the source of full compensation for their property and/or economic loss. *United States v. M/V Cosco*

57. Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 97 (1981).
58. Judge Friendly's modes describe the object achieved by judicial action as follows: "spontaneous generation as in the cases of government contracts or interstate controversies, implication of a private federal cause of action from a statute providing other sanctions, construing a jurisdictional grant as a command to fashion federal law, and the normal judicial filling of statutory interstices." Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 NY.U. L. Rev. 383, 421 (1964).
59. Glus v. G.C. Murphy Co., 629 F.2d 248, 259-60 (3d Cir. 1980) (Sloviter, J., dissenting).
60. Absent congressional blessing, the Court's displacement conclusion may be expressed in various ways. In *Northwest Airlines*, 451 U.S. at 94, for example, the Court stated: "It is . . . not within our competence as federal judges to amend these comprehensive enforcement schemes by adding to them another private remedy not authorized by Congress." In *Higginbotham*, 436 U.S. at 625, 1978 AMC at 1065, the Court asserted: "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." In *Milwaukee II*, 451 U.S. 304, 324 n.18 (1981), the Court explained: "In imposing stricter effluent limitations the District Court was not 'filling a gap' in the regulatory scheme, it was simply providing a different regulatory scheme." The displaced maritime rule's defect in each case is the rule's occupation of space in a manner that the Supreme Court views as violating separation-of-powers boundaries. Common, too, is the appropriate judicial response: invalidating the lower court's attempt to rewrite the statute under the guise of filling a gap within it.
61. United States v. Oswego Barge Corp., 664 F.2d 327, 339 n.17, 1982 AMC 769, 783 n.17 (2d Cir. 1981).
62. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195, 8 ELR 20513 (1978).
63. *Higginbotham*, 436 U.S. at 626, 1978 AMC at 1066; *accord Milwaukee II*, 451 U.S. at 324 ("The question is whether the field has been occupied, not whether it has been occupied in a particular manner.").
64. E. Donald Elliott & Mary Beth Houlihan, A Primer on the Law of Oil Spills 2 (2010), *available at* http://ssrn.com/abstract=2007604.
65. *Id.* at 5.
66. *Id.* at 4. OPA follows CERCLA in subjecting responsible parties to "status liability," a concept—foreign to the world of maritime negligence torts—that obligates these parties, whether or not liable for a discharge's response costs and damages, to compensate claimants for their damages, and then seek recourse against liable third-party defendants. Status liability renders direct claimant actions against nonresponsible parties redundant; in fact, OPA §2713(a) insists that "all claims for . . . damages shall be presented . . . to the responsible party." One dimension of this Article's thesis favoring displacement links directly to OPA's provisions for direct claimant access to responsible parties, principally §2713(a)'s universal ("*all claims*") and mandatory ("*shall be presented*") language as riveted to §2702(a)'s similarly categorical syntax, "[*n*]*otwithstanding any other provision or rule of law*" (emphasis added).

Busan[67] declares that the "animating principle of OPA is to permit injured parties to seek damages and cleanup costs directly from the responsible party."[68] *Gabarick* reaffirms the exclusive claimant/responsible party pairing in its holding: "Claimants should pursue claims covered under OPA only against the responsible part[ies] and in accordance with the procedures established by OPA. Then, the responsible party can take action to recover from third parties."[69]

B1 Bundle disagrees and insists upon the maritime law entitlement of claimants to sue third parties directly because "there is nothing [in OPA] to indicate that . . . Congress[ ] inten[ded]" otherwise.[70] *B1 Bundle*'s rote response is unfortunate because the question merits thoughtful attention by admiralty advocates. Weighing this response against OPA §2713's rationale and mandatory language, OPA's "subfield occupation" of pollution remedies, and the clash of the OPA and maritime damages limitation requirements,[71] however, displacement seems measurably the more plausible outcome.

Is approving direct claims against third parties merely filling an interstitial gap, or, instead, aggressive judicial law making? If the first, *B1 Bundle* enjoys significant latitude in resolving Congress' incomplete draftsmanship. If the second, the court does not, even if it could do a "better job" than Congress, *Higginbotham* reminds us, because federal courts have "no authority to substitute [their] views for those expressed by Congress in a duly enacted statute."[72] Again, it would appear more probable than not that *B1 Bundle* has "provid[ed] a different regulatory scheme" rather than "filling a gap."[73]

F. The Admiralty Savings Clause and Displacement Avoidance

Judicial law making that trespasses on Congress' law making prerogative may avoid displacement if Congress chooses to accept the incursion. Let us assume that this Article's displacement thesis offers the more plausible outcome, and inquire whether OPA §2751(e)[74] "saves" the maritime tort from displacement.

The view offered here is that the case for nondisplacement is severely challenged by the section's proviso, "[*e*]*xcept as otherwise provided*," and in fact would have been stronger without §2751(e). The proviso's plain meaning is clear, and hence conclusive, as to Congress' intent on this ground alone. As phrased, moreover, the clause duplicates the Court's core displacement jurisprudence norm. Further, its legislative history reveals Congress' choice to disassociate §2751(e) from §2718(a), the state law savings clause. Without any proviso or qualification,[75] this section exemplifies a "savings" clause primed to shield state measures controlling discharges within state waters from preemption by OPA. But the U.S. House of Representative's preference for a steel-encased admiralty savings clause was stymied in conference.[76] By the conferees' addition of the language "[e]xcept as otherwise provided,"[77] they converted §2751(e) from a clone of the state law savings clause into a statutory clone of *Delaval*'s elevation of "relevant" federal statutes over general maritime law.

The opening clauses of *Delaval* and §2751(e) are provisos that affirm the priority of, or "save," if you will, *federal statutory law* from the main clause's bounding of the area in which general maritime or admiralty law reigns supreme. Yet, no one speaks of *Delaval* as harboring an "admiralty savings clause." Its pronouncement is understood instead as a two-clause statement that secures federal statutory priority over general maritime law with respect to those matters either withdrawn from or denied to general maritime law by the legislative authority constitutionally vested in Congress.

The two-part syntax of §2751(e) is no different despite its faux label. Indeed, the section might, with greater reason, be deemed an "admiralty *displacing* clause" insofar as it overrides far more (if not all) of the maritime economic and property loss remedies than it "saves." The key to this conclusion is the term "otherwise," which in common parlance and as defined in the most respected of multivolume dictionaries signifies "[*i*]*n another way*" or "*in a different way or manner*."[78] What §2751(e) counsels, therefore, is that admiralty law is "saved" from displacement only to the extent that OPA fails to "provide" for the resolution of remedial issues "in another way" or "in a different way or manner" than that employed by the maritime tort.

This outcome mirrors the course engraved in the Supreme Court's core displacement jurisprudence. The proviso restates in statutory form the Court's constitutionally derived commitment to safeguard legislative primacy. The Court does so by displacing common-law/maritime rules that address the same question (or seek to occupy the same space) by answering the question or filling the space "in a different manner" or "in another way" than the statute. OPA displaces the private maritime tort because OPA's answer, as exhaustively detailed in this Article, is indisput-

67. 557 F. Supp. 2d 1058, 2008 AMC 1360 (N.D. Cal. 2008).
68. *Id.* at 1060, 2008 AMC at 1362.
69. Gabarick v. Laurin Mar. (Am.) Inc., 623 F. Supp. 2d 741, 750, 2009 AMC 1014, 1027 (E.D. La. 2009).
70. *B1 Bundle*, 808 F. Supp. 2d 943, 962 (E.D. La. 2011).
71. *See Ruling I*, *supra* note 1, at Part II.C.
72. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 626, 1978 AMC 1059, 1066 (1978).
73. *Milwaukee II*, 451 U.S. 304, 324 n.18 (1981).
74. OPA §2751(e) provides in material part, "Except as otherwise provided in this Act, this Act does not affect . . . admiralty and maritime law; or . . . the [admiralty] jurisdiction of the district courts of the United States . . . ."
75. OPA §2718(a) provides, "Nothing in this Act . . . shall—(1) affect, or be . . . interpreted as preempting, the authority of any State . . . from imposing any additional liability or requirements with respect to—(A) the discharge of oil or other pollution by oil within such State."
76. *See* H.R. Rep. No. 101-653, at 159 (1990) (Conf. Rep.), *reprinted in* 1990 U.S.C.C.A.N. 779, 838.
77. OPA §2751(e).
78. The Oxford English Dictionary 984 (2d ed. 1989) assigns as the primary meanings of the adverb "otherwise" the following: "[i]n another way, or in other ways; in a different manner, or by other means; differently." Webster's Third New International Dictionary of the English Language Unabridged 1598 (3d ed. 1986) assigns to the adverb "otherwise" the primary meaning "in a different way or manner; differently."

ably "otherwise" than that "provided" by maritime law. If interpreted in accordance with OPA's clearly defined objectives and purposes, its answers with respect to the various subjects surveyed in this Article are often at variance with those endorsed by the maritime remedy.

The "answer" provided by these and other OPA provisions also tweaks more nuanced forms of difference. Illustrative are the addition or subtraction of content from the maritime rule to address a perceived inadequacy,[79] the adoption, as mandatory, of requirements that admiralty treats as permissive,[80] and the specification of multiple statutes of limitations aligned with the procedural and substantive elements uniquely woven into the OPA-defined maritime tort.[81] Respecting the diverseness of difference secures the separation-of-powers value celebrated in *Milwaukee II* that "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law."[82]

Section 2751(e)'s legislative history witnessed the transformation of the section to its present version from its earlier mating in the House version with §2718(a)'s unqualified state law savings clause.[83] As initially presented in the House bill, the section read: "[This Act] does not affect admiralty and maritime law or [admiralty] jurisdiction."[84] The conference committee understood the House provision's purpose as establishing that it "does not supersede [admiralty] law, nor does it change the jurisdiction of the District Courts."[85] This understanding places the House provision in parallel with OPA's state law savings provision, which is similarly free of an "except as otherwise provided in this Act" proviso. The U.S. Senate bill was mute on the issue. The conference committee, however, resolved the difference between the two bills by a conference substitute that accepted the House version only "*with an amendment clarifying that the provision was subject to the provisions of the substitute*."[86] The committee's action effaced the two provisions' parallelism by imposing the *Delaval* format in §2751(e) as finally adopted.

III. Maritime Punitive Damages: *Townsend*, *Baker*, and "Category Errors"

Consideration of maritime punitive damages' post-OPA survival brings front and center *B1 Bundle*'s use of *Townsend*[87] and *Baker*[88] to justify its claims that maritime punitive damages, as well as the maritime tort overall, survive OPA's enactment. The present discussion adopts as its evaluative standard *Townsend*'s assault on category errors, a phrase used here to refer to factual or legal discrepancies between a putative precedent and its paired later opinion.

B1 Bundle's thesis that maritime law affords a parallel track to OPA derives ultimately from two rationales: the opinion's silence canon and its claim that *Townsend* and *Baker* sustain maritime punitive damages specifically and substantive general maritime law overall. Objections to the silence canon need not be reiterated here. This Article's objection to summoning *Townsend* and *Baker* to *B1 Bundle*'s side is straightforward: the effort is no less vulnerable to category errors than *South Port Marine, LLC v. Gulf Oil Ltd. Partnership*'s[89] use of *Miles v. Apex Marine Corp.*[90] to avoid the *Townsend* outcome.

A. Atlantic Sounding Co. v. Townsend

Townsend employed the rationale to reject an employer's motion to strike a seaman's maritime claims for maintenance and cure and punitive damages. The employer had invoked *Miles*[91] to support its claim that the Jones Act[92] precluded the punitive damages award in the *Townsend* maintenance and cure action.[93] The Court denied *Miles*' governance of the issue because "*Miles* does not address either maintenance and cure actions in general or the availability of punitive damages for such actions. The deci-

79. *See* OPA §2703(a) (limiting the responsible party to only three defenses: Act of God, Act of war, or of exclusive omission by a sole-fault third party not in a contractual relationship with the responsible party).
80. *See* OPA §2716(f) (mandating the direct liability of insurers (guarantors) of responsible parties to private claimants).
81. *See* OPA §2717(f)(1)(a)-(4) (establishing limitation periods for the commencement of actions for damages, removal costs, contribution, and subrogation, respectively).
82. *Milwaukee II*, 451 U.S. 304, 317 (1981).
83. This history is detailed in H.R. Rep. No. 101-653, at 159 (1990) (Conf. Rep.), *reprinted in* 1990 U.S.C.C.A.N. at 838.
84. *Id.*
85. *Id.*
86. *Id.* (emphasis added). The conferees also stated that "there is no change in current law unless there is a specific provision to the contrary," a statement that, in one unlikely interpretation, translates into the requirement that absent express proscription, as exemplified in OPA §2718(a)'s discard of the Limitation of Liability Act, OPA leaves maritime law unscathed. *Id.* This translation harkens back to *B1 Bundle*'s discredited canon that failure to expressly bar maritime law necessarily safeguards its survival. As explained *supra* Part II.A.1., OPA provisions incompatible with the maritime tort qualify as "specific provisions to the contrary" even if they are not expressly tagged as such. As well, the position runs directly counter to the plain meaning of the §2751(e) term "otherwise." Nor is the claim credible that a single sentence of OPA's voluminous legislative history offsets the principal tenets of Supreme Court displacement jurisprudence, or of Congress' understanding of the inadequacies of the maritime tort and its aggressive recasting of the latter within OPA itself.
87. 557 U.S. 404, 2009 AMC 1521 (2009).
88. 554 U.S. 471, 2008 AMC 1521 (2008).
89. 234 F.3d 58, 2001 AMC 609, 31 ELR 20344 (1st Cir. 2000).
90. 498 U.S. 19, 1991 AMC 1 (1990).
91. 498 U.S. 19, 1991 AMC 1 (1990).
92. 46 U.S.C. §30104 (2006).
93. *Miles* was similarly cabined by the U.S. Court of Appeals for the Ninth Circuit in its decision in *Baker* that the Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§1251-1387) (2006 & Supp. II 2009) [hereinafter CWA] did not displace maritime punitive damages rules. To Exxon's assertion that *Miles* justified a contrary conclusion, the court distinguished *Miles* as a *seaman's wrongful death case*, not a *maritime pollution tort case*, in which the parties, legal theories, remedies, history, and injuries are not comparable. The court understood, as *B1 Bundle* chose to ignore, that these two categories of actions address entirely different dimensions of the admiralty arc. *See infra* notes 94-97 and accompanying text. The Ninth Circuit viewed *Miles*' cause of action as one "based on the long and technical history of wrongful death actions, and the traditional restrictions of wrongful death remedies in Lord Campbell's Act. True, the congressional limitations were held [in *Miles*] to prevent an inference of broader remedies in the general maritime law, *but the tort was the specialized and traditionally limited one of wrongful death*." In re Exxon Valdez, 270 F.3d 1215, 1229, 2002 AMC 1, 15, 32 ELR 20320 (9th Cir. 2001) (emphasis added).

sion instead grapples with the entirely different question whether general maritime law should provide a cause of action for wrongful death based on unseaworthiness."[94] Nor was it helpful for the *Townsend* employer:

> Unlike the situation presented in *Miles*, both the general maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well established before the passage of the Jones Act. Also unlike the facts presented by *Miles*, the Jones Act does not address maintenance and cure or its remedy.[95]

Faithful to *Townsend*'s demand for precise situational equivalence, a three-point comparison of *Townsend* and *B1 Bundle* and a subsequent broader distinction between seamen's welfare and maritime pollution actions illuminate several of *B1 Bundle*'s transparent category errors. First, *Townsend* stresses that maritime maintenance and cure and punitive damages enjoy elevated status as long-established doctrines because they date back two centuries or more.[96] The maritime pollution tort, in contrast, was still seeking definitive shape as late as the 1960s.[97] Second, punitive damages and maintenance and cure are as venerated as they are ancient[98]; judicial nurturance of maintenance and cure, in fact, derives from the courts' centuries-long solicitude for the welfare of seamen as the special wards of admiralty.[99] Not so with the maritime pollution tort, whose inadequacies convinced Congress of the necessity for its radical transformation.[100]

Finally, the Jones Act expressly creates parallel statutory and general maritime remedial tracks by granting seaman claimants a §30104 election to proceed under either track.[101] In fact, the Court acknowledges elsewhere that the Jones Act "has done no more than supplement the remedy of maintenance and cure for injuries suffered by the seaman."[102]

By now, readers will have drawn their own conclusions concerning the aptness of dismissing OPA as "no more than [a] supplement" to the maritime pollution tort. What may be useful to add, however, is a comparison of the savings clauses of the Jones Act and OPA. Jones Act §30104 expressly grants the foregoing election and its parallel track. OPA §2751(e)'s proviso, on the other hand, expressly denies it for matters for which OPA "otherwise provide[s]." Transitioning from the former to the latter while ignoring a difference of this magnitude would not have been celebrated by the *Townsend* bench.

The error of *B1 Bundle*'s reliance on *Townsend* is aggravated by the nonequivalence of seamen welfare actions and the oil pollution tort disputes.[103] These two opinion sets are as different as chalk and cheese. *Townsend* itself models most of the components of the first category. It features the claimed tension between the Jones Act and the maritime remedy of maintenance and cure with a punitive damages add-on. Other seaman-based actions include maritime unseaworthiness or wrongful death rules, on the one side, and DOHSA, independent of or in conjunction with the Jones Act, on the other. If the issue turns on federal/state preemption rather than statutory/maritime law displacement, federal legislation disappears from the mix. The claimants, of course, are seamen (or their representatives), whose claims are predicated on damages for physical injury, death, or some other threat to their health or employment status.

The *B1 Bundle* tort offers an entirely different format in its federal statutory foundation, claimants, injury, and associated relief. The tort pairs not with the Jones Act or DOHSA, but with two federal environmental statutes, one of which (OPA) pervasively overhauls the maritime tort and bars an admiralty bloodline for its provisions that address the question of remedies in a manner "otherwise" than the maritime tort. Its claimants are not seamen seeking aid as wards of admiralty through writs formulated centuries ago,[104] but some 100,000 private entities, overwhelmingly dry-landers, grouped together exclusively on the basis of having suffered "private or 'non-governmental economic loss and property damages.'"[105] *B1 Bundle*'s frictionless traffic between such dissimilar formats speaks volumes about the admiralty gene's voracious appetite, expressed in *B1 Bundle* by its unyielding marginalization of OPA.

Moving beyond these differences, *B1 Bundle* and *Townsend* both seek maritime punitive damages, and both feature maritime rules adopted prior to the statutes claimed to have displaced them. Discussion of the former issue is taken up in the following section. Addressed here is the maritime tort's priority in time, which, when relied upon as indiscriminately as in *B1 Bundle*, further evidences the gene's dynastic bent.

Channeling *Delaval*, *Townsend* makes perfectly clear that the maritime maintenance and cure and puni-

94. *Townsend*, 557 U.S. at 419, 2009 AMC at 1533.
95. *Id.* at 420, 2009 AMC at 1534 (citation omitted).
96. *Id.* at 409-14, 2009 AMC at 1523-26.
97. *See* cases and authorities cited *supra Ruling I* note 1, at 22-23, note 105.
98. *Townsend*, 557 U.S. at 409-14, 2009 AMC at 1523-26.
99. *Id.* at 417, 2009 AMC at 1531-32. Justice Joseph Story justified the action in 1823 on humanitarian and economic grounds in the following terms: "If some provision be not made for [seamen] in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment." Harden v. Gordon, 11 F. Cas. 480, 483, 2000 AMC 893, 899 (C.C.D. Me. 1823) (No. 6047).
100. *See supra Ruling I* note 1, at Part II.
101. *Townsend*, 557 U.S. at 415-16, 2009 AMC at 1530. The section states that an injured seaman or his personal representative upon the former's death "*may elect* to bring a civil action at law . . . against the employer." 46 U.S.C. §30104(a) (2006) (emphasis added). *Accord* Cortes v. Balt. Insular Line, Inc., 287 U.S. 367, 374-75, 1933 AMC 9, 12-13 (1932).
102. O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 43 (1943).
103. For a detailed discussion of the distortions resulting from the conflation of the two types of actions, see John J. Costonis, *The Macondo Well Blowout: Taking the Outer Continental Shelf Lands Act Seriously*, 42 J. Mar. L. & Com. 511, 519-21 (2011); John Costonis, *And Not a Drop to Drink: Admiralty Law and the BP Well Blowout*, 73 La. L. Rev. 1, 5-13 (2012).
104. Seamen employees (or their representatives) of responsible parties have brought personal injury and death actions against responsible parties in the BP MDL proceedings, but these types of claims and injuries are not encompassed within OPA, which under §2702(a) and as employed in *B1 Bundle*, extends solely to nongovernmental economic and property losses attendant upon the oil discharges targeted by the section.
105. *B1 Bundle*, 808 F. Supp. 2d 943, 947, 2011 AMC 2220, 2222, 41 ELR 20340 (E.D. La. 2011).

tive damages rules remain effective "unless Congress has enacted legislation departing from this common-law understanding."[106] No jurisprudential Thetis, however, has dipped the maritime tort in the River Styx to shield it from legislative violence. The question turns instead on whether or not the passion garnered for seamen's welfare enlivens Congress' assessment of the maritime pollution tort as well. OPA's flight from, rather than embrace of, the latter surely settles this question.

B. Exxon Shipping Co. v. Baker

Aided by the silence canon, the admiralty gene also had its way in *B1 Bundle*'s equally facile traffic with *Baker*. *B1 Bundle* invoked *Baker*'s holding that the CWA does not displace maritime punitive damages[107] to reason that OPA too leaves these damages in place.[108] *B1 Bundle*'s reliance on *Baker* creates its own category errors, however. Several unbridgeable differences divide the *Baker*/CWA and *B1 Bundle*/OPA pairings, as do the conflicts in the respective statutory and maritime law damages limitation regimes.

Beginning with the last-named topic, earlier discussion established that conflicts between these damages limitation requirements call for OPA's displacement of maritime law remedies because the two regimes' treatment of liability standards, levels of damage, and types of damage openly clash with one another. *Baker*, moreover, does *not* offer *B1 Bundle* a way out of this conflict. *Baker*'s statute, CWA §311, excludes private parties from its benefits and, more important for comparison purposes, from its *restrictions*. Key among the latter is the statute's damages limitation regime, which would have displaced general maritime law remedies if private parties, such as the *Baker* plaintiffs, had been covered by the statute.[109] *Baker* properly concluded, therefore, that the Court had no basis for "perceiv[ing] that punitive damages for private harms will have any frustrating effect on the CWA remedial scheme, which would point to preemption."[110]

B1 Bundle's assertions that the "imposition of punitive damages under general maritime law would not circumvent OPA's limitation of liability,"[111] nor "frustrate the OPA liability scheme"[112] are difficult to honor. Added to the foregoing considerations is an impediment specific to the punitive damages category itself. OPA addresses *compensatory* damages alone.[113] *B1 Bundle* asserts, however, that "the behavior that would give rise to punitive damages under general maritime law—gross negligence—would also break OPA's limit of liability."[114] What *B1 Bundle* fails to say is that these observations camouflage still another conflict: under OPA's damages limitation regime, the damages due upon breaking its cap would be *compensatory* damages, not *punitive* damages as under maritime law. The quoted language also carries the implication that the OPA/maritime tort policies are so well-integrated that courts need not attend any longer to Congress' struggle[115] to balance OPA's victim-relief values with its damages limitation values. *South Port Marine*'s harsh dismissal of an OPA interpretation this liberal is considered presently.

A second category error dividing *Baker* and *B1 Bundle* arises in consequence of the interplay of two savings clauses: OPA §2751(e) and CWA §1321(o)(1). The former, as is now familiar, preserves only general maritime rules not "otherwise provided" for in OPA. The latter provides, "*Nothing* in this section shall affect . . . in *any* way the obligations of *any* owner or operator . . . to *any* person . . . under *any provision of law* for damages to *any* . . . privately owned property resulting from a discharge . . . ."[116] Rivals to a savings clause this unqualified are Jones Act §30104 and OPA §2718(a), both of which this Article has singled out as antonyms to OPA's admiralty savings clause. Predictably, the Court spurned Exxon's bid to recast CWA §1321(o)(1) as a harbinger of OPA §2751(e).[117]

Likewise asymmetrical in the *Baker/B1 Bundle* pairing is a missing step in the ladder that must be climbed to reach punitive damages: a cause of action for compensatory damages upon which the punitive damages count must be predicated. OPA, of course, excludes punitive damages from its own remedial palette by expressly restricting its damages-related provisions to compensatory damages alone.[118] Exxon assisted *Baker*'s claimants up the first step when it stipulated to its liability for negligence and attendant compensatory damages prior to the Court's consideration of the punitive damages issue.[119] But the entire run of pre-*B1 Bundle* OPA cases holding that maritime damages are displaced by OPA §2702(b)'s "covered damages"[120] saw off the limb upon which maritime punitive damages are poised. "Punitive damages . . . do not constitute a separate cause of action, but instead form a *remedy* available for some tortious or otherwise unlawful acts," *South Port Marine* advises.[121] "Consequently, plaintiff's claim for punitive damages must relate

106. Atl. Sounding Co. v. Townsend, 557 U.S. 404, 415, 2009 AMC 1521, 1529 (2009). Although worded differently, *Townsend*'s "unless clause" is as forceful as *Delaval*'s "[a]bsent a relevant statute," and OPA §2751(e)'s "[e]xcept as otherwise provided." *See supra* notes 69-71 and accompanying text.
107. Exxon Shipping Co. v. Baker, 554 U.S. 471, 488-89, 2008 AMC 1521, 1531-32 (2008).
108. *B1 Bundle*, 808 F. Supp. 2d at 960-62, 2011 AMC at 2242-45.
109. *See Ruling I*, *supra* note 1, at Part II.C.
110. *Baker*, 554 U.S. at 489, 2008 AMC at 1532.
111. *B1 Bundle*, 808 F. Supp. 2d at 962, 2011 AMC at 2245.
112. *Id.*
113. 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 section 2702(b) of this title."
114. *B1 Bundle*, 808 F. Supp. 2d at 962, 2011 AMC at 2245.
115. *See BP Ruling*, *supra* note 1, at Part II.C.
116. CWA §1321(o)(1) (emphasis added).
117. *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 488-89, 2008 AMC 1521, 1531-32 (2008).
118. *Baker* itself acknowledges that "the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct." 554 U.S. at 492, 2008 AMC at 1535.
119. *Baker*, 554 U.S. at 479-80, 2008 AMC at 1525.
120. The cases are collected in *BP Ruling*, *supra* note 25, at Part II.A.6.
121. 234 F.3d 58, 64, 2001 AMC 609, 616, 31 ELR 20344 (1st Cir. 2000).

to some separate cause of action which permits recovery of punitive damages."[122]

The final consideration is less a category error than a critique of *B1 Bundle*'s choice to ignore both the balance Congress struck in devising OPA's damages limitation regime and the unanimity of judicial support for the balance's role in securing displacement of maritime tort remedies.[123] Among *B1 Bundle*'s least satisfactory assertions is its claim that OPA's remedial scheme, inclusive of its damages limitation regime, does not "frustrate the OPA liability scheme."[124]

South Port Marine enjoys the upper hand in its response to the plaintiff's petition for a broadly liberal interpretation of OPA that would leave maritime punitive damages in place. "While we agree that such intentions were Congress' principal motivation in enacting the OPA," the court replied:

> [W]e think it would be naive to adopt so simpleminded a view of congressional policymaking in light of the competing interests addressed by the Act. For instance, the OPA imposes strict liability for oil discharges, provides both civil and criminal penalties for violations of the statute, and even removes the traditional limitation of liability in cases of gross negligence or willful conduct. Yet at the same time, the Act preserves the liability caps in most cases and declines to impose punitive damages. We think that the OPA embodies Congress's attempt to balance the various concerns at issue, and trust that the resolution of these difficult policy questions is better suited to the political mechanisms of the legislature than to our deliberative process.[125]

Among the further burdens imposed on responsible parties by OPA or OPA-related legislation is OPA's elimination of the *Robins* doctrine,[126] a change that vastly inflates BP's financial obligations to *B1 Bundle*'s 100,000-plus claimants, other private claimants, and a host of federal and state agencies. As to the latter, moreover, OPA also endorses such additional categories of public agency damages as natural resource loss or degradation[127]; losses associated with foregone taxes, royalties, rents, or fees[128]; and increases in the cost of public services during or after removal activities.[129] Lying in wait for responsible parties outside of OPA are a range of increased civil penalties, the most draconian of which would allow per barrel penalties of as much as $4,300.[130] Estimates of a total release from the Macondo well of 4.9 million barrels suggest a maximum civil penalty of around $20 billion. Congress has left to the courts the discretion, moreover, to consider such factors as the "seriousness of the violation," "the degree of culpability," and "any other matters as justice may require" as among the lead criteria for the penalty's calculation.[131]

Perhaps, even Llewellyn would agree that the basis has properly been laid in this Article for a canon that credibly sums up why OPA displaces not only punitive damages, but the maritime tort remedy overall:

> Once Congress legislates comprehensively on the subject of Government remedies for oil spill cleanup costs [and damages], the responsibility lies with Congress to spell out expressly what, if any, role remains for courts to fashion and apply non-statutory remedies.[132]

Having chosen not to spell out a role for the general maritime law tort remedy, Congress' silence speaks volumes.

122. *Id. B1 Bundle* does not address this contention, presumably because of its holding that general maritime law affords a parallel track that includes the foundational negligence tort compensatory damages action.
123. *See Ruling I*, *supra* note 1, at Part II.A.3. and II.B.
124. *B1 Bundle*, 808 F. Supp. 2d 943, 962, 2011 AMC 2220, 2245, 41 ELR 20340 (E.D. La. 2011).
125. *South Port Marine*, 234 F.3d at 66, 2001 AMC at 619.
126. *See* OPA §2702(b)(2)(E).
127. *See id.* §2702(b)(2)(A).
128. *See id.* §2702(b)(2)(D).
129. *See id.* §2702(b)(2)(F).
130. *See* CWA §1321(b)(7)(A), as modified by 40 C.F.R. §19.4 (2010).
131. *See id.* §1321(b)(7)(F)(8).
132. United States v. Oswego Barge Corp., 664 F.2d 327, 341, 1982 AMC 769, 786 (2d Cir. 1981).