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The BP B1 Bundle Ruling: Federal Statutory Displacement of General Maritime Law

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

John J. Costonis²
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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."³ 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 essay 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, the essay 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 inquiry⁴ targets conflicts between the competing federal/state norms that threaten federal 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's intent to displace] is not required," the United States Supreme Court has stated.⁵ 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."⁶

¹ U.S. Const. art. 1, sec. 1.

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³ Judge Henry Friendly, *In Praise of Erie –And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964).

⁴ Although often used interchangeably in the literature as well as in various of this essay's quotations, the terms "displacement" and "preemption" are accurately understood as referring, respectively, to supersession of federal common or maritime law by federal statute pursuant to the principles described in this essay's Part II, and supersession of a state legal norm by a federal norm in consequence of the (federal) Supremacy Clause.

⁵ *Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981) (hereinafter *Milwaukee II*).

⁶ *Id.*

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 branches. The judge-made rule risks displacement if it incompatibly addresses the same “question,” or occupies the same “space” as the federal statute.⁷ 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.”⁸

The Court has cautioned lower federal court judges that “[a]lthough ... there is a significant body of federal law 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.”⁹ Its “commitment to the separation of powers is too fundamental to continue to rely on federal common law ... when Congress has addressed the problem.”¹⁰ The federal common law’s general maritime law sector enjoys somewhat greater latitude,¹¹ 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.”¹² The Court’s privileging of federal statutes over maritime law is engraved in its iconic declaration in *East River Steamship Corporation v. Transamerica Delaval, Incorporated (Delaval)* that “[a]bsent a relevant statute, the general maritime law, as developed by the judiciary, applies.”¹³

Adjudicating displacement disputes places the Court squarely, if uneasily, between Congress and the lower federal courts.¹⁴ Despite its commitment to Congress’s primacy as lawmaker, the Court is alert to the judiciary’s common lawmaking powers, particularly as the admiralty clause amplifies them in the maritime sphere.

Two different questions arise depending upon whether or not Congress has adopted a statute that overlaps the pertinent judge-made rule, which usually appears as a maritime

⁷ Accord: *United States v. Steuart Trans. Co.*, 596 F.2d 609, 617 (4th Cir. 1979) (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”). See TAN Part II(B) *infra*.

⁸ *Milwaukee II*, 451 U.S. at 319, n. 14 (emphasis added).

⁹ *Northwest Airlines Incorporated v. Transport Workers, Union of America*, 451 U.S. 77, 94 (1981).

¹⁰ *Milwaukee II*, 451 U.S. at 315.

¹¹ Cf. *United States v. Oswego Barge Co.*, 664 F.2d 327, 336 (2^d 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”) (Newman J.).

¹² *Northwest Airlines*, 451 U.S. at 96. Accord, *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990) (“Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will”).

¹³ 476 U.S. 858, 864 (1986) (emphasis added).

¹⁴ Justice Blackmun has 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).”

cause of action or one of the latter's substantive or procedural components. Absent a statute, the Court confines its inquiry to whether the matter engages admiralty jurisdiction at all. If a tort, the Court's view under a line of authority commencing with *Executive Jet Aviation Company v. City of Cleveland*¹⁵ requires, among other elements, that the event feature a vessel on the nation's navigable waters pursuing a function that bears a "substantial relationship to a traditional maritime activity."¹⁶

If a federal statute overlaps judicial lawmaking, the focus shifts to the relationship between the two lawmaking exercises. The present essay features this shift in probing whether and to what extent the general maritime law oil pollution tort survives displacement by two federal statutes: the Oil Pollution Act of 1990¹⁷ (OPA) and the Outer Continental Shelf Lands Act¹⁸ (OCSLA).

Displacement disputes also divide between those in which the general maritime lawmaking exercise precedes or follows the statute's adoption.¹⁹ 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

¹⁵ 409 U.S. 249, 268 (1972).

¹⁶ *Id.* at 268. *Executive Jet* is discussed further in TAN145-48 *infra*. In earlier articles, the author has questioned whether admiralty jurisdiction appropriately attaches to the BP blowout and spill at all in light, *inter alia*, of OCS petroleum development operation's 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, 5212-24 (2011) [hereinafter Costonis I]; J. 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 II].

¹⁷ Pub. L. No.101-380, 104 Stat. 484 (2006) (codified as amended at 33 U.S.C. secs. 2701-2761 (2006 & Supp. III 2009)).

¹⁸ Ch. 345, 67 stat. 462 (1953), (codified as amended at 434 U.S.C. 1331-1356(a) (2006) & Supp. II 2009 [hereinafter OCSLA]. Despite this essay'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 *Deepwater: The Gulf Oil Disaster and the Future of Offshore Drilling* 167 (National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling 2011) [hereinafter *President's Report*]. The Deepwater Horizon contributed no more than 17,000 barrels at best of its own stored diesel oil, *id.* at p. 130, an infinitesimal *three/ten thousandths* of the BP well discharge. OCSLA, which Congress adopted under the Property and Interstate and Foreign Commerce Clauses, secures the federal government's sovereignty, control and regulatory powers over the OCS and its resources. See Costonis I, *supra* note 15, at 526-34. OCSLA also characterizes the OCS as an exclusive federal enclave, and specifies in sec. 1333(a)(1) of its 1953 version that *non-admiralty* 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 or MODUs), thereby calling into question MODUs' status as admiralty jurisdiction-creating "vessels." *Id.* at 545-49; Costonis II, *supra* note 15 at pp. 20-30. More problematic still is *B1 Bundle's* claim, *B1 Bundle*, 808 F. Supp. 2d 943, 949-950, that the OCS drilling operations are "substantially related to a traditional maritime activity." See *id.* at 15-20; see TAN 137-44 & n. 144. According to the OCSLA legislative conference report, the amendment, premised on Congress's power under the property clause, also introduced a "new statutory regime for the management of oil and natural gas resources of the OCS," Costonis I, *supra* note 16, at 541, quoting H.R. Rep. No. 95-590, at 10 (1977), reprinted in 1978 U.S.C.C.A.N 1450, 1461, approving environmental goals and a *private* OCS oil pollution liability regime, subsequently revised and folded into OPA's single federal pollution regime.

¹⁹ See *United States v. Oswego Barge Corp.*, 664 F.2d 327, 337 (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") (Newman J.).

subsequent statute's enactment as when they initially formulated the rule in the absence of the statute.²⁰ Whether or not their conclusion properly aligns with separation of powers considerations frames the issue for the Supreme Court.

*Mobil Oil Corporation v. Higginbotham*²¹ 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 Act²² (DHOSA) that "spoke directly"²³ to the same issue by referencing "pecuniary" damages.

Displacement is addressed in this essay through the prism of the *B1 Bundle Master Complaint Order and Ruling*²⁴ (*B1 Bundle*), issued by Louisiana's Eastern Federal District Court in the seminal opening phase of the BP Multi-District Litigation (MDL). 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, the Macondo lessee, and Transocean, owner of the Deepwater Horizon Mobile Offshore Drilling Unit, 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.²⁵ BP and Transocean were cited both as OPA section 2702(a) "Responsible Parties" and, along with other defendants, as tortfeasors liable for the oil discharges under maritime negligence law.

B1 Bundle ruled that general maritime substantive law and, with a minor exception, maritime procedural law survived OPA's enactment unscathed.²⁶ 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

²⁰ *Delavan'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 *B-1 Bundle* maritime tort unhindered, assuming that the latter satisfies and its progeny. The presence of such statutes, on the other hand, modifies the equation in disputes in which 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 statute[s]" --OPA and OCSLA-- in place.

²¹ 436 U.S. 618 (2010).

²² Death on the High Seas Act, 46 U.S.C.A. 30303 (2011)(hereinafter DHOSA).

²³ *Higginbotham*, 436 U.S. at 625.

²⁴ *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010*, 808 F. Supp. 2d 943 (E.D. La. 2011) (Barbier J.) (hereinafter *B1 Bundle*).

²⁵ For a detailed account of the Macondo blowout, see President's Report *supra* note 18.

²⁶ *B1 Bundle's* Finding 7 states that "OPA does not displace general maritime law 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 [sec. 2713] presentment requirement)." (emphasis added)." *B1 Bundle*, 808 F. Supp. at 969.

by themselves to establish OPA's displacement of the maritime tort remedy.²⁷ 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*.²⁸ Parts II and III illuminate why each set of considerations renders displacement distinctly more plausible than not.

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 and its related claim that rules announced in two Supreme Court non-OPA cases, *Atlantic Sounding Company v. Townsend*²⁹ and *Exxon Shipping Company v. Baker*,³⁰ should govern in *B1 Bundle* as well. *BP Bundle* equates the absence of express proscription with "silence," and silence, so defined, with Congress's supposed embrace of the prior maritime norm. 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's 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 essay and *B1 Bundle* itself.

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 overall³¹; of the maritime tort compensatory damages that duplicate those enumerated in OPA section 2702(b)³²; of maritime punitive damages³³; and of the entitlement of private plaintiffs under general maritime law to bring direct actions against third party defendants such as Halliburton or Cameron.³⁴

B1 Bundle celebrates general maritime law as a parallel track rather than classifies 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 Limited Liability Act³⁵ and associated Rule F³⁶ procedures simply by switching tracks to accommodate the pollution tort's change of costume to admiralty garb.³⁷

²⁷ Two OPA provisions that meet this criterion are sec. 2702(b)(2)(A)-(F) (OPA's "covered damages"), see *Gabarick v. Laurin Maritime (America) Inc.*, 623 F.Supp.2d 741, 744-46 (E.D. La. 2009); and sec. 2704 (OPA's "limitation of damages" provision) see Part II(C) *infra*.

²⁸ See Part II(B) *infra*.

²⁹ 557 U.S. 404 (2009).

³⁰ 554 U.S. 471 (2008).

³¹ *B1 Bundle*, 808 F. Supp. 2d at 960, 961.

³² *Id.* at 962 (by implication).

³³ *Id.*

³⁴ *Id.*

³⁵ Act of Mar. 3, 1851, Ch. 43, 9 Stat. 635 (codified as reenacted and amended at 46 U.S.C.A. app. secs. 181-189 (West 1958 & Supp. 1998)(hereinafter Limited Liability Act).

³⁶ Fed. R. Civ. P. Supp. F.

³⁷ 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 Limited Liability Act concursus proceeding exceeds this essay's scope. It merits attention, however, that OPA precedents holding either or both that OPA displaces those general maritime principles to which it speaks directly, and that OPA overrides the Limited Liability Act and Rule F undermine the device's legitimacy. See, e.g., *Gabarick v. Laurin Maritime (America) Inc.*, 623 F.Supp.2d 741 (E.D. La. 2009); *Bouchard Transp. Co. v. Updegraff*, 147 F.3rd 1344 (11th Cir. 1998); In re

Later discussion details three *B1 Bundle* flaws that beset its non-displacement 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 Carl Llewellyn termed the individual dispute's "situation-sense."³⁸

Second, *B1 Bundle* shuns engaging in this inquiry or, at least, in linking summary conclusions illuminated by it to the non-displacement 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 precedents³⁹ and the non-displacement 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 soundly 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, "undigested and undigestible in the middle of [the] Law," as Llewellyn would have put it.⁴⁰

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's jurisprudence's abstract, non-quantitative 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.⁴¹ I have chosen this course for an inquiry that addresses an

Metlife Capital Corp., 132 F. 3rd 818 (1st Cir. 1997), cert. denied sub nom. Bunker Group, 1998 U.S.L.W. 159185 (U.S. June 26, 1998); In re Jahre Spray, 1996 WL 451315 (D.N.J. 1996). A number of the impediments besetting the effort are explored in Robert Force & Jonathan Guttoff, Limitation of Liability in Oil Pollution Cases: In Search of Concurus or Procedural Alternatives to Concurus, 24 Tul. Mar. L. J. 331, 341 (1998).

³⁸ Carl 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.

³⁹ See cases cited *infra* Part I(A).

⁴⁰ Carl Llewellyn, Common Law Tradition: Deciding Appeals, *supra* note 38 at 378.

⁴¹ 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 (2d. Cir. 1981): "[W]e recognize, as [*Milwaukee II*] instructs, that the doctrine of separation of powers creates a

opinion so committed to its silence canon and secure in *Townsend's* and *Baker's* supposed reflected grace that the most influential of the inquiry's moving parts receive glancing inattention or are ignored altogether.

The essay 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. The inquiry's terms of debate will discomfort those who share the Fifth Circuit's self-confessed instinct for the "reflexive invocation of admiralty jurisdiction."⁴² But *Delavan* tempers, or, at least, should temper the instinct. Once the OPA statute's "relevance" is established, *Delavan* dictates, the burden of persuasion shifts to non-displacement advocates because it is only "[a]bsent a relevant statute" that "the general maritime law, as developed by the judiciary, applies." OPA/OCSLA indisputably qualify as "relevant" statutes.

The point is not trivial. The reflexive instinct inclines toward focusing on *Delavan's* second clause at the expense of the introductory proviso. For the same reason, it encourages a parsing of OPA's misleadingly named "admiralty savings clause" that slights its *Delavan*-like introductory proviso, "[e]xcept as otherwise provided in this Act," in favor of its statement that "[t]his Act does not affect ... admiralty and maritime law."⁴³

The essay'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 (Part I). The second assays leading themes and policies, evidenced both in OPA itself and in the Supreme Court's displacement lexicon and jurisprudence (Parts II and III, principally, but some engagement of Part I also). These stops proceed with one eye on *B1 Bundle*, and at appropriate points, gear down to set forth and evaluate discrete *B1 Bundle* contentions. But they also serve as stand-alone portrayals of federal statute/common law displacement jurisprudence and of OPA's origins and structure. They precede Part III's critique of *B1 Bundle's* reliance on *Townsend* and *Baker* to sustain *B1 Bundle's* non-displacement outcome.

Part I portrays the BP dispute's "situation sense" by contrasting elements of pollution liability policy and law affecting private victims' economic and property loss claims prior to and following OPA's adoption. The portrayal highlights the inadequacy of pre-OPA maritime law and statutory regimes and Congress's effort to remedy them in a comprehensive statute covering a broad range of governmental and private interests. The section's survey of the statute's economic and environmental drivers, OPA commentary and pre-*B1 Bundle* OPA case law illuminates the basis for this essay's purposive interpretation of OPA's silences.

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."

⁴² See *Lewis v. Glendel Drilling Co.*, 898 F.2d 1083, 1087 (5th Cir. 1990) (Jones, J.). The BP MDL was assigned to the Eastern District of Louisiana, a federal district court located within the Fifth Circuit.

⁴³ See Part II(F) *infra*.

Nine contentions are advanced in support of this posture.

First, resolution of *B1 Bundle*'s displacement debate engages the interaction of three distinct legal spheres: the Supreme Court's meta-law⁴⁴ 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 groundrules and lexicon are shaped by separation of powers values, principal among which is the Court's affirmation of Congress's constitutional primacy over the federal judiciary when congressional and judiciary lawmaking overlap in ways that derogate from or are otherwise incompatible with Congress's primacy.

Fifth, as 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, co-equal 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's 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 needlessly complicates a challenging, yet relatively straightforward inquiry.

Seventh, OPA section 2751(e), the misleadingly labeled "admiralty savings clause," does not afford a plausible escape route from displacement. The clause's stubborn restriction on

⁴⁴ 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 latter's candidates are federal statutory law, judge-made law (common or maritime), or some combination of both.

the scope of the admiralty law being “saved” -- “[e]xcept as otherwise provided in this Act”⁴⁵—deprives admiralty/maritime law of the sweeping immunity to displacement that state law enjoys from preemption pursuant to OPA section 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 non-displacement.

Eighth, the Supreme 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 section 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’s deliberate compromise, engraved initially in FWPCA section 311 and updated in OPA section 2704, that accommodates industry, pollution tort victim, 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.

I. OPA: Reinventing 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.”⁴⁶ 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 regime applicable to oil spills,”⁴⁷ and departs from “past practices 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 discharge of oil.”⁴⁸ 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.”⁴⁹

⁴⁵ OPA sec. 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” (emphasis added).

⁴⁶ Lawrence 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 (2000) [hereinafter Kiern I].

⁴⁷ Robert Force & Jonathan Guttoff, *Limitation of Liability in Oil Pollution Cases: In Search of Concursus or Procedural Alternatives to Concursus*, supra note 37, at 341.

⁴⁸ *Id.*

⁴⁹ Thomas Wagner, 5 U.S. F. Mar. L. J. 283, 285 (1993).

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."⁵⁰ His conclusion goes far toward answering his decade-earlier query concerning the event to which "the continued availability of both judge made and federal common law causes of action for relief in cases of environmental damage have been placed in doubt by congressional enactment of comprehensive environmental legislation including both the CWA and OPA."⁵¹

Judicial portrayals of OPA other than *B1 Bundle* celebrate a vigorous statute as well. *Gabarick v. Laurin Maritime (America), Incorporated*⁵² (hereinafter *Gabarick*) affirms that OPA displaces maritime actions seeking damages that duplicate OPA section 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.'"⁵³ A second insists that "OPA establishes an entirely new, federal cause of action for oil spills,"⁵⁴ 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."⁵⁵

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 section 2751(e) proviso requiring displacement when OPA provides "otherwise" for the same matter⁵⁶; OPA section

⁵⁰ Lawrence 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) [hereinafter Kiern II].

⁵¹ Kiern I, *supra* note 45 at 493.

⁵² 623 F. Supp. 2d 741 (E.D. La. 2009).

⁵³ *Id.* at 747-48

⁵⁴ *Tanguis v. M/V Westchester* 153 F. Supp. 2d 859 (E.D. La. 2001).

⁵⁵ *Id.* at 867 (citation omitted). In a third decision that denied remand back to a state court of an OPA proceeding, *United States v. Bodenger*, 2003 WL 22228517 at *1 (E.D. La. 2003), 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 (paraphrasing Sen. Rep. No. 101-94, reprinted in 1990 U.S.C.C.A.N. 722.

⁵⁶ See, e.g., *Nat'l Shipping Co. of Saudi Arabia v. Moran Mid-Atlantic Corp.*, 924 F. Supp.1436, 1447 (E.D. Va. 1996), *aff'd sub nom Nat'l Shipping Co. of Saudi Arabia v. Moran Trade Corp. of Delaware*, 1997 WL 560047 (4th Cir. 1997), *cert. denied, Nat'l Shipping Co. of Saudia v. Moran Trade Corp. of Delaware*, 523 U.S. 1021(1998); *In re Settoon*, 2009 WL 4730971 at *3 (E.D. La. 2009).

2702(b) “covered damages” duplication of damages awarded under maritime law⁵⁷; OPA’s use of mandatory language in defining the oil pollution tort, damages, and procedures for claims presentation by private parties⁵⁸; the “redundan[cy]”⁵⁹ or “superflu[ity]” of according maritime law status as a parallel track when OPA addresses the same injuries⁶⁰ more efficiently and more attuned to contemporary scientific, engineering, environmental and policy values; and Congress’s intent through OPA to replace the prior “fragmented collection of Federal and State laws....”⁶¹ “with a “single Federal law providing cleanup authority, penalties, and liability for oil pollution.”⁶²

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, Part II describes their place within the larger 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 or purpose”⁶³ or by the “text of the statute read as a whole.”⁶⁴ OPA is not “silent” as to particular displacing elements, moreover, when it “speaks directly” to them in a manner that is incompatible with maritime law, even though in doing so, OPA doesn’t expressly call for their displacement.⁶⁵

⁵⁷ See, e.g., *Gabarick*, 623 F. Supp. 2d 741, 748 (E.D. La. 2009); *South Port Marine LLC v. Gulf Oil Ltd Ptnsp*, 234 F. 3rd 58, 65 (1st Cir. 2000); *Clausen v. M/V New Carissa*, 171 F. Supp. 2d 1127, 1133 (D. Or. 2001).

⁵⁸ OPA secs. 2713, 2702(a), 2702(b) and 2713(a), respectively, each of which is cited in *Gabarick*, 623 F. Supp. 2d at 744.

⁵⁹ *In re Spray*, 1996 WL 451315 at *4 (D.N.J. 1996) (OPA’s provisions for legal defenses and damage limitations would be “redundant” unless OPA displaces maritime law).

⁶⁰ *Clausen v. M/V Carissa*, 171 F. Supp. 2d 1127, 1134 (D. Or. 2001) (“Why should the plaintiffs’ attempt to prove negligence when success on their OPA claim will prove provide identical remedies and not require proof of negligence?). Accord: *In re Settoon*, 2009 WL 4730971, at * 3 (E.D. La. 2009) (“The United States’ general maritime damages claims are preempted by its identical OPA 90 damages claims.”). Cf. *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527, 2531-32 (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.).

⁶¹ Sen. Rep. 101-94, at 2, reprinted in 1989 U.S.C.C.A.N., at 723. Amplifying the Report’s confirmation of OPA’s displacement of other sources of federal law is the statement during debate in the House that the “whole idea of a federal oil spill legislation is to have one coordinated and one comprehensive legislation, not a patchwork of state and federal laws which have turned out to be inadequate.” Statement of Representative Franzel, 135 Cong. Rec. H7954, at 7977 Nov. 1, 1989.

⁶² Sen. Rep. 101-94, at 2, reprinted in 1989 U.S.C.C.A.N., at 723 (emphasis added). Accord: *Gabarick*, 623 F. Supp. 2d at 748; *Tanguis v. M/V Westchester*, 153 F. Supp. 2d 849, 867-88 (E.D. La. 2001).

⁶³ See *Gabarick*, 623 F. Supp. 2d at 748 (citing *Altria Group v. Good* 129 S.Ct. 538, 543 (2009). *Gabarick* was responding to the assertion that “because the statutory language of OPA does not contain an explicit preemption cause or otherwise expressly preempt the general maritime law, ... preemption of general maritime claims ... was not the intent of Congress.” *Id.* (2008).

⁶⁴ See *Tanguis*, 153 F. Supp. 2d 859, 867 (E.D. La. 2001)

⁶⁵ In its reference to “speaking directly,” *Gabarick* invoked *Miles v. Apex Marine Corp*, 498 U.S. 19, 32 (1990), which derived this phrase from *Mobil Oil Corp v. Higginbotham*, 431 U.S. 618, 625 (1978). *Gabarick*, 623 F. 2d at 747.

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,” “speaking directly,” “comprehensive” or “occupation of a field.” These constructs, Part II clarifies, are not a random collection of independent variables, but incremental locations along a single, orderly continuum.

3. OPA section 2751(e) Admiralty Savings Clause

Pre-*B1 Bundle* decisions expressly acknowledge the parallelism of syntax employed by the Supreme Court in *Delavan* and by Congress in OPA’s “admiralty savings clause.”⁶⁶ *Delavan* and OPA section 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.⁶⁷

Settoon mirrors these arrangements in its statement that OPA section 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* [citing *Delavan*]. 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.”*⁶⁸

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

4. OPA and Federal Water Pollution Control Act (FWPCA)⁶⁹

Because OPA is modeled on the FWPCA with respect to certain of its key provisions,⁷⁰ FWPCA case law and practice merit deference in the interpretation of these provisions.⁷¹

⁶⁶ See, e.g., *Nat’l Shipping Co. of Saudi Arabia v. Moran Mid-Atlantic Corp.*, 924 F. Supp.1436, 1447 (E.D. Va. 1996), *aff’d sub nom Nat’l Shipping Co. of Saudi Arabia v. Moran Trade Corp. of Delaware*, 1997 WL 560047(4th Cir. 1997), *cert. denied*, *Nat’l Shipping Co. of Saudi Arabia v. Moran Trade Corp. of Delaware*, 523 U.S. 1021(1998); *In re Settoon*, 2009 WL 4730971 at *3 (E.D. La. 2009); cf. *Tanguis*, 153 F. Supp. 2d, at 867.

⁶⁷ One difference between the two formats is that OPA sec. 2751(e) displaces maritime law by non-admiralty (statutory) law, while the *Delavan* proviso speaks to displacement by any federal statute, admiralty or otherwise.

⁶⁸ *Id.* at *3 (emphasis in the original) (Lemmon, J.).

⁶⁹ Ch. 758, 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. secs. 1251-1376 (2006 & Supp. 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. secs. 1251-1387, the former FWPCA sec. 1321 title is retained in this article except when quoting other sources or except where a particular context favors either the FWPCA or either the “Clean Water Act” (CWA) or “section 311 of the Clean Water Act” (CWA sec. 311).

Parallelism in function and language of the FWPCA and OPA provisions being compared, however, is imperative to support the claim's credibility in any specific instance in order to avoid what this essay terms a "category error."⁷² The issue is tested in two investigations. One addresses whether the character of the OPA and FWPCA damage limitation provisions warrants citing FWPCA jurisprudence favoring maritime law's displacement as a basis for a similar result under OPA.⁷³ The second is whether *B1 Bundle* properly invokes the FWPCA, *Baker* or *Townsend* NO 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.⁷⁴ Among the pre-*B1 Bundle* OPA precedents, *Gabarick* speaks to the point with the greatest clarity. It dismissed a suit brought by an OPA claimant against a third party defendant, reasoning that

[i]n light of Congress's intent to minimize piecemeal lawsuits and the [OPA's] mandatory language [in section 2702(a) and (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.⁷⁵

Subsequent discussion will introduce two elements suggested, but not specifically addressed by *Gabarick*. The first is that OPA's "silence" regarding claimants' direct suit 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 1980's decade designed to secure accelerated cost-recovery, including, in particular, the procedures and status liability assigned to potentially responsible parties" under CERCLA Superfund legislation.⁷⁶

⁷⁰ The "body of law already established under section 311 of the Clean Water Act is the foundation of the reported bill. Many of section's concepts and provisions are adopted directly or by reference." Sen. Rep. 101-94, at p. 4; U.S.C.A.N. 772, 726.

⁷¹ In re Metlife Capital Corp., 132 F.3rd 818, 822 (1st Cir. 1997); United States v. Bodenger, 2003 WL 22228517 at *2 (E.D. La. 2003).

⁷² See Part II infra.

⁷³ See Part II(C).

⁷⁴ OPA section 2713(a) states that "all claims for removal costs and damages [pursuant to OPA sections 2702(a) and (b)] shall be presented first to the responsible party or [its] guarantor." OPA sec. 2702(a) precedes its definition of the statutory tort's elements with the language "[n]otwithstanding any other provision or rule of law and subject to the provisions of this Act ..." Sec. 2702(b), entitled "Covered removal costs and damages," identifies the damages inventoried in sec. 2702(b)(2)(A)-(F) as the "damages referred to in [section 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 sec. 2713(a)(2) to seek recourse against the Fund rather than to sue the responsible party.

⁷⁵ *Gabarick*, 623 F.Supp. 2d, at 750.

⁷⁶ See Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. secs. 9601-9675 ("CERCLA"). Compare OPA sec. 2701(32) (definition of a "responsible party") with 42 U.S.C. 9607(a)(2006) ("covered parties," also termed "potentially responsible parties").

6. OPA and Maritime Law Punitive Damages

*South Port Marine, LLC v. Gulf Oil Limited Partnership*⁷⁷ in tandem with *Clausen v. M/V Carissa*,⁷⁸ denies that OPA itself provides for punitive damage and asserts that OPA displaces the maritime law doctrine that does. It advances three *independent* grounds for displacement. The first, as clarified in *Clausen*,⁷⁹ 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*,⁸⁰ which denied recovery for loss of society when the latter were not provided in statute.⁸¹ 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.

Part III does not take issue with *B1 Bundle's Miles*-based objection, but suggests 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 decades-long frustration with pre-OPA governmental and private remedies, whose inadequacies were further amplified by a succession of pre-1990 oil spills.⁸² With the 1989 Exxon Valdez disaster as the last straw, Congress unanimously approved OPA '90 in order to replace the prior "fragmented collection of Federal and State laws...."⁸³ "with a "single Federal law providing cleanup authority, penalties, and liability for oil pollution."⁸⁴ 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. "Following enactment of this Act," the

⁷⁷ 234 F.3rd 58 (1st Cir. 2000).

⁷⁸ 171 F. Supp. 49, at 2d 1127 (D. Or. 2001).

⁷⁹ *Clausen*, 171 F. Supp. 2d at 1133.

⁸⁰ 498 U.S. 19 (1990).

⁸¹ *Id.* at 31.

⁸² The 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 Mountain Services*, 509 F. Supp. 710 (D.C. 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 (emphasis added).

⁸³ Sen. Rep. 101-94, at 2, reprinted in 1989 U.S.C.C.A.N., at 723. Amplifying the Report's confirmation of OPA's displacement of other sources of federal law is the House debate statement that the "whole idea of a federal oil spill legislation is to have one coordinated and one comprehensive legislation, not a patchwork of state and federal laws which have turned out to be inadequate." Statement of Representative Franzel, 135 Cong. Rec. H7954, at 7977 Nov. 1, 1989.

⁸⁴ Sen. Rep. 101-94, at 2, reprinted in 1989 U.S.C.C.A.N., at 723 (emphasis added).

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.”⁸⁵

Congress placed OPA’s liability/compensation regime within a larger framework featuring three additional components: environmental protection as the framework’s lodestar⁸⁶; oil spill prevention and cleanup oversight through regulation by multiple federal agencies⁸⁷; and a calibrated set of deterrence-incentivizing civil and criminal penalties that implement OPA’s “polluters pay” philosophy.⁸⁸ To an observer familiar only with the maritime pollution tort, OPA’s remedial regime is incomprehensible in light of the manner in which Congress baked these novel and far-reaching values into the regime’s configuration.

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 the latter’s correlative indifference to fault, causation, and array of negligence-based defenses.⁸⁹ It embraces a “polluter pays” vision that, nonetheless, respects a limitations/breakable caps regime.⁹⁰ It imposes status liability on responsible parties⁹¹ who, whether or not ultimately found liable, must front response and damages costs,⁹² a requirement designed to compensate public and private claimants with minimum delay. Responsible parties are relegated to contribution or subrogation

⁸⁵ Sen. Rep.101-94, at p. 25, reprinted in 1989 U.S.C.A.N, at p. 746-47.

⁸⁶ “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 I, *supra* note 46 at 507. Elliott and Houlihan add that OPA “was deeply influenced by the prevailing legal culture of the 1980’s and 1990’s,” and that its key provisions “were borrowed from the 1980’s [CERCLA] Superfund.” E. Donald Elliott & Mary Beth Houlihan, *A Primer on the Law of Oil Spills 2* (2010) available at <http://ssrn.com/abstract=2007604>, last visited on June 30, 2013 (hereinafter *Primer*). 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 II*, *supra* note 16 at 541-55.

⁸⁷ Illustrative, *inter alia*, are the rulemaking responsibilities allocated, first, to the United States Coast Guard to govern Oil Spill Liability Trust Fund obligations and agreements pursuant to OPA sec. 2716(a) and to oversee the financial liability of responsible parties for certain vessels and offshore facilities under OPA sec. 2712(e), and, second, to the National Oceanic and Atmospheric Administration in conjunction with the United States Environmental Protection Agency and Fish and Wildlife Service under OPA sec. 2706 (e) for the assessment of natural resource damages.

⁸⁸ Civil and criminal penalties fall outside of OPA for the most part. Among the best known is FWPCA sec. 1321(b)(7)(D) (as modified by 40 C.F.R. sec. 19.4 (2010), authorizing civil penalties up to \$4300 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 penalties, civil and criminal associated with OPA-related violations, see E. Donald Elliott & Mary Beth Houlihan, *Primer* note 86 *supra*, at pp. 16-22.

⁸⁹ OPA secs. 27012(17) and 2702(a).

⁹⁰ OPA sec. 2704. This provision’s role in contributing to OPA’s displacement of maritime law is detailed in TAN 134 *supra*.

⁹¹ See OPA secs. 2701(32) and 2702(a). Removal costs and damages are compensable “regardless of the source of the spill.” Sen. Rep. No. 101-94 at p. 4, reprinted in 1990 U.S.C.A.A.N. 772, 726. The Oil Spill Liability Trust Fund, moreover, provides compensation for damages “regardless of the liability of the spiller.” *Id.* at p.5, 1990 U.S.C.A.A.N., at p. 727.

⁹² See OPA secs. 2702(d)(1)(A) and (B)

actions to secure recompense against other liable parties.⁹³ OPA's compensation and liability provisions are intricately crafted to pair with a command and control regulatory program on the one side,⁹⁴ and a variety of civil and criminal fines and penalties on the other.⁹⁵

OPA's section 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 90 days of the claims presentation, failing which the former may seek satisfaction by pressing their claims either in court or before OPA's section 2712 Oil Spill Liability Trust Fund.⁹⁶

E. Donald Elliott, 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 co-authored article observing that OPA is "deeply influenced by the prevailing legal culture of the 1980's and 1990s,"⁹⁷ and that its key provisions "were borrowed from ... the 1980s Superfund."⁹⁸ Also borrowed was the "essence of the EPA's policy for implementing the 1986 Superfund amendments –do not delay clean-up while the PRPs argued 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."⁹⁹ Elliott describes this claims procedure as "unique with no analogical procedure under Superfund, the FWPCA or any other major federal environmental statute," and, needless to say, under general maritime law.

These features were neither perceived nor embraced when admiralty judges extended general admiralty tort principles to petroleum discharges earlier in the twentieth century.¹⁰⁰ Like OPA itself, they and the comprehensive framework they support are

⁹³ See OPA secs. 2702(d)(1)(B) (subrogation), 2708 (recovery by responsible parties), and 2709 (contribution by any "person").

⁹⁴ E. Donald Elliott has observed in a co-authored study that OPA was adopted "against 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) which "mandat[es] specific drilling practices and technological controls as well as government oversight and review and approval of drilling plans." E. Donald Elliott & Mary Beth Houlihan, Primer, supra note 86 at p. 2. "OPA 90" was drafted "[a]gainst this regulatory backdrop." Id.

⁹⁵ Id. at 16-23.

⁹⁶ OPA sec. 2713(c).

⁹⁷ E. Donald Elliott & Mary Beth Houlihan, Primer, note 86, at p. 2.

⁹⁸ Id.

⁹⁹ Id. at 4, n. 22. See Sen. Rep. No. 101-94 at p. 10

¹⁰⁰ See Kiern I, supra note 46 at 490-502. Robert Peltz portrays maritime case law through the late-1960's as "not particularly concerned with the possibility of oil pollution disasters ... [because] early environment-related casers were limited largely to local fishing and similar conservation issues." Robert Pelz, *The Myth of Uniformity in Maritime Law*, 103, 126 (1996). Post-1950's admiralty courts' evident struggle to rationalize remedial options within the maritime tort rubric appears in, e.g., *Oppen v. Aetna Ins. Co.*, 485 F.2d 252, 256 (9th Cir. 1973) (incorrectly construing *Executive Jet* as requiring that the activities of the oil pollution victim rather than of the tort's author to be substantially related to a traditional maritime activity); *California v. Bournemouth*, 307 F. Supp. 922, 927-29 (C.D. Cal. 1969)(resting admiralty jurisdiction on a non-statutory lien

creatures, first, of post-1950 political, technological and economic forces driving petroleum development in territorial and OCS waters,¹⁰¹ and, second, of the post-1970 environmental age,¹⁰² 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,¹⁰³ 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 marine.

Maritime tort values translate into an evidentially burdensome negligence standard, the Limited 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 latter is the tort's incorporation of the *Robins* doctrine, which denies recovery to oil discharge victims (other than commercial fishermen) absent injury to their physical property.¹⁰⁴ Contrarily, the maritime pollution tort borrowed the award of punitive damage from maritime general negligence law,¹⁰⁵ 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.¹⁰⁶

Judicial awareness of either would not have made much of a difference in any event. The half-century struggle of Congress and multiple federal agencies to overcome oil pollution regulation's political, technological, economic and public revenue-gathering dimensions places the effective resolution of its remedial challenge well beyond maritime lawmaking's competence or inclination. Absent congressional protection of private economic and property interests,¹⁰⁷ 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*,¹⁰⁸ pending Congress's restructuring of the private (and public) dimensions of the tort through OPA's enactment.

derived by an obviously forced analogy from non-pollution scenarios featuring injury to property by conversion); *Maine v. M/V Tamano*, 3545 F. Supp. 1097 (D.C. Maine 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).

¹⁰¹ See President's Report, *supra* note 18, ch. 3.

¹⁰² See Robert Pelz, *The Myth of Uniformity in Maritime Law*, *supra* note 100.

¹⁰³ Recognizing the fundamental difference between the two pursuits, Robert Pelz endorses separating environmental law issues out from admiralty's uniformity concerns. They pose problems that "traditional maritime law does not address" because they "did not exist in the past or were not considered important." *Id.* at p. 126.

¹⁰⁴ See Thomas Schoenbaum, *I Admiralty and Maritime Law*, secs. 11-12, 14-7, and 18-4 (5th ed. 2011).

¹⁰⁵ See *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

¹⁰⁶ For assessments both past and future of the scope of the problem and its risks, see President's Report, note 18 *supra* at chs. 6, 9 & 10.

¹⁰⁷ Pre-OPA federal pollution statutes going as far back as 1924 lacked a private cause of action for petroleum discharges.

¹⁰⁸ Placeholder by the judicial formulation of federal maritime or common law rules in the absence of Congress's resolution of issues of national concern enjoys the Supreme Court's firm endorsement as a valid

With OPA, however, Congress succeeded in fusing the liability and compensation provisions of four prior site-specific oil pollution acts¹⁰⁹ into a modern, precisely coordinated program. Congress also fashioned a private remedy that absorbs and dwarfs the maritime tort in scope and procedural detail¹¹⁰ while speaking to the identical question that the earlier maritime tort has been struggled so unsuccessfully to address.

*C. Oil Pollution Act of 1990 Preamble: "AN ACT to establish limitations on liability for damages resulting from oil pollution"*¹¹¹

OPA's reforms undoubtedly advantage private claimants. But OPA's Preamble establishes that OPA is also a *damages limitation statute*, as Lawrence Kiern properly counsels.¹¹² 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 section 311(b)(2)(f)(1)-(3)'s damages limitation provisions.

The provisions' legislative history and their judicial reception merit scrutiny because "the body of law already established under section 311 of the Clean Water Act is the

justification for federal judicial lawmaking. See TAN 189 *infra*. Relevant to the placeholder discussions in text is the Fourth Circuit's view of the maritime pollution tort as a placeholder pending Congress's adoption of the FWPCA which, in turn, displaced the maritime tort. See *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609 (4th Cir. 1979). Holding that FWPCA sec. 1321(f)(1) displaced the maritime tort, the court stated that latter was "inferred from the ... maritime law *precisely because no adequate statutory remedy existed*." *Id.* at 61.

¹⁰⁹ See OCSLA, ch. 345, 67 Stat. 462 (1953) (codified as amended at 43 U.S.C. 1331-1356(a) (2009); Deepwater Port Act of 1974, Pub. L. No. 93-627, 88 Stat. 2126 (1975), at 33 U.S.C. secs. 1501-24 (2006); Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 584 (1973), at 43 U.S.C. secs. 1651 et seq. (2006); Federal Water Pollution Control Act, ch. 758, 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. secs 1251-1376 (2006 & Supp. 2009).

¹¹⁰ OPA, through subchapter I and with the inclusion of sec. 2751(e) of subchapter II, requires approximately 23 pages, and includes 22 provisions, the greater part of which govern both the private and the public statutory tort, and discerningly address the various matters reviewed in this essay. 112's total of seven provisions, on the other hand, runs a page or less in print.) Representative of the provisions' content are sec. 2701 (a four-page definitions section of fundamental substantive import), sec. 2702 (a) (cause of action), sec. 2702(b) (covered damages), sec. 2703 (responsible party/sole fault third party defenses); sec. 2704 (liability limitation schedule and requirements), sec. 2705 (interest awards, partial claims payments); secs. 2709 and 2715 (actions for contribution and subrogation), sec. 2710 (indemnification agreements), sec. 2712 (Oil Spill Liability Trust Fund), sec. 2713 (claimant recovery procedure), sec. 2716 (vessel and facility owners' financial responsibility), sec. 2717 (litigation, jurisdiction venue and independent statutes of limitations for actions for damages, for removal costs, for contribution, and for subrogation), sec. 2718(a) (state law savings clause); sec. 2719 (reserved state and federal authority), and sec. 2751(e) (admiralty savings clause). contributory negligence, survival, and damages." The length of a statute alone is a crude gauge for assessing its comprehensiveness, of course. But as illuminated by their evaluation throughout this essay, the provisions' content, precision and scope manifest statutory density of an order, Parts II(A) and (B) affirm, more than sufficient to support OPA's displacement of the maritime tort on the several different grounds there discussed.

¹¹¹ Oil Pollution Act of 1990, Pub. L. No. 101-380 Preamble, 104 stat. 484.

¹¹² See Kiern II, *supra* note 50 at p. 54 ([T]he first expressed purpose of OPA is to 'establish limitations on liability for damages resulting from oil pollution...").

foundation of the reported [OPA] bill.”¹¹³ They illuminate both the structure of the compromise Congress struck in seeking a balanced damages limitation regime,¹¹⁴ and the federal courts’ unanimous agreement that the regime’s implementation in CWA section 311 displaces the federal government’s maritime cause of action against owner/operators.¹¹⁵

*United States v. Steuart Transportation Company*¹¹⁶ lists as values shaping the compromise section 311’s impacts on maritime commerce; insurance availability and premiums; economic needs of shippers, vessel owners and consumers; and the federal government fiscal needs.¹¹⁷ The House and Senate bills went in different directions; the House proposing liability based on fault and an absolute limit on removal costs, and the Senate, strict liability within a maximum limit subject to certain defenses.¹¹⁸ “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.”¹¹⁹

CWA litigation centered on the federal government’s effort to employ a maritime remedy to obtain the difference between the section 311 cap and the government’s actual recovery costs. Impeding this outcome were not only its rejection by the courts, of course, but the Limited Liability Act, the principal contributor to this outcome. Over a period of a century and 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 ship owners’ damages in a maritime tort action, the Act reduces the latter to the Act’s salvage value/freight pending formula if the incident’s simple negligence occurs without the ship owner’s knowledge or privity.¹²⁰

But the federal courts rebuffed the CWA parallel track claim for government/owner-operator suits,¹²¹ citing the outright conflict between the CWA remedy, as conditioned by

¹¹³ Sen. Rep. No. 101-94, at p. 4, 1999 U.S.C.C.A.N. 722, 726.

¹¹⁴ CWA sec. 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.

¹¹⁵ See, e.g., *Frederick E. Bouchard, Inc. v. United States*, 583 F. Supp. 477 (D.C. Mass. 1984); *United States v. Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981); *In re Hokkaido Fisheries Co.*, 506 F. Supp. 631 (D. Alaska 1981); *United States v. Dixie Carriers*, 627 F. 2d 736 (5th Cir. 1980); *Steuart Transp. Co. v. Allied Towing Corp.*, 506 F.2d 609, 614 (4th Cir. 1979).

¹¹⁶ 596 F.2d 609 (4th Cir. 1979).

¹¹⁷ *Id.* at 617.

¹¹⁸ *Id.* at 613

¹¹⁹ *Id.*

¹²⁰ Limited Liability Act, 46 U.S.C.A sec. 30505(1) and (2).

¹²¹ 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 the discharge of oil...” See, e.g., *United States v. Bear Marine Services*, 509 F. Supp. 710 (E.D. La. 1980); cf. *United States v. M/V Big Sam*, 681 F.2d 342 (5th Cir. 1982) (right to maritime suit against CWA sec. 311(g) sole-fault third party preserved under CWA sec. 311(h)(2)).

its section 311 damages limitation requirement, and the maritime negligence remedy as qualified by the Limited Liability Act. *United States v. Oswego Barge Corporation* pinpoints the displacement-creating objection in a rationale that speaks for an entire generation of section 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.¹²²

Oswego’s “inconsistency” will differ according to which of four ascending scenarios it engages. Under the first, a non-negligent oil discharger is strictly liable under CWA section 311, but escapes both maritime tort negligence liability and the elements of the Limited Liability Act discussed below. Second, the latter act could reduce the federal government’s recovery well *below* section 311’s cap in consequence of act’s application of its vessel salvage value/pending freight formula to ordinary negligent incidents beyond the “knowledge or privity” of the owner/operator.¹²³ The third scenario is posed in *Oswego* itself in which sec. 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.¹²⁴ The section 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 section 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 the costs.” The maritime award, on the other hand, would include both this compensatory amount *and* some additional multiple of the latter as *punitive* damages.

¹²² *Oswego*, 664 F.2d at 343-44.

¹²³ See *In re Hokkaido Fisheries Co.*, 506 F. Supp. 631 (D.C. Alaska 1981) (allowing only \$48,489 for salvage value/freight pending as against government response costs of \$2,780,000; the total amount of the sec. 311 caps is not disclosed in the opinion but likely substantially exceeded the value/freight pending amount).

¹²⁴ Cf. *Nat’l Shipping Co. of Saudi Arabia v. Moran Mid-Atlantic Corp.*, 924 F. Supp.1436, 1447 (E.D. Va. 1996), *aff’d sub nom Nat’l Shipping Co. of Saudi Arabia v. Moran Trade Corp. of Delaware*, 1997 WL 560047 (4th Cir. 1997), cert. denied, *Nat’l Shipping Co. of Saudi v. Moran Trade Corp. of Delaware*, 523 U.S. 1021(1998). *National Shipping* demonstrates the restraint OPA’s damages limitation regime impose upon private claimants. An OPA claimant whose status liability of some \$1,269,000 as an oil discharger was transferred to a non-willful/non-grossly negligent third party, i.e, a party liable solely for “ordinary negligence, was nonetheless denied \$769,000 of this payout in its contribution action against the third party because OPA secs. 2702((d)((2)(A) and 2704(a) capped the latter’s liability at \$500,00.

The scenarios' inconsistency with maritime law does not plague section 311 because the section's damage limitations regime engages the United States alone, the sole section 311 plaintiff in the scenario. In the Ninth Circuit's view, the same reason explains why *Baker* (maritime remedy allowed for a private claimant recovering maritime punitive damages) is not inconsistent with *Oswego* (no maritime remedy allowed for the United States for recovery of response costs against owner/operator).

[*Oswego*] read[s] [section 311] as we do, and concluded that its remedies section preempted the *Government's* non-FWPCA remedies against a discharging vessel. 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 in [section 311].¹²⁵

If maritime rules were deemed displaced by section 311, moreover, private victims of oil spills would be unfairly disadvantaged when, as in *B1 Bundle*¹²⁶ or under general maritime preemption principles, state remedies prove to be unavailable. Inspired by 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."¹²⁷

But the harmony gracing *Baker's* CWA/maritime law pairing flees with OPA's embrace of *private* claimants. The impressive benefits conferred on the latter under the OPA statutory tort remedy come at the price of the restrictions that OPA's section 2704 damages limitation regime imposes on the dollar amount owed them by responsible parties.¹²⁸

Other than its extension to private claimants, the OPA regime mirrors its CWA section 311 counterpart despite changes that broadened the statute's scope. *In re Metlife Capital Corporation* confirms that the FWPCA cases sustaining section 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

¹²⁵ *In re Exxon Valdez*, 270 F.3rd 1215, 1232 (9th Circuit 2001), *aff'd sub nom Exxon Shipping Co., v Baker*, 554 U.S. 471 (2008) (emphasis in original). General maritime law's displacement in governmental actions under 311 comports with numerous federal decisions holding the sec. 311 impliedly or expressly supersedes Limited Liability Act. See, e.g., *In re Hokkaido Fisheries Co.*, 506 F. Supp. 631 (D. Alaska 1981) (express override); *United States v. Dixie Carriers, Inc.*, 627 F.2d 736 (C.A. La. 1980) (implied override); Accord: 2 Thomas Schoenbaum, *Admiralty and Maritime Law* sec. 18-3, at p. 293, n. 27. Eschewing *B1 Bundle's* silent canon error, *Dixie Carriers* grounds its holding on congressional intent as evidenced 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."

¹²⁶ See *B1 Bundle*, 808 F. Supp. 943, 951-58 (E.D. La. 2011) (BP oil pollution's source was external to state territorial waters, hence, state law was preempted by national maritime law; alternatively, BP discharge not "within" a state is unprotected by OPA sec. 21718(a)(1)(A)'s savings provision).

¹²⁷ *In re Exxon Valdez*, 270 F.3rd 1215, 1232 (9th Cir. 2001).

¹²⁸ See the discussion in note 124 *supra* concerning the denial to a non-negligent discharging OPA claimant of more than half of its payments for response costs and discharge victim damages claims because OPA's damage limitations regime capped the negligent third party's liability at less than half of the claimant's OPA payout.

to the settled law applicable to FWPCA when OPA was enacted.”¹²⁹ OPA section 2702(b)’s damages were added to supplement pollution removal costs, for example, and damages caps were increased under OPA section 2704. But *Metlife*, OPA’s legislative history¹³⁰ and OPA section 2704 itself confirm that Congress remains as committed in OPA as it was in the CWA to balancing remedies with restraint.

Resurfacing in OPA, therefore, are CWA section 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 of the latter, liability increases from the OPA cap to actual, i.e., *compensatory*, removal costs or damages.¹³¹ Additionally, Congress left no doubt that OPA expressly supersedes the Limited Liability Act.¹³² 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.*”¹³³

Oswego ultimately premised the maritime pollution tort’s displacement on the “inconsistencies” between the damages limitation requirements of the tort and of CWA section 311. *Baker* escapes the inconsistencies *only* because the exclusion of private claimants as CWA plaintiffs also excluded the latter from the demands of the section 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 the OPA: The Non-Admiralty Statutory Dimension of the Mixed Admiralty/Non-Admiralty BP Blowout

OPA and OCSLA do not take kindly to maritime law’s supposed access to a parallel track co-equal with these statutes.¹³⁴ The proviso to OPA’s admiralty savings clause is hostile to

¹²⁹ In re *Metlife Capital Corp.*, 132 F.2d 818, 821 (1st Cir. 1997), cert. denied sub nom. *Bunker Group, Inc. v. United States*, 524 U.S. 952 (1998) (quoting William Duncan, *The Oil Pollution Act of 1990’s Effect on Shipowners’ Limited Liability Act*, 5 U.S.F. Mar. L. J 303, 316 (1993).

¹³⁰ Sen. Rep. No. 101-94, at pp. 13-14, reprinted in 1990 U.S.C.C.A.N. 722, 735-36; H.R. Conf. Rep. No. 101-653, at pp. 105-08, reprinted in 1990 U.S.C.C.A.N. 732, 783-85. In re *Matter of Spray (Jahre)*, 1996 WL 451315, at *4 (D.N.J. 1996) observes that in formulating OPA, the “various 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.”

¹³¹ OPA’s text leaves no doubt that the “damages” to which OPA sec. 2702(b) refers are *compensatory* damages only. See OPA sec. 2701(3), which defines a “claim” as a “request ... for compensation for damages or removal costs resulting from [a section 2702(a)] incident”; OPA sec. 2701(4), which defines “claimant” as “any person ... who presents a claim for compensation under this subchapter; and OPA sec. 2701(5), which defines “damages” as “damages specified in section 2702(b) of this title.”

¹³² See, .e.g. OPA sec. 2718(a); 2718(c).

¹³³ Sen. Rep. No. 101-94, at pp. 13-14; reprinted in 1990 U.S.C.C.A.N. 779, 735-36 (emphasis added). Compare In re *Hokkaido Fisheries Co.*, 506 F. Supp. 631, 634 (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.”)

¹³⁴ OCSLA finds its constitutional footing in the commerce clause, see *Smith v. Pan Air*

maritime rules that are 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 Company*¹³⁵ and *Herb’s the Welding v. Gray*¹³⁶ 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 poorest, when it does not.

These observations, detailed at length elsewhere,¹³⁷ 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 proposing the option in hearings that included the testimony that “[m]aritime law in the strict sense has never had to deal with the resource in the ground beneath the sea, and its whole tenor is ill adapted for that purpose.”¹³⁸ In *Rodrigue*,¹³⁹ the Supreme Court invoked this statement to conclude that “the most sensible interpretation of Congress’s reaction to this testimony is that admiralty treatment was eschewed altogether....”¹⁴⁰ and added that “maritime law [is] inapposite” as a governance vehicle for OCS activities occurring on OCS drilling platforms.¹⁴¹ In its subsequent decision in *Herb’s Welding v. Gray*, the Court excoriated as “untenable” the claim that “offshore drilling is maritime commerce.”¹⁴² It cited *Rodrigue* as establishing that OCSLA’s legislative history “at the very least forecloses the ... holding that offshore drilling is a maritime activity,”¹⁴³ and added for good measure

Corp, 684 F.2d 1102, 1107 n. 12 (5th Cir. 1982) (OCSLA “depends on national sovereignty and the commerce clause.”) (Rubin, J.). Congress’s 1978 amendment of OCSLA confirmed the statute’s shared footing under the property clause. See *Costonis I*, supra note 16, at p. 541. OPA provisions falling outside of admiralty law pursuant to OPA sec. 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 sec. 2701(24) (defining “Outer Continental Shelf facility”); OPA sec. 2704(20) (defining “natural resources” to include “such resources belonging to, managed by ... or otherwise controlled by the United States), and sec. 2704(c)(3) (barring damages limitations for an “OCS facility or vessel”). OPA’s non-admiralty 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 (1918, an opinion *B1 Bundle* cites alongside *Knickerbocker Ice. Co v. Stewart*, 253 U.S. 149 (1920), as “still retain[ing] ‘vitality.’” 808 S. F. Supp. 2d at 954 n. 7 (citations omitted). Accord: Robert Peltz, *The Myth of Uniformity in Maritime Law*, supra note 100, at p. 126. OPA authorizes the application of the differing laws of *all* states experiencing tortious impacts from single oil discharge incident within their waters, see OPA sec. 2718(a); of federal non-admiralty statute law pursuant to OPA/OCSLA; *and*, if *B1 Bundle*’s non-displacement position is correct, of the general maritime law that often conflicts with OPA. “Admiralty uniformity” in such a setting is a phantasm. 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 note 62 supra, which necessarily excludes general maritime law’s supposed status as an additional federal law track.

¹³⁴ 476 U.S. 858, 864 (1986).

¹³⁵ 395 U.S. 352 (1969).

¹³⁶ 470 U.S. 414 (1985).

¹³⁷ See *Costonis I*, note 16 supra at 523-24.

¹³⁸ Outer Continental Shelf: Hearings before the Senate Committee on Interior and Insular Affairs, 83rd Cong. 668 (1953) (statement of Richard Young, Esq., Member of the New York State Bar).

¹³⁹ 395 U.S. 352, 365 n. 12 (1969)

¹⁴⁰ *Id.* at 365 n.12 (1969).

¹⁴¹ *Id.* at 363.

¹⁴² 470 U.S. 414, 421 (1985).

¹⁴³ *Id.* at 422.

that “exploration and development of the Continental Shelf are not themselves maritime commerce.”¹⁴⁴

Executive Jet endorses in more contemporary form Justice 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.”¹⁴⁵ 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 activities.”¹⁴⁶ It applauds admiralty law’s governance of matters that the latter is competent to address on the basis of its accumulated expertise and experience. Hence, its observation that

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, capture and prizes, limitation of liability, cargo damage and claims for salvage.”¹⁴⁷

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.*”¹⁴⁸

Executive Jet’s point, like that of this essay overall, is straightforward and quite obvious. Core rationality calls for choosing the tool that not only is the most fit for the task at hand, but, as Part II illuminates, that squarely aligns with the Court’s displacement law and policy.

II. Displacement: Congress, the Supreme Court and the Lower Federal Courts

Reading the *B1 Bundle* opinion is akin to arriving at a theater during the second act of a three-act play, 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 OPA’s being left in the wings when Congress blasted through a two-decade stalemate to award OPA the starring role? The present section 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 this play’s narrative.

¹⁴⁴ Id. at 425. Despite the Fifth Circuit’s former resistance, see *Costonis II*, supra note 16 at 15-20, it now acknowledges that “under Supreme Court precedent, offshore drilling is not maritime activity.” OCS drilling is not “maritime commerce.” See *Hercules Offshore, Inc. v. Barker*, No. 12-20150 at p.10 (E.D. La. 2013) (refusing to remand to state court action for injury to worker atop OCS jack-up rig).

¹⁴⁵ *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 235 (Holmes J., dissenting).

¹⁴⁶ *Executive Jet*, 409 U.S. at 273.

¹⁴⁷ Id. at 270.

¹⁴⁸ Id. at 539-40 (1995) (emphasis added).

Four tasks await Part II. Employing the concepts of “silence” and “speaking directly” to a “question” as the discussion’s prompts, the first establishes guidelines addressing various dimensions of the displacement lexicon. The second brings greater precision to the manner in which the Supreme Court identifies and gauges overlap or cohabitation of the same “space” by a federal statute and its paired common law rule. The third highlights the threat to separation of powers values that these 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.

The displacement lexicon’s key terms include “silence;” “comprehensive;” statutory “scope;” “speaking directly” to a “matter,” “question,” or “subject;” “fields,” whether “entire” or otherwise, being “occupied;” “judicial lawmaking” and “interstitial gap filling” or, in Justice Holmes’ memorable phrase, “molar and molecular motions;”¹⁴⁹ and, finally, the statutory “windows,” wide or narrow, through which maritime law seeks passage and cohabitation with its paired statute. Dispersed throughout displacement decisions like the shards of a window’s broken glass, these terms challenge the following paragraphs to discern and give order to what on closer examination is the inherent sense of their seemingly random use.

A. SILENCE

1. DUELING CANONS

Silence, it has been observed, “may be interpreted in a number of ways 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 a bill.”¹⁵⁰ *B1 Bundle* interprets OPA’s four silences¹⁵¹ as approval of matters not expressly negated, observing as to the punitive damages silence that “Congress knows how to proscribe punitive damages when it intends to.”¹⁵² 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, Carl 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 “dueling canons,”¹⁵³ 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.”¹⁵⁴

¹⁴⁹ *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

¹⁵⁰ *In re Tug Allie-B, Inc.*, 114 F. Supp.2d 1301, 1304 (M.D.Fla. 2000), quoting *Rogers v. Frito-Lay, Inc.* 611 F.2d 1074, 1085 (5th Cir. 1980).

¹⁵¹ See TAN *supra* notes 31-34.

¹⁵² *B1 Bundle*, 808 F. Supp. 2d at 962.

¹⁵³ Carl Llewellyn, *The Common Law method: Deciding Appeals* *supra* note 38, at Appendix C.

¹⁵⁴ *Milwaukee II*, 451 U.S., at 340, n.11 (Blackmun J., dissenting).

For displacement of prior law: “It 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.”¹⁵⁵

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.”¹⁵⁶

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 remedy it considered appropriate.”¹⁵⁷

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.”¹⁵⁸ 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 mistakenly construes the Supreme Court’s “speak[ing] directly” condition to require, 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 Corporation 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.”¹⁵⁹

Higginbotham held that the Fifth Circuit overstepped its admiralty lawmaking bounds by approving loss of society damages under a maritime law wrongful death track when, under DHOSA, Congress permitted only pecuniary damages. DHOSA, the Court reasoned,

¹⁵⁵ *Dean v. American Sec. Ins. Co*, 559 F. 2d 1036, 1039 (5th Cir. 1978), en banc reh’g denied, 564 F.2d 97 (5th Cir. 1977), cert. denied, 434 US 1066 (1977).

¹⁵⁶ *Isbrandsten Co. v. Johnson*, 343 U.S. 779, 783 (1952).

¹⁵⁷ *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Assn*, 453 U.S. 1, 145 (1981).

¹⁵⁸ F. Scott Fitzgerald, *Rich Boy* (Red Book Jan./Feb. 1926).

¹⁵⁹ *Milwaukee II*, 451 U.S. at 315, quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. at 625 (emphasis added). The Court likewise does not require express statutory language to establish the statutory *creation* of a remedy. Hence, the Court’s statement that “[i]t is unnecessary to discuss at length the principles set out in recent decisions considering the question whether Congress intended to create a private action under a federal statute without saying so explicitly. The key to the inquiry is the intent of Congress.” *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Assn.*, 453 U.S. at 13. Accord: *Transamerica Mortgage Advisors Inc., v. Lewis* 444 U.S. 11, 15 (1979).

spoke incompatibly to the same question that the maritime law tort addressed: the elements appropriate for inclusion in a wrongful death award. But DHOSA contains no language making express proscription a condition precedent to a displacement outcome. That is, DHOSA does not state that a “maritime law remedy, whether enacted prior to or following DHOSA’s enactment, that fails to respect section 30303’s ‘pecuniary’ limitation is hereby displaced.” This is the sense in which DHOSA is “silent” on the issue. The outcome was the work of the Court, which, sensitive to Congress’s lawmaking priority under separation of powers principles, declared that the statutory/maritime law difference *by itself* was sufficiently indicative of Congress’s intent to justify the Court’s ruling.

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.”¹⁶⁰ “Scope” and “scheme” are not themselves express Congressional directives requiring displacement. Rather, they are intermediate elements that 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’s 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, silence’s meaning 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”¹⁶¹

¹⁶⁰ Id. at 315 (emphasis added). In a setting closer to the Macondo scenario, *United States v. Oswego Barge Co.*, 664 F.2d 3237 (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 on its costs of cleaning up oil spilled on American waters. Section 1321(f) establishes a comprehensive scheme of providing for both strict liability up to specific limits and recovery of full costs upon proof of willful negligence or willful misconduct with the privity and knowledge of the owner.” Id. at 339-40. 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 section 1321(f). *Gabarick* handles the task more modestly because the “space” it focuses upon—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 Maritime (America) Inc.* 623 F. Supp. 2d 741, 748. (E.D. La. 2009)

¹⁶¹ *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974), quoting *Brown v. Duchesne*, 19 How. 183, 194 (1857).

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 latter may present itself as narrowly as *Higginbotham's* "loss of society" damages in a wrongful death action,¹⁶² or as broadly as the Environmental Protection Agency's responsibility to insure the health of the nation's waters¹⁶³ or to abate carbon dioxide emissions into the atmosphere.¹⁶⁴ If the "question" is narrow, a statute speaks directly to it simply by naming the topic or its equivalent, as witness *Higginbotham's* restricted focus on DHOSA's reference to "pecuniary damages."

Setting the boundaries of the "question" is more demanding when the latter engages an entire field as in the foregoing abatement of carbon dioxide emissions or the pollution of the nation's waters examples. The task commences with 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.¹⁶⁵

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 lawmaking rules can "fit" through them in order to take up residence alongside the statute. As Judge Newman portrays the metaphor in *United States v. Owego Barge Corporation*,¹⁶⁶

[i]n 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.¹⁶⁷

¹⁶² See *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978).

¹⁶³ *Milwaukee II*, 451 U.S. 304 (1981).

¹⁶⁴ See *American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011)

¹⁶⁵ For an instance of a legislative scheme that failed to meet the test in text, see *Oneida County v. Oneida Nation of New York State*, 470 U.S. 226, 236-41(1995)(Non-Intercourse Acts did not "speak directly" to the elimination of a tribe's federal common law right to bring possessory land actions).

¹⁶⁶ 664 F.2d 327, 339 N. 15 (2d Cir. 1981).

¹⁶⁷ *Id.* at 339, n. 15 (citation omitted).

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

Oswego and *Higginbotham* advise that OPA leaves no or insufficient 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 details or comprehensiveness would be undermined by common law supplements." 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 latter's "answer" in breadth and often incompatible detail.¹⁶⁸

Higginbotham's phrasing differs somewhat from *Oswego's*, but its meaning is more pointed still for this essay'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.¹⁶⁹

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 lawmaking 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. I find it 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.¹⁷⁰ 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.¹⁷¹ Or it may be used to justify a

¹⁶⁸ See note 110 *supra*.

¹⁶⁹ See *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 665 (1978).

¹⁷⁰ *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 at 959, and that the 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 the two non-OPA precedents reviewed in Part III(B) *infra*.

¹⁷¹ See *Milwaukee II*, 451 U.S. 304, 317 (1981).

displacement conclusion on its own footing despite acknowledgement that the statute occupies less than an entire field.¹⁷²

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. 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.*”¹⁷³ Obviously, a judge-made rule the content of which 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 there is a great deal in the OPA/maritime rule pairing, is only one form of incompatibility. *Milwaukee II*'s language warrants opposition to a variety of forms of judicial lawmaking that derogate from Congress's 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's intent, not to make a fetish of one or more of these labels as *B1 Bundle* does by exiling OPA to a non-displacement no-mans-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 FWPCA *both* as

¹⁷² This usage is routine in opinions favoring OPA's preemption of the maritime tort, which reason that OPA doesn't cover the entire field because it excludes such additional concerns as personal injury, death or vessel collisions. See, e.g. *Gabarick v. Laurin Maritime (America) Inc.*, 623 F. Supp. 2d 741, 745-46, 748 (E.D. La. 2009); *Nat'l Shipping Co. of Saudi Arabia v. Moran Mid-Atlantic Corp.*, 924 F. Supp. 1436, 1447, 1450 (E.D. Va. (1996), *aff'd sub nom Nat'l Shipping Co. of Saudi Arabia v. Moran Trade Corp. of Delaware*, 997 WL 560047 (4th Cir. 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 private statutory tort, which exhaustively establishes a remedial regime for private economic and private losses attendant upon tortious oil discharges, is not rendered less comprehensive because it does not cover other matters, e.g., 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 sec. 311 of the FWPCA as to particular elements. See TAN 177-79 *infra*.

¹⁷³ *Milwaukee II*, 451 U.S. at 319, n. 14.

occupying its entire field¹⁷⁴ *and* as speaking directly to the question addressed by the displaced common law rule.¹⁷⁵

Consider the alternative configurations of OPA that are in play in *B1 Bundle* in light of this continuum. If OPA's section 2702(b) "covered damages" is the target, it makes perfect sense for *Gabarick* to describe OPA as "speaking directly" to this discrete component on the same basis that *Higginbotham* described DHOSA section 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.¹⁷⁶

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 section 2702 and its associates.¹⁷⁷ *Gabarick* rightfully emphasizes that the language of sections 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 FWPCA's narrow focus on governmental cleanup cost recovery. OPA radically oversteps the latter, moreover, by embracing the *private* claimants and *private* remedies. OPA aggressively *proscribes* virtually any actual or threatened private petroleum discharge, NO while the FWPCA *allows* discharge, by permit, of a broad range of pollutants.¹⁷⁸ OPA and the FWPCA join together, however in their vast geographic range: their respective writs run to the nation's inland waters, the OCS's living and non-living 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.¹⁷⁹ It is unlikely that there are many other subfields defined as sweeping in the United States Code.

¹⁷⁴ Milwaukee II, 451 U.S., at 317 (The FWPCA creates "an all encompassing program of water pollution regulation").

¹⁷⁵ *Id.* at 313. (Applying the *Higginbotham* "speaking directly" standard to the FWPCA). *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) likewise appears to conflate the "occupation of an entire field" with "speaking directly" displacement gauges. See *id.* at 489.

¹⁷⁶ *B1 Bundle*, 808 F. Supp. 2d 943, 961 (E.D. La. 2011).

¹⁷⁷ See note 110 *supra* for a partial inventory of these provisions.

¹⁷⁸ See Michael Healy, *Still Dirty after Twenty-Five Years: Water Quality Standards Enforcement and the Availability of Citizen Suits*, 24 *Ecol. L.Q.* 393 (1997).

¹⁷⁹ See Sen. Rep. No. 101-94 at p. 11, 1999 U.S.C.A.N. 722, 733. Among the various reasons why OPA is premised in part, and OCSLA, in whole, on Congress's non-admiralty constitutional powers is their application to the OCS, which effectively constitutes United States public *lands*, and to the *airsheds* above the waters superadjacent to the OCS. Control of ambient air quality above OCS facilities is prescribed by OCSLA sec. 1344(a)(8).

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 lawmaking in displacement disputes.¹⁸⁰ Under appropriate circumstances, the authority may afford a “narrow exception to the limited lawmaking role of the federal judiciary,” the Supreme Court declared in *Northwest Airlines*, “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.”¹⁸¹ Nor can the resilience of at least some “long-established” admiralty or general maritime principles be ignored.¹⁸² None are as venerated as rules pertaining to the welfare of seamen, the “wards of admiralty.”¹⁸³

But federal judges’ lawmaking powers are no match for those of Congress when their exercise threatens or breaches separation of powers boundaries. *Northwest Airlines* counsels, as also previously observed, that “[e]ven 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.”¹⁸⁴ *Delaval*, of course, drives the nail home by assigning general maritime law dominance only “in the absence of a relevant statute.”¹⁸⁵

Maritime law principles that Congress concludes no longer reflect the needs of the age, moreover, are not shielded from displacement simply by reason of their vintage. Otherwise, Congress would exceed its powers in displacing the federal government’s former maritime remedies by CWA section 311. The *Robins* rule and the 1851 Limited Liability Act, moreover, boast longevities of decades or over a century and a half, respectively. In the 1990 OPA statute, however, Congress scuttled both,¹⁸⁶ demonstrating that vintage alone hardly guarantees non-displacement, and may well preordain it. One might argue, however

¹⁸⁰See *Lines v. Haen Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285 (1952); *United States v. Oswego Barge Co.*, 664 F.2d 327, 642 (2d Cir. 1981); Henry Hart, *Relations between State and Federal Law* 54 Colum L. Rev. 489 496-97 (1954).

¹⁸¹ *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 95-96 (1981). In *United States v. Reliable Transfer Co.*, 421 U.S. 39 (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 had largely left to this Court the responsibility for fashioning the controlling rules of admiralty law.’” (citing *Fitzgerald v. United States Lines Co.*, 374 U.S. 15, 20 (1963). *Id.* at 409.

¹⁸² See *Isbrandsten Co. v. Johnson*, 343 U.S. 779 (1952) in which, the Court accompanied its ruling that a ship owners’ expenses could not be set off against a seaman’s wages and transportation allowance, with the observation that “[s]tatutes which invade the ... the 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 is evident.” *Id.* at 783.

¹⁸³The story is blessed with centuries of history as note 229, 232-34 *infra*.

¹⁸⁴ *Northwest Airlines*, 451 U.S. at 96.

¹⁸⁵ 476 U.S. 858, 864 (1986). Accord: *Miles v. Apex Marine Corp.*, 498 U.S. 19, 24 (1990); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 624-25.

¹⁸⁶ See OPA secs. 2702(b)(2)(E) (eliminating the *Robins* requirement that the claimant’s own property must be damaged) and sec. 2718(a) and (c) (immunizing state or federal liability additional to OPA liability from restriction by the Limited Liability Act). *B1 Bundle* agrees that OPA itself supersedes the both elements, but only under the OPA track. See *B1 Bundle*, 808 f. Supp. 2d 943, 959.

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 pre-date OPA. What counts is not age, but Congress's assessment of the former rule's concordance with current values.¹⁸⁷ This principle is amplified when, as under OPA section 2751(e), Congress expressly *excludes* admiralty law's governance of those OPA elements falling within the OPA section 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 lawmaking as a *placeholder*, terminable upon Congress's later passage of legislation speaking to the same issue. Illustrative are the Court's recurring portrayals of judicial lawmaking as a response to necessity or compulsion created by Congressional inaction,¹⁸⁸ 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 in the absence of an applicable Act of Congress and because the Court is compelled to consider federal questions which cannot be answered from federal citations 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 lawmaking by federal courts disappears.¹⁸⁹

These sentiments inform the modern Court's understanding of the federal statute/general maritime rule pairing as well.¹⁹⁰ Hence, *Milwaukee II*'s reliance on a prior admiralty decision, *Higginbotham*, to accord primacy to congressional lawmaking. Adverting to the unavailability of "legislative codes and statutes,"¹⁹¹ *Higginbotham* repeats that the absence of a "comprehensive maritime code" compels general maritime lawmaking.¹⁹² But it too insists that the rule formulated in this exercise must yield upon Congress's adoption of a statute that "speaks directly" to the matter addressed by the maritime rule.¹⁹³

¹⁸⁷ As the principle was classically formulated by the Court, "[i]t 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 (1875).

¹⁸⁸ See, e.g., *Illinois v. City of Milwaukee*, 406 U.S. 91, 109 n. 9 (1972); *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 469 (1942) (Jackson J., concurring); cf. *Committee for Consideration of Jones Fall Sewerage System v. Train*, 539 F. 2d 1006, 1008 (4th Cir. 1976).

¹⁸⁹ *Milwaukee II*, 451 U.S. at 313-14 (quotation marks and citations omitted).

¹⁹⁰ Because the "Court has frequently stated that 'Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law,'" Judge Sloviter has observed, the "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 257, 261 (C.A. Pa. 1980) (citations omitted) (Sloviter J., dissenting).

¹⁹¹ *D'Oench, Duhme*, 315 U.S. at 470 (1975) (Jackson J., concurring) (federal common law's necessity derives from the "recognized futility of attempting all-complete statutory codes....").

¹⁹² *Higginbotham*, 436 U.S. at 625.

¹⁹³ *Id.*

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

The distinction between judicial lawmaking 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."¹⁹⁴ Elaborating upon Judge Friendly's four-part division of federal common law modes,¹⁹⁵ Judge Sloviter adds that "[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 Congress's acts."¹⁹⁶

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 lawmaking space.¹⁹⁷ It redirects the judicial inquiry from questions (and responses) appropriate for a judicial gap-filling exercise to those focused on judicial lawmaking's propriety. Seconding *Northwest Airlines* within the FWPCA oil pollution remedy context, Judge Newman observes that "[i]nterpreting' 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."¹⁹⁸

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 in fashioning a judicial patch for Congress's 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 addressed as well by a maritime rule should prevail in a displacement contest unless Congress has indicated otherwise.

¹⁹⁴ *Northwest Airlines*, 451 U.S. at 97.

¹⁹⁵ Judge Friendly's modes describe the object achieved by judicial action as follows: "spontaneous generation as in the case 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 filling of statutory interstices." In *Praise of Erie –And of the New Federal Common Law*, supra note 3 at 421.

¹⁹⁶ *Glus v. G.C. Murphy Co.*, 629 F.2d 248, 259 (C.A. Penn. 1980) (Sloviter J., dissenting).

¹⁹⁷ Absent congressional blessing, the Court's displacement conclusion may be expressed in various ways. In *Northwest Airlines*, 451 U.S. at 94, for example, "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 *Mobil Oil Corp. v. Higginbotham*, 436 U.S. at 625, "[t]here is a basic difference between filling a gap left by Congress and rewriting rules that Congress has affirmatively and specifically enacted." In *Milwaukee II*, 451 U.S. at 324, "[i]n 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.

¹⁹⁸ *United States v. Oswego Barge Co.*, 664 F.2d at 339 n. 17 (1981).

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.”¹⁹⁹ 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.”²⁰⁰ 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’s lawmaking power. Its “primary goal” has been described as “delivering expanded compensation quickly to victims without requiring them to suffer the law’s delay while the courts sorted out who was responsible.”²⁰¹ “The ‘heart of OPA 90 is the concept of a ‘responsible party,’”²⁰² moreover, “who would have to pay for everything regardless of fault, but then could re-allocate ultimate responsibility by contract and contribution actions.”²⁰³

Pre-*B1 Bundle* OPA jurisprudence endorsed this model, which aligns claimants directly with responsible parties as the source of *full* compensation for their property/economic loss. *United States v. M/V Cosco Busan*²⁰⁴ declares that “[t]he animating principle of OPA is to permit injured parties to seek damages and cleanup costs directly from the responsible party.”²⁰⁵ *Gabarick* reaffirms the exclusive claimant/responsible party pairing in its holding that “[c]laimants should pursue claims covered under OPA only against responsible parties and in accord with the procedures established by OPA. Then, the responsible party can take action against third parties.”²⁰⁶

¹⁹⁹ *TVA v. Hill*, 437 U.S. 153, 195 (1978)

²⁰⁰ *Id.* at 626. 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”).

²⁰¹ E. Donald Elliott, Primer, *supra* note 86 at 2.

²⁰² *Id.* at 5.

²⁰³ *Id.* at 4. OPA follows Superfund 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. See note 124 for the concept’s application in a context in which the non-negligent responsible party has become a claimant itself, but is prevented by OPA’s damages limitation regime from recovering from the negligent party its entire payout to the government and other claimants. Status liability renders direct claimant actions against non-responsible parties redundant; in fact, OPA section 2713(a) insists that “all claims for ... damages shall be presented ... to the responsible party.” One dimension of this essay’s thesis favoring displacement links directly to OPA’s provisions for direct claimant access to responsible parties, principally sec. 2713(a)’s universal (“*all claims*”) and mandatory (*shall be presented*) language as riveted to sec. 2702(a)’s similarly categorical syntax “*Notwithstanding any other provision or rule of law*”) (emphasis added).

²⁰⁴ 557 F. Supp.2d 1058 (N.D. Ca. 2008).

²⁰⁵ *United States v. M/V Cosco Busan*, 557 F. Supp. 2d 1058, 1060 (N.D. Ca. 2008).

²⁰⁶ *Gabarick v. Laurin Maritime (America) Inc.*, 623 F. Supp. 2d 741, 750 (E.D. 2009).

B1 Bundle disagrees, and insists upon the maritime law entitlement of claimants directly to sue third parties because “there is nothing in OPA to indicate that Congress intended “ otherwise.²⁰⁷ *B1 Bundle*’s rote response is unfortunate because the question merits thoughtful attention by admiralty advocates. Weighing this response against OPA section 2713’s rationale and mandatory language, OPA’s “subfield occupation” of pollution remedies,²⁰⁸ and the clash of the OPA and maritime damages limitations requirements,²⁰⁹ however, it would seem clear that displacement is measurably the more plausible outcome.

Is approving direct claims against third parties merely filling an interstitial gap, or, instead, aggressive judicial lawmaking. If the first, *B1 Bundle* enjoys significant latitude in resolving Congress’s 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.” The considerations enumerated in the preceding paragraph favor the conclusion that *B1 Bundle* has “provid[ed] a different regulatory regime” rather than “filling a gap.”²¹⁰

F. The Admiralty Savings Clause and Displacement Avoidance

Judicial lawmaking that trespasses on Congress’s lawmaking prerogative may avoid displacement if Congress chooses to accept the incursion. Let us assume that this essay’s displacement thesis offers the more plausible outcome, and inquire whether OPA’s section 2751(e) ²¹¹ “saves” the maritime tort from displacement.

The view offered here is that case for non-displacement is severely challenged by the section’s proviso, “[e]xcept as otherwise provided,” and in fact would have been stronger without section 2751(e). The proviso’s plain meaning is clear, and hence conclusive as to Congress’s intent on this ground alone. As phrased, moreover, the clause strikingly duplicates the Court’s core displacement jurisprudence norm. Further, its legislative history reveals Congress’s choice to disassociate section 2751(e) from section 2718(a), the state law savings clause. Without any proviso or qualification,²¹² this section exemplifies a “savings” clause primed to shield state measures controlling discharges within state waters from preemption by OPA. But the House’s preference for a steel-encased admiralty savings clause was stymied in conference.²¹³ By the conferees’ addition of the language “except as otherwise provided,”²¹⁴ they converted section 2751(e) from a rival of the state law savings

²⁰⁷ *B1 Bundle*, 808 F. Supp. 2d 943, 962 (E.D. La. 2011).

²⁰⁸ See supra Part II(B)(2).

²⁰⁹ See supra Part I(c).

²¹⁰ *Milwaukee II*, 451 U.S. 304, 315 (1981).

²¹¹ OPA sec. 2751(e) provides in material part that “[e]xcept 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....”

²¹² OPA sec. 2718(a) provides that “[n]othing in this Act ... shall – (1) affect or ...be interpreted as preempting the authority of any State from imposing any additional liability or requirement with respect to – (a) the discharge of oil or other pollution by oil within such state....”

²¹³ See H.R. Conf. Rep. 101-653 at 159; reprinted in 1990 U.S.C.A.N. 779, 837.

²¹⁴ *Id.*

clause into a statutory clone of *Delaval*'s elevation of "relevant" federal statutes over general maritime law.²¹⁵

The opening clauses of *Delaval* and section 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 the latter by the legislative authority constitutionally vested in Congress.

The two-part syntax of section 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 remedy than it "saves." The key to this conclusion is the term "otherwise," which in common parlance and as defined in the most respected of multi-volume dictionaries signifies "*in another way*" or "*in a different manner*."²¹⁶ What section 2751(e) says and means, 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 manner" than that employed by the maritime tort.

This outcome precisely follows 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 essay, is indisputably "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 essay are at variance with those endorsed by the maritime remedy.

The "answer" of these and other OPA provisions also tweak more nuanced forms of difference. Illustrative are the addition or subtraction of content from the maritime rule to address a perceived inadequacy,²¹⁷ the adoption, as mandatory, of requirements that admiralty treats as permissive,²¹⁸ and the specification of multiple statutes of limitations

²¹⁵ *Delaval* states that "[a]bsent a relevant statute, the general maritime law, as developed by the judiciary, applies," 476 U.S. 858, 864 (1986).

²¹⁶ The Oxford Dictionary 984 (2d ed. 1989) assigns as the primary meanings of the adverb "otherwise" the following: "in another way, in other ways, in a different manner, or by other means, differently." Webster's Third New International Dictionary of the English Language Unabridged 1598 (1986) assigns to the adverb "otherwise" the primary meanings "in a different way or manner; differently."

²¹⁷ See OPA sec. 2703(a) limiting the responsible party's defenses to three only: Act of God, of war, or of exclusive commission by a sole fault third party not in a contractual relationship with the responsible party.

²¹⁸ See OPA section 2716(f) mandating the direct liability of insurers (guarantors) of responsible parties to private claimants.

aligned with the procedural and substantive elements uniquely woven into the OPA-defined maritime tort.²¹⁹ 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.”²²⁰

Section 2753(e)’s legislative history witnessed the transformation of the section to its present version from its earlier mating in the House version with section 2718((a)’s unqualified state law savings clause.²²¹ As initially presented in the House bill, the section read: “This Act does not affect ... admiralty or maritime law, or ...[admiralty jurisdiction].”²²² The conference committee understood the House provision’s purpose as clarifying that it “does not supersede [admiralty] law, nor does it change the jurisdiction of the District Courts....”²²³ 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 Senate bill was mute on the issue. But the conference committee 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.”²²⁴ The committee’s action effaced the two provisions’ parallelism by imposing the *Delavan*-format on section 2751(e) as finally adopted.

Part III

Maritime Punitive Damages: *Townsend*, *Baker* and Category Errors

Consideration of maritime punitive damages’ post-OPA survival completes the nine topics listed in this essay’s introduction. The issue brings front and center *B1 Bundle*’s use of *Atlantic Sounding Company v. Townsend*²²⁵ and *Exxon Shipping Company v. Baker*²²⁶ 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

²¹⁹ See OPA secs. 2717(f)(1)(a)-(4) (establishing limitations periods for the commencement of actions for damages, removal costs, contribution and subrogation, respectively).

²²⁰ *Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981).

²²¹ This history is detailed in H.R. Conf. Rep. 101-653, at p. 159; reprinted in 1990 U.S.C.C.A.N., at p. 838.

²²² H.R. Conf. Rep., at 160; 1990 U.S.C.C.A.N., at 839.

²²³ *Id.* 557 U.S. 404 (2009).

²²⁴ The conferees also stated that “[t]here is no change in current law unless there is a specific provision to the contrary,” *id.*, a statement that, in one unlikely interpretation, translates into the requirement that absent express proscription, as exemplified in OPA sec. 2718(a)’s discard of the Limited Liability Act, OPA leaves maritime law unscathed. This translation harks back to *B1 Bundle*’s discredited canon that failure expressly to bar maritime law necessarily safeguards its survival. As Part II(A) explains, 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 sec. 2751(a) 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’s understanding of the inadequacies of the maritime tort and its aggressive reinvention of the latter within OPA itself.

²²⁵ 557 U.S. 404 (2009).

²²⁶ 554 US. 471 (2008).

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 needn't be reiterated here. The objection to summoning *Townsend/Baker* to *B1 Bundle's* side is straightforward: the effort is no less vulnerable to category errors than was the use of *Miles* to avoid the *Townsend* outcome.

A. *Atlantic Sounding Company 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 v. Apex Marine Corporation*²²⁷ to support its claim that the Jones Act precluded the award of punitive damages in the *Townsend* maintenance and cure action.²²⁸ The Court denied *Miles's* 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 decision instead grapples with the entirely different question whether general maritime law should provide a cause of action for wrongful death based on unseaworthiness."²²⁹ Nor was it helpful for the *Townsend* employer that "[u]nlike 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."²³⁰

Consistent with *Townsend's* demand for precise situational equivalence, a three-point point comparison of *Townsend* and *B1 Bundle* and a following 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 punitive damages enjoy elevated status as long-established doctrines because they date back two centuries or more.²³¹ The maritime pollution tort, in contrast, was still seeking

²²⁷ 498 U.S. 19 (1990)

²²⁸ *Miles* was similarly cabined by the Ninth Circuit in its decision in *Baker* below that the 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 TAN 243-246 *infra*. The appellate court viewed *Miles's* 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 Campbells' 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.3rd 1215, 1229 (9th Cir. 2001).

²²⁹ *Townsend*, 557 U.S. at 419.

²³⁰ *Id.* at 420.

²³¹ *Id.* at 409-14.

definitive shape as late as the 1960's.²³² Second, punitive damages and maintenance and cure are as venerated as they are ancient²³³; 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 the admiralty.²³⁴ Not so with the maritime pollution tort, whose inadequacies, as detailed throughout Parts I and II, convinced Congress of the necessity for its radical transformation.

Finally, the Jones Act expressly creates parallel statutory and general maritime remedial tracks by granting seaman claimants a section 30304 election to proceed under either track.²³⁵ In fact, the Court acknowledges that the Jones Act "has done no more than *supplement* the remedy of maintenance and cure for injuries suffered by the seaman."²³⁶ By this point in the essay, 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 section 30404 expressly *grants* the foregoing election and its parallel track. OPA section 2751(e)'s proviso, on the other hand, expressly *denies* it for matters for which OPA "otherwise provide[s]." Gliding 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 non-equivalence of seamen welfare actions and the oil pollution tort disputes.²³⁷ These two opinions 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 DHOSA, independent of or in conjunction with the Jones Act, on the other. If the issue turns on federal/state preemption rather than statute/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 DHOSA, but with two federal environmental statutes, one of which pervasively overhauls the maritime tort and bars an admiralty bloodline for those of its provisions that address the question of

²³² See cases and authorities cited n. 100 supra.

²³³ *Townsend*, 557 U.S. at 409-14.

²³⁴ *Id.* at 417. Justice 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 (No. 6,047) (CC Me. 1823).

²³⁵ *Id.* at 416. Sec. 30304 of the Jones Act provides 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" (emphasis added). Accord: *Cortes v. Baltimore Insular Lines, Inc.*, 287 U.S. 367, 374-75 (1932).

²³⁶ *O'Donnell v. Great Lakes Dredge & Dry Dock.*, 318 U.S. 36, 43 (1928) (emphasis added).

²³⁷ For a detailed discussion of the distortions resulting from the conflation of the two types of actions, see *Costonis I*, note 16 supra, at 519-21; *Costonis II*, note 16 supra, at 5-13.

remedies in a manner “otherwise” than the maritime tort.²³⁸ Its claimants are not seamen seeking aid as wards of admiralty through writs formulated centuries ago,²³⁹ 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.’”²⁴⁰ *B1 Bundle*’s frictionless traffic between these two jarringly 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 *Baker/B1 Bundle* subsection immediately below. Addressed here is the maritime tort’s priority in time, which, when credited as indiscriminately as it is in *B1 Bundle*, further evidences the gene’s dynastic bent.

Channeling *Delevan*, *Townsend* makes perfectly clear that the maritime maintenance and cure and punitive damages rules remain effective “unless Congress has enacted legislation departing from this common-law understanding.”²⁴¹ 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’s 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 Company 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 damages²⁴² to reason that OPA too leaves these damages in place.²⁴³ *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.

Taking the last-named topic first, earlier discussion²⁴⁴ established two fundamental points. First, conflicts between these damages limitations requirements call for OPA’s displacement of maritime law remedies. The two regimes’ treatment of liability standards,

²³⁸ See TAN 66-68, 211-16 supra.

²³⁹ Seamen employees (or their representatives) of responsible parties have brought personal injury and death actions against responsible parties, but the latter are not encompassed within OPA, which under section 2702(a) and as employed in *B1 Bundle*, extends solely to non-governmental economic and property losses attendant upon the oil discharges targeted by the section.

²⁴⁰ *B1 Bundle*, 808 F. Supp. 2d 943, 947 (E.D. La. 2011).

²⁴¹ *Townsend*, 557 U.S., at 415 (emphasis added). Although worded differently, *Townsend*’s “unless clause” carries the same substantive import as *Delevan*’s “[a]bsent” a relevant statute,” and OPA sec. 2751(e)’s “[e]xcept as otherwise provided.” See TAN 66-68, 211-16 supra.

²⁴² *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 488-89 (2008).

²⁴³ *B1 Bundle*, 808 F.Supp. 2d at 960, 962.

²⁴⁴ See Part I(C).

levels of damage, and types of damage openly clash with one another.²⁴⁵ Second, *Baker* does not offer *B1 Bundle* a way out of this conflict. *Baker*'s statute, CWA section 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 limitations regime, which would have displaced general maritime law remedies if private parties, such as the *Baker* plaintiffs, had been covered by the statute.²⁴⁶ *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."²⁴⁷

B1 Bundle's assertions that the "imposition of punitive damages under general maritime law would not circumvent OPA's limitation of liability,"²⁴⁸ nor "frustrate the OPA liability scheme,"²⁴⁹ are difficult to honor. Added to the foregoing considerations is an impediment specific to the punitive damages category itself. OPA addresses *compensatory* damages alone.²⁵⁰ *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."²⁵¹ 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 needn't attend any longer to Congress's struggle to balance OPA's victim-relief values with its damages limitation values.²⁵² *South Port Marine*'s harsh dismissal²⁵³ 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 section 2751(e) and CWA section 1321(o)(1). The former, as is now familiar, preserves only general maritime rules not "otherwise provided" for in OPA. The latter provides that "[n]othing 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...."²⁵⁴ Rivals to a savings clause this unqualified are Jones Act section 30304 and OPA section 2718(a), both of which this essay has singled out as antonyms to OPA's admiralty savings clause. Predictably, the Court spurned Exxon's bid to recast CWA section 1321(0)(1) as a harbinger of OPA section 2751(e).²⁵⁵

²⁴⁵ See TAN 121-24 supra.

²⁴⁶ See TAN 125-33 supra.

²⁴⁷ Exxon Shipping Co. v. Baker, 554 U.S. 471, 489 (2008).

²⁴⁸ *B1 Bundle* 808 F. Supp. 2d, at 962

²⁴⁹ Id.

²⁵⁰ See note 131 supra.

²⁵¹ *B1 Bundle*, 808 F.2d. at 962 (E.D. La. 2011)

²⁵² See TAN supra at 114-19, 129-33.

²⁵³ See TAN 263 infra.

²⁵⁴ CWA sec. 1321(0)(1) (emphasis added).

²⁵⁵ See Exxon Shipping Co. v. Baker, 554 U.S. 471, 488-89 (2008).

Likewise asymmetrical in the *Baker/B1 Bundle* pairing is a missing step in the ladder that must be climbed to reach punitive damages: namely, a cause of action for compensatory damages upon which the punitive damages count is –and 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.²⁵⁶ Exxon assisted *Baker*'s clamaints 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.²⁵⁷ But the entire run of pre-*B1 Bundle* OPA cases holding that maritime damages are displaced by OPA section 2702(b)'s "covered damages"²⁵⁸ 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,"²⁵⁹ *South Port Marine* advises. "Consequently, plaintiff's claim for punitive damages must relate to some separate cause of action which permits recovery of punitive damages."²⁶⁰

The final consideration is less a category error than a critique of *B1 Bundle*'s choice to ignore Part I(C)'s implications concerning 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.²⁶¹ Among *B1 Bundle*'s least satisfactory dimensions is the improbability of its claim that OPA's remedial scheme, inclusive of its damages limitation regime, does not "frustrate the OPA liability scheme."²⁶²

I believe that *South Port Marine* got it right 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's principal motivation in enacting the OPA," the court replied

we 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.²⁶³

²⁵⁶ See note 131 supra. *Baker* itself acknowledges that "the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct." *Baker*, 554 U.S. at 419.

²⁵⁷ *Baker*, 554 U.S. at 479.

²⁵⁸ See cases cited Part I(A)(1) supra.

²⁵⁹ *South Port Marine LLC*, 234 F.3rd at 64.

²⁶⁰ *Id.* *B1 Bundle* does not address this contention presumably because of its holding that general maritime law affords a parallel track (and hence the first step of the ladder).

²⁶¹ See cases cited note 115 (CWA sec. 311 displacement of maritime law); *South Port Marine LLC*, 243 F.3rd 58 (1st Cir. 2000) (OPA displacement of maritime law); *Clausen v. M/V New Carissa*, 171 F. Supp. 1127 (D. Or. 2001) (same).

²⁶² *B1 Bundle*, 808 F. Supp 2d at 962.

²⁶³ *South Port Marine*, 234 F.3rd at 66.

Among the further burdens imposed on responsible parties by OPA or OPA-related legislation is OPA's elimination of the Robins Doctrine²⁶⁴, 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 degradation²⁶⁵; losses associated with foregone taxes, royalties, rents or fees²⁶⁶; and increases in the cost of public services during or after removal activities.²⁶⁷ 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 \$4300.²⁶⁸ Estimates of a total release from the Macondo well of 4.9 million barrels suggest a maximum civil penalty in the range of \$20 billion. Congress has left to the courts the discretion, however, 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.²⁶⁹

Perhaps even Llewellyn would agree that the basis has properly been laid in this essay for a canon, updated to take account of OPA's passage, that elegantly sums up why maritime punitive damages should be displaced, and, more broadly, why OPA's pivotal silences should be interpreted to support the displacement of the maritime tort remedy overall.

Once Congress legislates comprehensively on the subject of 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.²⁷⁰

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

²⁶⁴ See OPA sec. 2702(b)(2)(E).

²⁶⁵ See OPA sec. 2702(b)(2)(A).

²⁶⁶ See OPA sec. 2702(b)(2) (D).

²⁶⁷ See OPA sec. 2702(b)(2)(F)

²⁶⁸ See CWA 1321(b)(7)(A), as modified by 40 C.F.R. sec. 19.4 (2010).

²⁶⁹ See CWA, sec. 1321(b)(7)(F) (8).

²⁷⁰ *United States v. Oswego Barge Co.*, 664 F.2d 327, 341 (2d Cir. 1981).