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## Patchwork Justice: State Unlimited Liability Laws in the Wake of the Oil Pollution Act of 1990

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## ARTICLES

### PATCHWORK JUSTICE: STATE UNLIMITED LIABILITY LAWS IN THE WAKE OF THE OIL POLLUTION ACT OF 1990

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I.	INTRODUCTION .....	149
II.	THE OIL POLLUTION ACT OF 1990 .....	151
	A. <i>Liability of Responsible Parties</i> .....	151
	B. <i>Limitation of Liability</i> .....	152
	1. Federal .....	152
	2. State .....	153
III.	THE NIGHTMARE OF STATE LAW DIVERSITY .....	155
	A. <i>Recovery of Purely Economic Damages</i> .....	155
	1. In Admiralty Generally .....	155
	2. In State Tort Law .....	156
	3. In Admiralty After OPA 90 .....	157
	B. <i>Limitation on Liability for Non-Robins Damages</i> ..	158
IV.	THE UNIFORM NATIONAL MARITIME LAW .....	161
V.	CONCLUSION .....	164
	A. <i>OPA 90 Must Meet Knickerbocker Ice Head On</i> ..	164
	1. Askew Inapplicable .....	164
	2. Not a Maritime but Local Issue .....	165
	3. OPA 90 Does Not Preempt <i>Robins</i> .....	166
	B. <i>The Constitutional Fate of OPA 90</i> .....	167

#### I. INTRODUCTION

In 1851, in an effort to promote shipbuilding and maritime investment,<sup>1</sup> Congress codified a rule of maritime law dating back to “the close of the middle ages . . . limit[ing] a shipowner’s liability to the

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1. *Norwich Co. v. Wright*, 80 U.S. (13 Wall.) 104, 119-121 (1871).

value of the vessel and its cargo."<sup>2</sup> The Shipowner's Limitation of Liability Act (SLLA)<sup>3</sup> was criticized almost immediately for the vagueness of its terms.<sup>4</sup> By 1954, even its underlying rationale was seriously questioned, as the lot of the shipping industry improved and Congress employed other methods for encouraging participation in shipbuilding.<sup>5</sup> With these changes, the question arose: What would it take for Congress to repeal SLLA?

In 1975, Gilmore and Black predicted that "the pollution controversy will in time lead to long overdue fundamental reconsideration of the policy casually adopted more than a hundred years ago in our Limitation Act."<sup>6</sup> This prophecy came partially true fifteen years and numerous oil spills later when Congress passed the Oil Pollution Act of 1990 (OPA 90).<sup>7</sup> While not repealing SLLA, OPA 90 replaces its limitation provisions for liability in federal oil spill actions,<sup>8</sup> and withdraws the limitation protection it provided against liability in similar state actions.<sup>9</sup> The fear of unlimited liability at the state level has generated both criticism of OPA 90 and threats of trade-based retaliation against the United States.<sup>10</sup>

2. *Esta Later Charters, Inc. v. Ignacio*, 875 F.2d 234, 235 (9th Cir. 1989) (citing HUGO GROTIUS, *DE JURE BELLI AC PACIS* 139 (Campbell trans. 1901)). See Walter W. Eyer, *Shipowners' Limitation of Liability — New Directions for an Old Doctrine*, 16 *STAN. L. REV.* 370, 371 (1964).

3. 46 U.S.C. app. §§ 181 - 96 (1988).

4. *Ignacio*, 875 F.2d at 235-36 (citing GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* § 10-2, at 819 & n. 6 (2d ed. 1975)) (observing that "[n]o one who has had occasion to study the Limitation of Liability Act has been struck by its *lucidity*." (emphasis added)).

5. *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 437 (1954) (Black, J., dissenting). Justice Black was joined in his opinion by Chief Justice Warren, and Justices Douglas and Minton. *Id.* at 427.

6. GILMORE & BLACK, *supra* note 4, § 10-4(b), at 825.

7. Pub. L. No. 101-380, 104 Stat. 484 (1990). The events leading to support of the passage of OPA 90 included the Exxon Valdez oil spill in Prince William Sound, the World Prodigy oil spill in the coastal waters of Rhode Island, and oil spills in the Delaware River and the Houston Ship Channel. S. REP. NO. 94, 101st Cong., 2d. Sess. 5 (1990), reported in 1990 U.S.C.C.A.N. 722, 723-24. The latter three incidents occurred within twenty-four hours of each other. *Id.* at 723.

8. 33 U.S.C. § 2704 (Supp. III 1991).

9. *Id.* § 2718.

10. See, e.g., Leonard F. Alacatrana & Mary A. Cox, *OPA 90 Certificates of Financial Responsibility*, 23 *J. MAR. L. & COM.* 369 (1992); A.F. Bessemer Clark, *The U.S. Oil Pollution Act of 1990*, 1991 *LLOYD'S MAR. & COM. L.Q.* 247; Paul S. Edelman, *The Oil Pollution Act of 1990*, 8 *PACE ENVTL. L. REV.* 1 (1990); James A. Hutchinson, *Financial Responsibility Provisions: Are They Sinking the U.S. Maritime Trade?*, 24 *LAW & POL'Y INT'L BUS.* 223 (1992); Thomas J. Wagner, *The Oil Pollu-*

However, SLLA is not the only limitation on a state's ability to impose liability in the area of maritime law. State laws that "contravene" the uniform maritime law of the United States may run afoul of the U.S. Constitution.<sup>11</sup> In maritime law, financial loss may be recovered only if there is an attendant injury to property.<sup>12</sup> Although Congress may alter this rule,<sup>13</sup> it cannot delegate to the states its legislative authority over admiralty in an effort to further national goals in that area.<sup>14</sup> Clearly, a state-based scheme threatens the uniform nature of the national maritime law.<sup>15</sup>

This article explores the viability of these defenses to state liability laws authorized by OPA 90. Part II presents the basic liability provisions of OPA 90 and the relevant role of state law.<sup>16</sup> Part III provides examples of the myriad state liability schemes to which OPA 90 exposes responsible parties and the resulting negative implications for the uniform national maritime law.<sup>17</sup> Part IV discusses the limitations that a uniform national maritime law imposes on state laws and Congress' incorporation of state laws in federal statutes.<sup>18</sup> Part V analyzes whether these defenses ought to succeed against actions under state laws authorized by OPA 90, and concludes that *Knickerbocker Ice Co. v. Stewart*<sup>19</sup> should be overruled to make Congress' authority to legislate in maritime matters consistent with the rest of its powers under the commerce clause.<sup>20</sup>

## II. THE OIL POLLUTION ACT OF 1990

### A. *Liability of Responsible Parties*

Under OPA 90, a responsible party is liable for the damages and

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*tion Act of 1990: An Analysis*, 21 J. MAR. L. & COM. 569 (1990).

11. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917).

12. *See, e.g., IMTT-Gretna v. Robert E. Lee S.S.*, 993 F.2d 1193, 1195 (5th Cir. 1993); *Kingston Shipping Co. v. Roberts*, 667 F.2d 34 (11th Cir. 1982), *cert. denied*, 458 U.S. 1108 (1982).

13. *See, e.g., In re Glacier Bay*, 746 F. Supp. 1379, 1383 (D. Alaska 1990) ("Unless it is determined that TAPAA preempts the application of substantive maritime law, maritime law applies regardless of the fact that plaintiffs did not invoke the procedural benefits of admiralty jurisdiction.")

14. *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 226 (1924).

15. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920).

16. *See infra* notes 21-53 and accompanying text.

17. *See infra* notes 54-115 and accompanying text.

18. *See infra* notes 116-158 and accompanying text.

19. 253 U.S. 149 (1920).

20. *See infra* notes 159 - 219 and accompanying text.

removal costs that result from a discharge of oil "into or upon the navigable waters or adjoining shorelines or the exclusive economic zone."<sup>21</sup> Responsible parties include "any person owning, operating, or demise chartering [a] vessel."<sup>22</sup> A responsible party may be liable for injuries to natural resources, real or personal property, subsistence use, revenues, profits and earning capacity, and public services.<sup>23</sup> Liability will not attach where oil is discharged due to an act of God or war,<sup>24</sup> or an act or omission of a third party.<sup>25</sup> A responsible party is not liable to a claimant whose gross negligence or willful misconduct caused the discharge of oil,<sup>26</sup> as long as the responsible party reported the discharge,<sup>27</sup> and cooperated or assisted with the removal operations.<sup>28</sup>

## B. Limitation of Liability

### 1. Federal

In general,<sup>29</sup> OPA 90's federal provisions limit liability for com-

21. 33 U.S.C. § 2702(a) (Supp. III 1991). Navigable waters are "the waters of the United States, including the territorial sea." *Id.* § 2701(21). The exclusive economic zone was established by President Reagan in Proclamation No. 5030, 48 Fed. Reg. 10605 (Mar. 14, 1983). 33 U.S.C. § 2701(8).

22. *Id.* § 2701(32)(A). "Responsible party" is defined somewhat differently for onshore and offshore facilities, deepwater ports, and pipelines. *Id.* § 2701(32)(B)-(E). Provisions are also made for determining the "responsible party" in the case of abandonment, *id.* § 2701(32)(F), and when a third party should be held liable. *Id.* § 2702(d).

23. *Id.* § 2702(b)(2).

24. *Id.* § 2703(a)(1)-(2).

25. *Id.* § 2703(a)(3). The third party must not be an "employee or agent of the responsible party", and his or her act or omission usually must not occur "in connection with any contractual relationship with the responsible party." *Id.* The responsible party must have "exercised due care" regarding the oil spilled, and taken "precautions against foreseeable acts or omissions of [the] third party." *Id.* § 2703(a)(3)(A) - (B).

26. *Id.* § 2703(b).

27. *Id.* § 2703(c)(1). The responsible party need not report the incident unless he or she "knows or has reason to know" of the incident. *Id.*

28. *Id.* § 2703(c)(2). Cooperation and assistance need only be rendered at the request of "a responsible official." *Id.* To avail himself or herself of this defense, a responsible party must also comply with any "order issued under" § 1321(c), (e), or §§ 1471 - 87. *Id.* § 2703(c)(3).

29. No limitation of liability is available where gross negligence, willful misconduct, or a "violation of an applicable federal safety, construction, or operating regulation" is involved. *Id.* § 2704(c)(1). Likewise, failure to meet the requirements listed *supra* at notes 27 - 28 and accompanying text, will serve to remove any limitation on a responsible party's liability. 33 U.S.C. § 2704(c)(2). Also, special liability rules apply to Outer Continental Shelf facilities and vessels. *Id.* § 2704(c)(3).

bined damages and removal costs to the greater of \$1,200 per gross ton or \$10 million for tank vessels of more than 3,000 gross tons;<sup>30</sup> \$1,200 per gross ton or \$2 million for tank vessels of 3,000 gross tons or less;<sup>31</sup> or the greater of \$600 per gross ton or \$500,000 for all other vessels.<sup>32</sup> Certain responsible parties must “establish and maintain . . . evidence of financial responsibility sufficient” to meet the maximum of the applicable limitations detailed above.<sup>33</sup> Failure to do so allows the Secretary of the Treasury to revoke the vessel’s required clearance,<sup>34</sup> deny entry to, detain, or seize the vessel.<sup>35</sup> Those providing evidence of financial responsibility<sup>36</sup> are “guarantors”<sup>37</sup> and thereby may be sued directly for any amounts for the liability of the guaranteed responsible party.<sup>38</sup>

## 2. State

OPA 90 does not truly guarantee that the liability of a responsible party will be limited. The Act allows each state to enforce its own individual liability schemes, which are neither limited nor preempted by OPA 90 or SLLA.<sup>39</sup> Specifically, a state can impose “additional liability or requirements” exceeding that of OPA 90 regarding oil discharge and pollution, and related removal costs.<sup>40</sup> A state’s ability to impose

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30. *Id.* § 2704(a)(1)(A) - (B)(i).

31. *Id.* § 2704(a)(1)(A)-(B)(ii).

32. *Id.* § 2704(a)(2).

33. Those with “vessels over 300 gross tons (except . . . non-self-propelled vessel[s] . . . not carry[ing] oil as cargo or fuel) using any place subject to the jurisdiction of the United States,” or “vessel[s] using the waters of the exclusive economic zone to transship or lighter oil destined for a place subject to the jurisdiction of the United States.” *Id.* § 2716(a)(1),(2).

34. 33 U.S.C. § 2716(b)(1). Clearance is required by 46 U.S.C. app. § 91 (1988) for a vessel “other than a licensed yacht or [certain] undocumented American pleasure vessels” to depart the United States for a foreign port.

35. 33 U.S.C. § 2716(b)(2) - (3).

36. These include insurers, surety companies, or guarantors. *Id.* § 2716(e); 33 C.F.R. § 130.8(b)(1) - (2), (4) (1993).

37. 33 U.S.C. § 2701(13).

38. *Id.* § 2716(f). Guarantors have the same defenses available as the responsible parties for whom they provide Certificates of Financial Responsibility. *Id.* § 2716(f)(1). *See supra* notes 24 - 28 and accompanying text. Furthermore, guarantors have defenses arising from 33 U.S.C. § 2716(e), and are not liable for incidents “caused by the willful misconduct of the responsible party.” *Id.* § 2716(f)(2) - (3). A guarantor’s liability is limited to that amount required under OPA 90 for which he or she provided evidence of financial responsibility. *Id.* § 2716(g). *See supra* notes 28 - 33 and accompanying text.

39. 33 U.S.C. § 2718(a), (c).

40. *Id.* § 2718(a).

civil or criminal penalties is similarly unaffected by the Act.<sup>41</sup>

Furthermore, OPA 90 removes SLLA's limitations imposed on state regulation.<sup>42</sup> SLLA limits a shipowner's<sup>43</sup> general liability to its interest in the "vessel and [its] freight then pending."<sup>44</sup> For bodily injury and loss of life, a shipowner's liability under SLLA cannot exceed the greater of his or her interest in the vessel and its freight or "\$420 per ton of such vessel's tonnage."<sup>45</sup> SLLA served to limit vessel owners' liability for removal costs imposed by state and local governments.<sup>46</sup> OPA 90 supersedes SLLA's regulation of both clean-up costs and damages.<sup>47</sup> Indeed, the criticism voiced by courts that have applied the SLLA spurred Congress to remove the act's limitations as a way to achieve OPA 90's goal of a comprehensive package of international, national, and state laws dealing with oil spills.<sup>48</sup>

While OPA 90 thus contributes to the uniformity of environmental law,<sup>49</sup> it threatens the "general harmony and uniformity"<sup>50</sup> of national maritime law. OPA 90 presents a limitation scheme for federal claims,<sup>51</sup> a liability scheme the states are free to adopt.<sup>52</sup> OPA 90 does

41. *Id.* § 2718(c).

42. *Id.* § 2718(a), (c).

43. Charterers manning, victualing, and navigating a "vessel at [their] own expense" are treated as shipowners. 46 U.S.C. app. § 186 (1988).

44. *Id.* § 183(a).

45. *Id.* § 183(b). This particular provision does not apply to "pleasure yachts, tugs, towboats, towing vessels, *tank vessels*, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, and nondescript non-self-propelled vessels . . . ." *Id.* § 183(f) (emphasis added). However, there is no reason that in the absence of OPA 90, the other provisions of SLLA should not apply to oil spills. See GILMORE & BLACK, *supra* note 4, § 10-4(b), at 825.

46. *Butler v. Boston & Savannah Steamship Co.*, 130 U.S. 527, 557 (1889); William M. Ducan, *The Oil Pollution Act of 1990'S Effect on the Shipowner's Limitation of Liability Act*, 5 U.S.F. MAR. L.J. 303, 311 & n. 32 (1993) (citing *Puerto Rico v. S.S. Zoe Colocotroni*, 628 F.2d 652, 665-66 (1st Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *Complaint of Harbor Towing Corp.*, 335 F.Supp. 1150, 1154-55 (D. Md. 1971)).

47. 33 U.S.C. § 2718 (a), (c) (Supp. III 1990).

48. See S. REP. NO. 94, 101st Cong., 2d Sess. 5 (1990), reported in 1990 U.S.C.C.A.N. 722, 725-26 (quoting *Esta Later Charters, Inc. v. Ignacio*, 875 F.2d 234, 235-36, 239 (9th Cir. 1989)).

49. See Michael J. Uda, *The Oil Pollution Act of 1990: Is There a Bright Future Beyond Valdez?*, 10 VA. ENVTL. L.J. 403, 419-33 (1991) (noting that OPA 90 contributes clarity, efficiency, and a more comprehensive compensation mechanism to the process of preventing and cleaning-up oil spills).

50. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917).

51. See *supra* notes 28 - 30 and accompanying text.

not require the states to adopt the federal scheme, instead leaving it to each state's legislature to decide whether its law will follow the federal law. Furthermore, OPA 90 preserves plaintiffs' state law claims. The elements of these state law claims may vary from state to state and from claims available under federal law. Because OPA 90 removes the SLLA limitation on these claims, SLLA can no longer guarantee that responsible parties will be subjected to only one predictable judgement regardless of the location of the damage caused by the spill.<sup>53</sup>

### III. THE NIGHTMARE OF STATE LAW DIVERSITY

#### A. *Recovery of Purely Economic Damages*

##### 1. In Admiralty Generally

A plaintiff in admiralty cannot recover tort damages for a purely financial injury where there is no injury to his or her property.<sup>54</sup> For example, in *Robins Dry Dock & Repair Co. v. Flint*,<sup>55</sup> a time charter called for the vessel to be docked once every six months for repairs,<sup>56</sup> during which time payment for the ship's use was to be suspended.<sup>57</sup> After the charterer delivered the vessel to Robins Dry Dock to be repaired, the dry dock negligently damaged the vessel's propeller, delaying the ship's return to service.<sup>58</sup> The Supreme Court denied recovery for loss of use during that time because the charterer had no property interest in the vessel.<sup>59</sup>

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52. S. REP. NO. 94, 101st Cong., 2d Sess. 5 (1990), reported in 1990 U.S.C.C.A.N. 722, 728.

53. See *supra* notes 44 - 46 and accompanying text.

54. See *supra* note 12 and accompanying text.

55. 275 U.S. 303 (1927).

56. A time charter is a contract for the lease of a vessel for a specified time or use under which the owner continues to operate the vessel, whose master and crew remain servants of the owner. See, e.g., *Atlantic Banana Co. v. M.V. "Calanca"*, 342 F.Supp. 447, 453 (S.D.N.Y. 1972).

57. *Robins*, 275 U.S. at 307.

58. *Id.*

59. *Id.* at 308-09. This "bar against indirect recoveries has been widely applied in maritime tort cases . . . and has attracted criticism as a major barrier to oil spill plaintiffs in cases like the Exxon Valdez spill, although statutory exceptions sometimes apply." ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 163 (1992) (citing Mulhern, *Marine Pollution: A Tort Recovery Standard for Pure Economic Losses*, 18 ENVTL. AFF. L. REV. 85 (1990)).



## 2. In State Tort Law

Recovery for indirect, purely financial injuries has been imposed for state law tort claims. For example, in *Pruitt v. Allied Chemical Corp.*,<sup>60</sup> the defendant sought to dismiss nine of the plaintiffs' twelve counts for economic damages resulting from the discharge of the toxic chemical Kepone into the James River and the consequent pollution of the Chesapeake Bay.<sup>61</sup> The plaintiffs claimed jurisdiction based on admiralty, federal question, and diversity of citizenship.<sup>62</sup> They sought relief in three counts based on state law causes of action in negligence and products liability.<sup>63</sup> In one count, they sought relief based on the law of admiralty.<sup>64</sup> None of the plaintiffs suffered "direct, physical damage" as a result of the discharge.<sup>65</sup>

The court dismissed the claim based on admiralty jurisdiction in reliance upon *Robins Dry Dock*.<sup>66</sup> Although considered by the court,<sup>67</sup> *Robins Dry Dock* did not serve to prevent the plaintiffs from pursuing their state law claims.<sup>68</sup> The Virginia Supreme Court had not spoken to the issue of purely economic damages.<sup>69</sup> Since the case law from other states was conflicting, the court fashioned its own theory.<sup>70</sup> It noted that even if *Robins Dry Dock* were controlling, commercial fishermen could recover.<sup>71</sup> While their damages were purely economic, these plaintiffs had a constructive property interest in the fish they harvested.<sup>72</sup>

If economic harm could be demonstrated, the lot of sport fisher-

60. 523 F.Supp. 975 (E.D. Va. 1981).

61. *Id.* at 976.

62. *Id.*

63. *Id.* at 976 - 77.

64. *Id.* at 980 - 81.

65. *Id.* at 976.

66. *Id.* at 981 - 82.

67. *Id.* at 977 & n. 7 (citing *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927)).

68. *Id.* at 976 - 80. This conclusion seems strange since a plaintiff does not have to base a claim on admiralty jurisdiction in order for the *Robins Dry Dock* limitation to apply as long as the case generally sounds in admiralty. In re the Glacier Bay, 746 F.Supp. 1379, 1383 (D. Alaska 1990). In that case, plaintiffs' state law claims for purely economic damages were cognizable only because the federal statute allowing their recovery preempted *Robins Dry Dock*. *Id.* at 1383 - 88.

69. *Pruitt*, 523 F.Supp. at 977.

70. *Id.* at 977 - 78.

71. Indeed, the defendant did not seek to prevent recovery by these plaintiffs. *Id.* at 978.

72. *Id.*

men was not so different from that of commercial fishermen, even if the former class of plaintiffs had no property interest in the bay's fish.<sup>73</sup> Therefore, the sport fishermen ought likewise recover.<sup>74</sup> Plaintiffs suffering somewhat more indirect damages, namely boat, tackle and bait shop, and marina owners, were allowed to recover as well.<sup>75</sup> However, the claims of "plaintiffs who purchased and marketed seafood from commercial fishermen" were dismissed as being too remote.<sup>76</sup> In the end, the court drew a line, different from that drawn in *Robins Dry Dock* but no less arbitrary, as to the recovery from purely economic injury.<sup>77</sup>

### 3. In Admiralty After OPA 90

In contrast, OPA 90 authorizes the states to impose any additional liability for oil spills. This authorization permits state legislators to allow recovery for non-*Robins* damages in admiralty.<sup>78</sup> Allowing plaintiffs to bring state law claims against responsible parties for indirect, purely financial injuries resulting from oil spills threatens the uniformity of the general maritime law in two ways. First, in those states recognizing actions for non-*Robins* damages,<sup>79</sup> a significant number of new claimants will have a cause of action. An "oil spill foreseeably harms not only ships, docks, piers, beaches, wildlife, and the like, that are covered with oil, but also harms blockaded ships, marina merchants, suppliers of those firms, the employees of marina businesses and suppliers, the suppliers' suppliers, and so forth."<sup>80</sup> Second, in such

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73. *Id.* at 978 & n. 13. Sport fishermen admittedly would have a difficult time proving such damages. *Id.* at 980 & n. 25.

74. *Id.* at 978.

75. *Id.* at 980.

76. *Id.*

77. "[E]ven the commentators most critical of the general rule [preventing recovery of] indirect damages have acknowledged that some limitation to liability, even when damages are foreseeable, is advisable." *Id.* at 979 - 80.

78. *In re Oriental Republic Uruguay*, 821 F.Supp. 950, 956 & n. 6 (D. Del. 1993); *In the Matter of Ballard Shipping Co.*, 810 F.Supp. 359, 365 & n. 4 (D. R.I. 1993).

79. These states include Delaware, Rhode Island and Alaska. *See In re Oriental Republic Uruguay*, 821 F.Supp. at 955 (applying DEL. CODE ANN. tit. 7, § 6207(a)(6) (1991)); *In the Matter of Ballard Shipping Co.*, 810 F.Supp. at 364 (applying R.I. GEN. LAWS § 46-12.3 - 4 (1991)); *In re the Glacier Bay*, 746 F.Supp. 1379, 1386 - 88 (1990) (interpreting ALASKA STAT. §§ 46.03.822 - .828 (1984)).

80. *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 54 (1st Cir. 1985). *See also Pruitt v. Allied Chemical Corp.*, 523 F.Supp. 975, 977 & n. 5 (E.D. Va. 1981) (citing PROSSER, LAW OF TORTS, § 130 at 952 (1971)).

states, "liability for pure financial harm [can be] vast, cumulative and inherently unknowable in amount."<sup>81</sup> One result of the economic disincentive created by this unpredictability could be "insurance premiums too expensive for the average [shipper]."<sup>82</sup>

### B. *Limitation on Liability for Non-Robins Damages*

Furthermore, the limitations on liability imposed by the various states for direct injury is hardly uniform. For example, in North Carolina, anyone "having control over oil" is liable without limit for injuries to private property.<sup>83</sup> In Texas,<sup>84</sup> liability for property damages and clean-up costs is limited to \$1 million for vessels of 300 gross tons or less not carrying oil as cargo; \$5 million for vessels of 8,000 gross tons or less; and \$600 per gross tons for vessels over 8,000 gross tons (but in no case more than \$50 million).<sup>85</sup> In contrast, federal law limits the liability of an 8,000 gross ton vessel to only \$10 million.<sup>86</sup> Virginia limits liability to \$10 million for damages to public property, loss of tax revenues and natural resources, as well as private claims.<sup>87</sup>

Other states more closely follow the federal limitation on liability. Louisiana claims to be the state most adversely affected by oil spills,<sup>88</sup> but caps liability for "all damages and removal costs" at the greater of \$1,200 per gross ton or \$10 million for tank vessels of more than 3,000 gross tons; the greater of \$1,200 per gross ton or \$2 million for tank vessels of 3,000 gross tons or less; and the greater of \$600 per gross ton or \$500,000 for all other vessels.<sup>89</sup> New York has set forth a liability scheme identical to Louisiana's, though adding a charge of \$300 per gross ton for vessels not subject to OPA 90,<sup>90</sup> but assuring that in no case will liability exceed the federal limit.<sup>91</sup>

Some states refrain from any limitation of oil spill liability.<sup>92</sup> In

81. *Barber Lines*, 764 F.2d at 55.

82. *Id.*

83. N.C. GEN. STAT. § 143-215.93 (1990).

84. TEX. NAT. RES. CODE ANN. § 40.202(a)(2) (West Supp. 1993).

85. *Id.* §§ 40.151, .202(a)(1).

86. *See supra* note 28 and accompanying text. At \$1,200 per gross ton, an 8,000 gross ton vessel would incur \$9.6 million in liability. Since OPA 90 calls for the greater of \$10 million or \$1,200 per gross ton for vessels of 3,000 gross tons or more, an 8,000 gross ton vessel would incur (at most) \$10 million in federal liability.

87. VA. CODE ANN. § 62.1-44.34:18.

88. LA. REV. STAT. ANN. § 30:2452(A) (West Supp. 1994).

89. *Id.* at § 30:2479(A)(1)-(2).

90. N.Y. NAV. LAW § 181(3)(a)(i) - (iii) (Consol. Supp. 1994).

91. *Id.* § 181(3)(b).

92. Ducan, *supra* note 46, at 312 & n. 40 (citing CAL. GOV'T CODE § 8670.56.6

Maryland, for instance, liability is unlimited for damages to both the State for clean-up and restoration costs, and private parties for injuries to real and personal property.<sup>93</sup> Other unlimited liability states include California,<sup>94</sup> Connecticut,<sup>95</sup> Rhode Island,<sup>96</sup> South Carolina,<sup>97</sup> Oregon,<sup>98</sup> and Washington.<sup>99</sup>

This "new hodgepodge [of] one federal statute overlapping numerous state provisions and general maritime law and common law remedies"<sup>100</sup> fails to "prevent[] duplicative and inconsistent state laws and remedies under the general maritime law and the common law."<sup>101</sup> For example, OPA 90 authorizes the states to enforce the federal evidence of financial responsibility provisions,<sup>102</sup> but does not prevent state legislators from adopting more stringent evidence of financial responsibility requirements.<sup>103</sup> If an unlimited liability state were to require evidence of financial responsibility for all reasonably foreseeable removal costs and damages, it could significantly hamper maritime commerce within its jurisdiction: unlimited liability would render financial responsibility incalculable to responsible parties and their guarantors.<sup>104</sup> Even in unlimited liability states that specify the amount of financial responsibility a responsible party must demonstrate, ultimate liability remains incalculable, rendering uncertain whether vessels entering their jurisdictions are adequately insured.<sup>105</sup>

The effects of OPA 90's assault on the uniformity of the general maritime law could be disastrous. Insurance premiums "for tankers calling in the United States" increased from ten to twenty percent soon

(West Supp. 1993); OR. REV. STAT. § 466.640 (1992); WASH. REV. CODE § 90.48.336 (1992)).

93. MD. CODE ANN., ENVIR. § 4-408, -409(a).

94. CAL. GOV'T CODE §§ 8670.56.5(a), 8670.56.6 (West Supp. 1994).

95. CONN. GEN. STAT. ANN. § 22a-451(a) (West Supp. 1994).

96. R.I. GEN. LAWS § 46-12.5-7 (1991). Rhode Island imposes liability on responsible parties for any economic benefit they realize due to their discharge of oil! *Id.* § 46-12.5 - 7(a)(3).

97. S.C. CODE ANN. §§ 48-43-820, -44-30(c) (Law. Co-op. 1987 & Supp. 1993).

98. OR. REV. STAT. § 466-640 (1992).

99. WASH. REV. CODE ANN. § 90:56.360, .370, .380 (West 1992).

100. Wagner, *supra* note 10, at 585.

101. *Id.*

102. 33 U.S.C. § 2719 (Supp. III 1991).

103. In fact, OPA 90 invites states to enact "additional liability or additional requirements." *Id.* § 2718(c)(1).

104. Hutchinson, *supra* note 10, at 239.

105. See generally Alacatrana & Cox, *supra* note 10, at 369 (discussing the implications of Certificates of Financial Responsibility and varying state requirements).

after the Act was passed.<sup>106</sup> Such pressures may cause even insured responsible parties to refrain from “committing their [vessels] to the U.S. trade.”<sup>107</sup> While pre-OPA 90 state statutes providing unlimited shipowners’ liability did not prevent “oil shipping and producing companies [from being willing] to do business,”<sup>108</sup> these responsible parties were shielded by the limitations imposed by SLLA.<sup>109</sup> The United States is such an important market for international shipping companies that the global shipping industry may be affected by the uncertainty in U.S. liability.<sup>110</sup>

Additionally, insurance is a major source of funding for the recovery of loss from oil spills.<sup>111</sup> State unlimited liability schemes that render responsible parties unable to determine the necessary amount of coverage may chase off this source of funding, leaving responsible parties to pay on their own the amount of liability for which they were uninsured.<sup>112</sup>

Even though OPA 90 and SLLA no longer prevent states from imposing their own liability schemes on responsible parties,<sup>113</sup> constitutional limitations on state regulation remain. Specifically, the states cannot interfere with the general “harmony and uniformity” of the national maritime law.<sup>114</sup> Furthermore, it is constitutionally impermissible for Congress to incorporate state statutes into federal law if incorporation disrupts the consistency of maritime law.<sup>115</sup>

106. Edelman, *supra* note 10, at 21.

107. Clark, *supra* note 10, at 251. See Edelman, *supra* note 10, at 22 and Hutchinson, *supra* note 10, at 258 & n. 315 for lists of merchants who have refused to send vessels to most or all United States ports as a result of OPA 90.

108. S. REP. No. 94, 101st Cong., 2d Sess. 5 (1990), reported in 1990 U.S.C.C.A.N. 722, 728 - 29.

109. See *supra* note 46 and accompanying text.

110. Hutchinson, *supra* note 10, at 258. When the United States market is deprived of significant amounts of oil, an oversupply may occur in other markets “[pushing] some owners and operators out of business” and depressing “freight rates . . . putting some fleets, including U.S. companies, at a competitive disadvantage in the world wide shipping market.” *Id.*

111. *Id.* at 239.

112. *Id.*; Statement by Pres. G. Bush upon Signing HR. 1465, 1990 U.S.C.C.A.N. 861-1, 861-2 (Aug. 27, 1990). A new insurance company is being formed to “cover for Oil Pollution Act (OPA) liabilities . . . .” *New Insurance Company to Cover OPA 90 Pollution Liabilities*, 10 LLOYD’S MAR. L. 5, 5 - 6 (1993). However, “[i]nsurance would be for federal OPA requirements and would not extend to liabilities imposed at state level.” *Id.* at 6.

113. See *supra* notes 39 - 42 and accompanying text.

114. Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917).

115. Washington v. W.C. Dawson & Co., 264 U.S. 219, 228 (1924); Knicker-

## IV. THE UNIFORM NATIONAL MARITIME LAW

The Constitution gives the federal judiciary jurisdiction over "all . . . admiralty and maritime" cases,<sup>116</sup> and Congress the authority "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing Powers and all other Powers vested by this Constitution in the government of the United States, or in any Department or Officer thereof."<sup>117</sup> Congress has given the United States District Courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction; . . . saving to suitors in all cases, the right of a common law remedy, where the common law is competent to give it."<sup>118</sup>

Congress thus has the ultimate authority to establish the national maritime law.<sup>119</sup> Where Congress has not spoken, the national maritime law is that accepted by the federal courts.<sup>120</sup> This scheme ensures the national uniformity and consistency that state legislation could not provide.<sup>121</sup>

In *Southern Pacific Co. v. Jensen*,<sup>122</sup> the Supreme Court held that the states may not pass laws interfering with the uniformity of national maritime law. The Court's opinion in *Knickerbocker Ice Co. v. Stew-*

bocker Ice Co. v. Stewart, 253 U.S. 149, 164 (1920).

116. U.S. CONST. art. III, § 2.

117. U.S. CONST. art. I, § 8. Congress' power to make new maritime law stems in part from its power to legislate in the context of interstate commerce. *Id.*; *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 404 (1940) (observing that "[t]he power of the United States over its waters which are capable of use as interstate highways arises from the commerce clause of the Constitution."); *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824) (navigation is one aspect of commerce). But the grant of admiralty jurisdiction to the federal judiciary also impliedly grants to Congress a power of revising and supplementing the maritime law. U.S. CONST. art. III, § 2; *Crowell v. Benson*, 285 U.S. 22, 55 (1956). The significance of this latter grant for legislation such as OPA 90 is unclear, as Congress' power over navigable waters is plenary under the "commerce" and "necessary and proper" clauses. See DAVID E. ENGBAHL, *CONSTITUTIONAL FEDERALISM* 132 (2d. ed. 1987).

118. 28 U.S.C. § 1333 (1988).

119. *In re Garnett*, 141 U.S. 1, 14 (1891) (state law in contravention of limited liability for fire damages unconstitutional).

120. *Butler v. Boston & Savannah Steamship Co.*, 130 U.S. 527, 556-57 (1889) (noting that limited liability "has always been received as maritime law in this country" even before Congress acted). But in some areas, such as insurance, where there is no established federal maritime law, state law is an acceptable source from which new maritime law may be derived. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955).

121. *The Lottowanna*, 88 U.S. (21 Wall.) 558, 575 (1874).

122. 244 U.S. 205 (1917).

*art*<sup>123</sup> reveals that Congress may not delegate to the states the authority to pass laws which might interfere with such uniformity. This barrier was fortified in *Washington v. W.C. Dawson & Co.*<sup>124</sup> This line of cases led to the passage of the Longshore and Harbor Workers' Compensation Act.<sup>125</sup> But if *Jensen* and *Knickerbocker Ice* are followed, then the OPA 90 authorization of recovery of non-*Robins* damages under state liability law is unconstitutional.

In *Jensen*, a longshoreman was killed while unloading lumber from a ship owned by Southern Pacific.<sup>126</sup> At that time, wrongful death was not a cause of action recognized at maritime law.<sup>127</sup> Consequently, Jensen's widow pursued a remedy under New York's Workmen's Compensation Act. New York awarded the widow compensation under the state act,<sup>128</sup> which required no proof of Southern Pacific's negligence and did not consider Jensen's possible contributory negligence.<sup>129</sup> Ships could not "load or discharge . . . cargo at a dock" in New York unless they either paid a fine or complied with the state Workmen's Compensation Act.<sup>130</sup>

The Court found the New York law to conflict with the Constitution as the state had applied it to longshoremen.<sup>131</sup> First, the state law was in contravention of a congressional policy "to encourage investments in ships."<sup>132</sup> Furthermore, because the Workmen's Compensation remedy was wholly unknown to the common law,<sup>133</sup> Jensen's widow was not entitled to the award under the saving to suitors clause.<sup>134</sup>

When Congress amended the saving to suitors clause to preserve "to claimants the rights and remedies under the workmen's compensation law of any state,"<sup>135</sup> the Supreme Court held this action to be unconstitutional.<sup>136</sup> In *Knickerbocker Ice*, a bargeman drowned in the

123. 253 U.S. 149 (1920).

124. 264 U.S. 219 (1924).

125. 33 U.S.C. §§ 901 - 950.

126. 244 U.S. at 207-08.

127. *The Harrisburg*, 119 U.S. 199 (1886), *overruled* by *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

128. 244 U.S. at 209.

129. *Id.* at 211.

130. *Id.* at 213 - 14.

131. *Id.* at 217-18.

132. *Id.*

133. *Jensen*, 244 U.S. at 218.

134. 28 U.S.C. § 1388 (1988). *See supra* note 118 and accompanying text.

135. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 156 (1920).

136. *Id.* at 164.

Hudson River while "doing work of a maritime nature."<sup>137</sup> Wrongful death was still not a cause of action cognizable in maritime law.<sup>138</sup> But since Congress had attempted to extend each state's worker's compensation law to maritime workers injured on its navigable waters,<sup>139</sup> his widow received an award under "the Workmen's Compensation Law of New York."<sup>140</sup>

The Court held that a maritime application of this law was still unconstitutional because Congress could not delegate its legislative power over maritime law to the states.<sup>141</sup> Disparate state maritime laws, though sanctioned by Congress, would still destroy the harmony and uniformity which the Constitution not only contemplated but actually established.<sup>142</sup> If Congress could so act, there would have been no point in granting it the "paramount power"<sup>143</sup> over the national maritime law in the first place.<sup>144</sup>

Subsequently, Congress further amended the Judiciary Act, "saving . . . to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State, District, Territory, or possession of the United States . . ." <sup>145</sup> In *W.C. Dawson & Co.*, the Supreme Court found this alteration likewise unconstitutional.<sup>146</sup> The purpose of the act was obviously still to apply state workmen's compensation laws "to injuries within the admiralty and maritime jurisdiction substantially as provided by the Act of 1917."<sup>147</sup> Congress could enact a national law compensating injured maritime workers,<sup>148</sup> but could not use state law in contravention of the Constitution's vision of a uniform national maritime law.<sup>149</sup>

Whether the *Jensen* line of cases prevents a state from imposing its own liability scheme for oil spills was at issue in *Askew v. American*

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137. *Id.* at 155.

138. *See supra* note 127 and accompanying text.

139. *See supra* note 135 and accompanying text.

140. 253 U.S. at 155 - 56.

141. *Id.* at 164.

142. *See Southern Pac. Co. v. Jensen*, 244 U.S. 205, 215 (1917).

143. *Id.*

144. *Knickerbocker Ice*, 253 U.S. at 164.

145. Act of June 10, 1922, c. 216, 42 Stat. 634 (*quoted in* *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 221, n.1 (1924)).

146. *Id.* at 223.

147. *Id.*

148. *Id.* at 227.

149. *Id.* at 228.



*Waterways Operators, Inc.*<sup>150</sup> In *Askew*, the plaintiffs sought to enjoin the state of Florida from enforcing a state law imposing liability on responsible parties for clean-up costs associated with oil spills in its territorial waters, and "other damage incurred by the state and for damages resulting from injury to others."<sup>151</sup> The Supreme Court held that those provisions allowing federal recoupment of clean-up costs in the federal Water Quality Improvement Act of 1970 did not prevent a state from devising its own method of recovering clean-up costs.<sup>152</sup>

Like OPA 90,<sup>153</sup> the federal Act explicitly left a state free to "impose[ing] any requirement or liability with respect to the discharge of oil into any waters within such State."<sup>154</sup> The Court found that a state's ability to enforce laws such as Florida's is not diminished by *Jensen and Knickerbocker Ice*.<sup>155</sup> Those cases apply "to suits relating to the relationship of vessels, plying the high seas and our navigable waters, and to their crews."<sup>156</sup> In that context, states do not have the authority, and Congress cannot confer upon them the authority, to impose regulation.<sup>157</sup> But for sea-to-shore injuries, a state's law can apply as a valid exercise of its police power.<sup>158</sup>

## V. CONCLUSION

### A. OPA 90 Must Meet Knickerbocker Ice Head On

#### 1. *Askew* Inapplicable

*Askew* will not prevent the state liability provisions of OPA 90 from colliding with *Jensen* and its progeny, mainly because the general harmony and uniformity of the national maritime law was not at stake in *Askew*.<sup>159</sup> Although the federal Act in *Askew* was similar to OPA 90

150. 411 U.S. 325 (1973).

151. *Id.* at 332 (quoting FLA. STAT. ANN. § 376.12 (West 1974)).

152. *Id.*

153. See *supra* notes 39 - 41 and accompanying text.

154. *Askew*, 411 U.S. at 329 (citing Water Quality Improvement Act of 1970 § 1161(o)).

155. *Id.* at 337 - 44.

156. *Id.* at 344.

157. See *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920); *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917).

158. *Askew*, 411 U.S. at 343 - 44.

159. *Id.* at 332. "Whether the amount of costs [Florida] could recover from a wrongdoer is limited to those specified in the Federal Act and whether in turn this new Federal Act removes the pre-existing limitations of liability in the Limited Liability Act are questions we need not reach here." *Id.*

in that it imposed federal liability for cleanup costs on responsible parties while preserving the states' ability to impose additional liability,<sup>160</sup> it did not explicitly rescind SLLA limitations on state law recoveries like OPA 90.<sup>161</sup> The removal of SLLA limitations on liability significantly contributes to the unpredictability of liability for state law claims.<sup>162</sup> How the *Askew* court would have responded in the name of *Knickerbocker Ice* to such a rescission is therefore unclear. In other words, liability under the federal Act at issue in *Askew* simply was not as unpredictable as it is under OPA 90.

Furthermore, the Florida law at issue mainly involved that state's ability to recover its cleanup costs and damages.<sup>163</sup> Thus, the statute imposed little threat of the "unpredictable number of plaintiffs" complication of liability for purely economic injuries.<sup>164</sup> Even if one reads the "shall be liable . . . for damages resulting from injury to others" language of the Florida statute to create a private right of action, the provision does not purport to create a cause of action for purely economic injuries.<sup>165</sup> Furthermore, *Askew* does not discuss the propensity of the federal Act to allow liability for purely economic injuries under state common law; in fact, *Robins Dry Dock* is not mentioned in the opinion. True, the federal Act at issue in *Askew* dealt solely with cleanup costs, so that a discussion of *Robins* was not particularly appropriate; but this is one more reason why a court cannot look to *Askew* alone to decide the applicability of *Jensen* and *Knickerbocker Ice* in the context of OPA 90, which deals with damages as well as cleanup costs.<sup>166</sup>

## 2. Not a Maritime but Local Issue

Nor should OPA 90's allowance of liability under state law for non-*Robins* damages due to oil spills avoid *Jensen* and *Knickerbocker Ice* by posing as a maritime but local issue. The doctrine of maritime but local is the logical "other side" of the *Jensen* coin: if state laws which unjustifiably interfere with the uniformity of the national maritime law are unconstitutional, then those which do not interfere, or

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160. *Id.* at 329.

161. *See supra* notes 42-48 and accompanying text.

162. *See supra* notes 83-112 and accompanying text.

163. *See* FLA. STAT. ANN. § 376.12 (West 1974).

164. *See supra* note 80 and accompanying text.

165. *See* FLA. STAT. ANN. § 376.031 (West 1974). The statute does not define "damages" or "injury." *Id.*

166. *See supra* note 21 and accompanying text.

which do so justifiably, may be valid.<sup>167</sup> State laws serving a compelling interest may be allowed to contravene the uniformity of the general maritime law.<sup>168</sup>

In *Slaven v. BP America, Inc.*,<sup>169</sup> the court allowed recovery of purely economic damages based on state law causes of action out of a concern that state law be uniform with the federal Trans Alaska Pipeline Authorization Act (TAPAA), which preempts *Robins Dry Dock* at the federal level.<sup>170</sup> In dicta, the court suggested that state laws imposing liability for pure economic injuries were permissible as maritime but local,<sup>171</sup> observing that "California has a strong local interest in regulating pollution within its borders, particularly oil spills affecting its coastal waters."<sup>172</sup> Because "environmental regulation [generally] has long been regarded by the [Supreme] Court as particularly suited to local regulation,"<sup>173</sup> the court presumably would entertain private claims under state law for non-*Robins* damages.<sup>174</sup> The precedential value of this case for state law actions authorized by OPA 90 is questionable, however, because this latter rationale was not the basis of the court's decision.<sup>175</sup>

### 3. OPA 90 Does Not Preempt *Robins*

Similarly, an argument that OPA 90 preempts the general maritime law of damages as established in *Robins* should not prevent review of that statute under the principles of *Jensen* and *Knickerbocker Ice*. Congress may abrogate *Robins Dry Dock* by statute.<sup>176</sup> In *In re the Glacier Bay*<sup>177</sup> the plaintiffs sought a declaratory judgment that purely

167. Even the *Jensen* court recognized that state regulation may permissibly result in some alteration of the general maritime law. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917).

168. *Slaven v. BP America, Inc.*, 786 F. Supp. 853, 863 (C.D. Cal. 1992). See *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961).

169. 786 F. Supp. 853 (C.D. Cal. 1992).

170. *Id.* at 863.

171. *Id.*

172. *Id.* at 863.

173. *Id.*

174. *Id.*

175. Unlike TAPAA, which preempts *Robins Dry Dock* and SLLA, OPA 90 merely preempts SLLA. See *supra* note 42 and accompanying text.

176. See, e.g., *In re the Glacier Bay*, 746 F. Supp. 1379, 1383 (D. Alaska 1990) ("Unless it is determined that TAPAA preempts the application of substantive maritime law, maritime law applies regardless of the fact that plaintiffs did not invoke the procedural benefits of admiralty jurisdiction.").

177. 746 F. Supp. 1379 (D. Alaska 1990).

economic damages are recoverable under a state statute, the Alaska Environmental Conservation Act, and under TAPAA.<sup>178</sup> The court held that TAPAA preempts SLLA<sup>179</sup> and all other applicable maritime law, including *Robins Dry Dock*.<sup>180</sup> TAPAA imposes strict liability “[n]otwithstanding the provisions of any other law, . . . for all damages . . . sustained by any person” arising from spills of oil “transported through the trans-Alaska pipeline [and] loaded on a vessel at the terminal facilities of the pipeline . . . .”<sup>181</sup>

The court interpreted this language to mean that TAPAA preempts not only all other statutory law, but all other applicable law from any source, including general maritime law.<sup>182</sup> TAPAA does not define what “damages” are recoverable by “any person”, but the statute’s scope is so broad as to incorporate non-*Robins* damages by referring to “all damages.”<sup>183</sup> Furthermore, like OPA 90, “TAPAA clearly encouraged state legislation regarding liability for . . . oil spills.”<sup>184</sup> Therefore, TAPAA did not preempt the Alaska act allowing for the recovery of purely economic damages.<sup>185</sup> *Robins Dry Dock* did not preempt such a recovery under state law because preemption under that case would not be uniform with the liability scheme created viz. TAPAA.<sup>186</sup>

But OPA 90 defines “damages” so that under that law, at the federal level, a plaintiff can only recover for economic injuries “due to the injury, destruction, or loss of real property, personal property, or natural resources.”<sup>187</sup> Furthermore, damages recovered at the federal level under OPA 90 are limited to those defined in the Act.<sup>188</sup> Thus, a *Glacier Bay* analysis would not keep a reviewing court from applying *Jensen* and *Knickerbocker Ice* to a state law permitting recovery for purely economic injuries as authorized by OPA 90.

### B. *The Constitutional Fate of OPA 90*

It seems inevitable that a court will have to address the issue of

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178. *Id.* at 1382.

179. *Id.*

180. *Id.* at 1382 - 86.

181. *Id.* at 1384 (quoting 43 U.S.C. § 1653(c)(1)).

182. *Id.* at 1384 - 86.

183. *Id.* at 1385.

184. *Id.* at 1387.

185. *Id.*

186. *Id.* at 1387 - 88.

187. 33 U.S.C. § 2702(b)(2)(E) (1988 & Supp. III).

188. *Id.* § 2702(a).

whether OPA 90's authorization for recovery under state liability laws, to the extent it permits state law claims for non-*Robins* damages, is constitutional per *Knickerbocker Ice* and *W.C. Dawson & Co.* The threat posed by these cases to this aspect of the Act is implicitly recognized by its legislative history. There, OPA 90 is constantly characterized as not "affect[ing]" or "preempt[ing]";<sup>189</sup> rather than delegating the "authority"<sup>190</sup> of states to impose additional liability or requirements on responsible parties. OPA 90 is presented as simply "preserving the authority of any State to impose its own requirements or standards with respect to discharges of oil within that State."<sup>191</sup> So characterized, the Act would probably survive scrutiny under *Knickerbocker Ice* and *W.C. Dawson & Co.*, as prior statutes containing such a provision have withstood challenge.<sup>192</sup>

However, OPA 90 does more than just preserve any pre-existing state authority to prevent and control oil spills; states now have new authority to pass unlimited liability schemes permitting recovery for non-*Robins* damages.<sup>193</sup> Thus, the Act can fairly be seen as delegating to states the power to compose part of a national effort to prevent and control oil spills.<sup>194</sup> A state defending its unlimited liability statute will thus have to successfully persuade the Court to overrule or abandon *Knickerbocker Ice* and *W.C. Dawson & Co.* This task will not be difficult.

The *Askew* court, while not specifically addressing an issue like that presented by OPA 90,<sup>195</sup> nevertheless limited *Knickerbocker Ice* as well as *Jensen* to "suits relating to the relationship of vessels, plying the high seas and our navigable waters, and to their crews."<sup>196</sup> This interpretation leads to the current situation in which Congress may some-

189. 1990 U.S.C.A.A.N. 722, 740.

190. *Id.* at 739 - 40.

191. *Id.* at 799.

192. The statute under consideration in *Askew* provided that "nothing in this section shall be construed as preempting any state or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such state." *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 329 (1973).

193. *See supra* note 78 and accompanying text.

194. *See Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920). "To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the states to do as they might desire, is false reasoning" because, in general, admiralty is an area of the law in which only Congress can legislate. *Id.*

195. *See supra* notes 159 - 166 and accompanying text.

196. *Askew*, 411 U.S. at 344.

times delegate its authority, and sometimes not. The easiest solution to this inconsistency would be to expressly overrule *Knickerbocker Ice* and *W.C. Dawson & Co.*

Congress' inability to adopt by reference current or future state laws is unique to admiralty. The Court once flirted with the idea that the national uniformity demanded by the Commerce Clause<sup>197</sup> prevented Congress from incorporating future state laws into its legislation.<sup>198</sup> However, in *In re Rahrer*,<sup>199</sup> the Court upheld a federal law that allowed the law of a state into which liquor was imported to govern the product's traffic within that state.<sup>200</sup> Such state laws are invalid in the absence of Congressional action, because the interstate transport of liquor must be governed by uniform rules under the Commerce Clause.<sup>201</sup> But Congress does not act unconstitutionally in an area of interstate commerce over which it has exclusive control by removing the barrier of uniformity to state laws affecting that area.<sup>202</sup> This removal can occur via statutory authorization of such state laws.<sup>203</sup> Congress lifted just such a barrier in OPA 90 when it authorized states to pass unlimited liability laws.

National uniformity of the law is no less important in the area of interstate commerce than in admiralty.<sup>204</sup> States generally may not interfere with "the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation."<sup>205</sup> However, Congress may "permit the states to regulate the commerce in a

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197. U.S. CONST. art. I, §8, cl. 3.

198. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 321 (1851). Where an area of the law is exclusively the province of Congress, "it may be doubted whether Congress could, with propriety, recognize [state laws] as laws, and adopt them as its own acts." *Id.* Sometimes, Congress has the exclusive power to govern interstate commerce (*i.e.*, where the subject of regulation is national in nature, or "admit[s] only of one *uniform* system, or plan of regulation.") *Id.* at 319 (emphasis added).

199. 140 U.S. 545 (1891).

200. *Id.* at 560.

201. *Leisy v. Hardin*, 135 U.S. 100, 109 - 10 (1890). A state in the exercise of its police power, cannot inhibit the import of a commodity protected by the need for uniform laws governing its traffic. *Rahrer*, 140 U.S. at 560.

202. *Id.* at 564. This is not a delegation of national legislative power to the states. Rather, state laws passed under Congressional authorization are as binding on the citizens of that state as anyone entering the state. At the same time, they do not bind anyone acting outside of the state. *See United States v. Sharpnack*, 355 U.S. 286, 294 (1957).

203. *See Rahrer*, 140 U.S. at 564.

204. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216 - 17 (1917).

205. *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 770 (1945).

manner which would otherwise not be permissible."<sup>206</sup> In other words, Congress can authorize state regulation creating nonuniformity in the law of interstate commerce.<sup>207</sup> Why should the situation be any different in admiralty?

As an initial matter, Congress can legislate in the area of interstate commerce through a direct constitutional grant of authority.<sup>208</sup> By negative implication, state legislation burdening interstate commerce is unconstitutional.<sup>209</sup> Congress can authorize such legislation because the direct constitutional grant of power means Congress has "the final authority for determining the way in which interstate commerce is regulated."<sup>210</sup>

By contrast, the only direct constitutional grant of authority regarding admiralty is to the federal judiciary.<sup>211</sup> The Supreme Court has used this power to apply and develop the substantive law "inherent in the admiralty and maritime jurisdiction."<sup>212</sup> Such power might imply that the Court has the final say on how admiralty may be regulated, making *Knickerbocker Ice* more appropriate in maritime matters than in the interstate commerce context.<sup>213</sup> But the Court seemed to relinquish "final say" authority over admiralty law in *Crowell v. Benson*,<sup>214</sup> in which it held that the direct constitutional grant of authority to the federal judiciary over maritime cases contained an indirect constitutional grant of authority to Congress to revise and supplement the maritime law.<sup>215</sup>

Furthermore, one may fairly characterize the indirect, Article III grant of authority to Congress over maritime law as superfluous. Congress seems to have plenary power over the navigable waters of the United States as part of its direct constitutional grant of authority to

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206. *Id.* at 769.

207. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 8.5, at 281 (4th ed. 1991).

208. U.S. CONST. art. I, § 8.

209. JEROME A. BARRON ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 172 & n. 1 (3d ed. 1987).

210. NOWAK & ROTUNDA, *supra* note 207, at 281.

211. U.S. CONST. art. III, § 2.

212. *Crowell v. Benson*, 285 U.S. 22, 55 (1932).

213. Since Congress has been entrusted with regulating interstate commerce, the appropriateness of judicial fact-finding to overturn state laws as unconstitutionally burdening interstate commerce has been questioned. See *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 795 (1945) (Douglas, J., dissenting).

214. 285 U.S. 22 (1932).

215. *Id.* at 55.

regulate interstate commerce.<sup>216</sup> As a result, there is nothing left for the Court to exercise any "final say" authority over when Congress acts as it did in passing OPA 90, which deals specifically with oil spills in "navigable waters."<sup>217</sup>

Interstate commerce and admiralty are thus closely akin with respect to the necessity of uniformity, and the exclusiveness of federal control over them.<sup>218</sup> Therefore, because the Court chose not to adopt reasoning similar to *Rahrer* in *Knickerbocker Ice*, the latter opinion has been described as "old" and "poorly reasoned."<sup>219</sup> As environmental concerns served as a catalyst for reevaluating SLLA, perhaps the Court will now reconsider *Jensen*, *Knickerbocker Ice* and *W.C. Dawson & Co.*

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216. ENGBAHL, *supra* note 117, at 132. If the commerce clause only empowered Congress to regulate navigation, Congress could not "regulate the discharge into [navigable] waters of wastes that could not interfere with navigation." *Id.* at 129. However, Congress' authority under the commerce clause is not limited to navigation but extends to navigable waters themselves. *See United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 404 (1940) (stating that "[t]he power of the United States over its waters which are capable of use as interstate highways arises from the commerce clause of the Constitution.") As a result, "the objective at which a particular regulation of navigable waters is aimed becomes immaterial to the question of constitutional validity." ENGBAHL, *supra* note 117, at 130.

217. *See* 33 U.S.C. § 2702(a) (Supp. III 1991).

218. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216-17 (1917).

219. NOWAK & ROTUNDA, *supra* note 207, at 280, n. 1.



