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ARTICLE

NECESSARY AND PROPER, BUT STILL UNCONSTITUTIONAL: THE OIL POLLUTION ACT'S DELEGATION OF ADMIRALTY POWER TO THE STATES

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When the *Exxon Valdez* fetched up on Bligh Reef in Alaska in 1989, the nation's attention was focused on the problem of oil spill liability and compensation as never before. The national outcry that accompanied televised pictures of oil-stained beaches and dead or dying wildlife prompted Congress to undertake a review of the nation's oil spill laws. Fifteen years of congressional confusion and inaction evaporated overnight, and a consensus rarely seen in Congress developed to produce a dramatic overhaul of federal oil pollution legislation. The result was the Oil Pollution Act of 1990 (OPA),[1] which was designed to serve as the foundation of a package of complementary international, national, and state laws intended to "adequately compensate victims of oil spills [and] provide quick, efficient cleanup."[2]

OPA contains several provisions that bring the nation much closer to this goal: It provides strict liability with increased liability

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1. Oil Pollution Act of 1990, 104 Stat. 484 (1990) (codified as amended at 33 U.S.C. §§ 2701-2761 (1994); 26 U.S.C. §§ 4611, 9509 (1994)).

2. S. REP. NO. 101-94, at 2 (1989), *reprinted in* 1990 U.S.C.C.A.N. 723.

limits on those responsible for oil spills; it broadens the rights and remedies afforded those injured by pollution damage; it creates a fund designed to ensure adequate compensation for those unable to recover the costs of cleanup or other damage from the dischargers of oil; and it tightens operation and construction requirements applicable to vessels transporting oil in American waters.

OPA seeks to balance the need to make industries which benefit from the transport of oil internalize the costs of pollution, while at the same time avoiding the possibility that responsible vessel owners will be driven from the industry with crippling damage awards. OPA thus provides for strict, but limited, liability. But in its desire to be tough on spillers, Congress went too far. Congress succumbed to the hysteria surrounding the *Exxon Valdez* incident, and with a single, superficially simple provision, upset this balance by permitting states to impose unlimited strict liability on vessels which discharge oil into state waters.

In drafting the OPA, Congress explicitly chose not to preempt state action. Congress included a "non-preemption" clause which is designed to preserve the right of states to legislate over matters of local concern. The result, however, has been a confusing array of inconsistent state legislation, subjecting vessel owners to varying, and even inconsistent, liability regimes. The uniformity so long thought to be essential to the development of the maritime law is impaired. More importantly, OPA's "non-preemption" clause is unconstitutional, because delegation of power to the states leads to a lack of uniformity impermissible under the Constitution's Admiralty Clause.

Uniformity in admiralty law has long been thought to be a constitutional imperative. Until recently, the Supreme Court invalidated both state and federal legislation having the potential to disrupt uniformity. Although several recent Supreme Court cases seem to discount the necessity for uniformity in admiralty law, it is nevertheless clear that the primary purpose of the constitutional grant of admiralty power to the federal government was to ensure the application of a uniform substantive admiralty law throughout the nation. Indeed, the concern for uniformity behind the Constitution's grant to the federal government of power over interstate and foreign commerce was intensified in the field of maritime law. The Framers' experience under the Articles of Confederation taught them that a lack of uniformity in maritime law would not only inhibit the growth of commerce, but would engender conflicts in the United States' relations with foreign nations. They set out to

ensure that the administration of maritime law would be uniform throughout the nation. In vesting power over admiralty matters in the federal government, rather than the states, the founding generation expected the national government to be a bulwark against intrusion by the states.

OPA's failure to preempt state action is a chink in the armor of uniformity, opening the way to a myriad of local regulations on shipping. Rather than creating a comprehensive and complementary regime, OPA has created a situation in which a vessel owner's liability for oil pollution will depend on the locality of the spill. This uneven regulatory scheme has resulted in substantive and procedural complications. A substantive problem arises because different states have imposed different liability regimes: Some impose unlimited liability, others have a statutory limit on liability. Furthermore, some states permit recovery for pure economic loss, while others do not. The defenses available to shipowners whose vessels are involved in spills are also variable. Adding to the confusion are the non-statutory claims which survive OPA, each with its own jurisdictional basis, and each with its own defenses and liability limits.

This chaos is exacerbated by a provision in OPA which preempts the shipowners' right to limitation under the Shipowners' Limitation of Liability Act.[3] While a number of courts and commentators have criticized the substantive provisions of the Limitation of Liability Act, its procedural value is significant because it allows the joinder of all claims into a single proceeding. The Limitation of Liability Act prevents a "race to the courthouse" and provides a means by which the available assets may be divided equitably. OPA, in contrast, has failed to provide any means for consolidating claims arising from an oil pollution incident into a single forum. As a result, not only are substantive liabilities subject to variation, but a single spill can engender litigation in several fora, raising the potential for inconsistent judgments.

This article will show that the provision permitting states to enact oil spill statutes that impose different, potentially greater, liabilities than those permitted by OPA itself is an unconstitutional delegation of the admiralty power. Part I will examine the statutory regime applicable to oil pollution incidents. It will highlight the

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[3] Act of March 3, 1851, ch. 43, 9 Stat. 635 (1851) (codified at 46 U.S.C. §§ 181-89).

basic provisions of the various federal oil pollution statutes, paying particular attention on the remedies provided by OPA. Part II will focus to the constitutional requirement for uniformity in maritime law. It will show that any legislation that delegates admiralty power to the states so as to disrupt that uniformity is unconstitutional. It will first consider Congress's authority under the Commerce Clause, showing that the decision not to preempt state action is permissible under the Commerce Clause. It will then consider OPA's constitutionality in light of the Admiralty Clause. It will show that the admiralty power was granted by the Constitution primarily to ensure uniformity in the maritime law, and that for this reason the Admiralty Clause bars any delegation of the admiralty power by Congress. Part III will examine the substantive and procedural difficulties created by OPA's non-preemption clause, as a means of illustrating the wisdom of the doctrine of uniformity in admiralty.

I. THE STATUTORY REGIME

A. Federal Legislation Prior to OPA

Prior to the *Exxon Valdez* disaster of 1989, the United States had several statutes designed to combat and clean up oil pollution incidents. These included the Rivers and Harbors Act of 1899,[4] the Oil Pollution Act of 1924,[5] the Clean Waters Restoration Act of

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[4] Rivers and Harbors Appropriation Act of 1899, ch. 425, 30 Stat. 1121 (1899) (codified in scattered sections of Title 33, U.S.C.). This Act imposes penalties on vessel owners who discharge refuse into the navigable waters of the United States. *See* 33 U.S.C. § 407 (1994). Oil is considered "refuse" within the terms of the Act. *See* United States v. Standard Oil Co., 384 U.S. 224, 229-30 (1966) ("There is nothing more deserving of the label 'refuse' than oil spilled into a river."). Violators are subject to a maximum fine of $25,000. *See* 33 U.S.C. § 411 (1996) (amending 33 U.S.C. § 411 (1994)) (prior to the 1996 amendment, the Act subjected violators to modest fines of between $500 and $2,500). Although the Act makes no specific provision for recovery of cleanup costs, the Supreme Court has held that the federal government's right to recover such costs is implied in the statute. *See* Wyandotte Transp. Co. v. United States, 389 U.S. 191, 204 (1967) (holding that the federal government may assert its right to impose financial responsibility on those who negligently or willfully discharge oil). The Refuse Act is of limited use in most oil pollution incidents, because it provides no remedy, either express or implied, to private claimants. *See* California v. Sierra Club, 451 U.S. 287 (1981) (denying an environmental organization and two private citizens the opportunity to enjoin the State of California from constructing water diversion facilities), *vacated*, Sierra Club v. Watt, 451 U.S. 965 (1981).

[5] Oil Pollution Act of 1924, 43 Stat. 604 (1925) (repealed). This Act provided only for criminal penalties for unauthorized discharges of oil. *See id.* § 4, 43 Stat. at 605.

1966,[6] the Water Quality Improvement Act of 1970, (WQIA),[7] and the Federal Water Pollution Control Act Amendments of 1972, (FWPCA), later known as the Clean Water Act (CWA).[8] These acts were generally considered ineffective in controlling oil pollution and in providing compensation to those damaged by an oil pollution incident.[9]

The difficulty with this patchwork regime was that before OPA, none of the statutes of general application made specific provision for recovery of cleanup-costs by states or private parties. The CWA provided for the recovery of cleanup costs incurred by governments only. Private parties could recover these costs and damages only by actions in admiralty[10] or by resort to state statu-

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[6] 33 U.S.C. § 466 (1994).

[7] 84 Stat. 91 (1970) (codified as amended at 33 U.S.C. §§ 1251-1376 (1994)). The WQIA was an improvement over earlier legislation in that it made a discharger of pollution strictly liable for cleanup costs, but that liability was limited to the lesser of $100 per ton or $14 million. *See id.* § 11, 84 Stat. at 94 (1970) (codified as amended at 33 U.S.C. § 1321 (1994)). Such a low liability limit might be effective in only the smallest spills; a massive spill by a 100,000 ton tanker would subject a vessel owner to a mere $10 million in liability.

[8] 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376 (1994)).

[9] The CWA was the primary piece of legislation applicable to oil spill prior to the passage of the Oil Pollution Act of 1990. It prohibited all discharges of oil or hazardous substances into the navigable waters of the United States. *See* 33 U.S.C. § 1321(b)(3) (1994). Under the Act, the party responsible for a spill has the primary duty for cleanup. *See id.* § 1321(c). However, at least two major problems with the CWA remain.

First, while it provides a right to recover costs incurred by the federal and state governments for cleanup, it does not address private claims for removal costs. *See id.* § 1321. States and private citizens *are* permitted to recover for damage caused to property. *See* United States v. Dixie Carriers, Inc., 627 F.2d 736, 742 (5th Cir. 1980). In fact, states are entitled to enact even more stringent liability regimes. *See* Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973) (upholding such a statute, passed by Florida, against the claim that it was preempted by federal law).

The second problem with the CWA is that non-federal claims for damage and recovery are subject to limitation under the Limitation of Liability Act. 46 U.S.C. §§ 181-96 (1994). Similarly, the recovery of federal cleanup costs is limited to the amounts stated in the CWA. *See In re* Oswego Barge Corp., 664 F.2d 327 (2d Cir. 1981) (concluding that the CWA provides the federal government's exclusive remedy for pollution recovery costs).

The Senate Committee on Environment and Public Works expressed its displeasure with the adequacy of the Clean Water Act in its report recommending the passage of OPA. The Committee complained that "[t]he Act sets inappropriately low limits of liability for owners and operators of vessels with respect to Federal oil spill removal costs and natural damages, and provides no coverage or compensation for other damages." S. REP. No. 101-94, at 3 (1989), *reprinted in* 1990 U.S.C.C.A.N. 724.

[10] *See generally* Stephen E. Roady, *Remedies in Admiralty for Oil Pollution*, 5 FLA. ST. U. L. REV. 361 (1977) (explaining how private claimants, in the absence of a state-created cause of action or a direct suit against the polluters' insurers, are frequently frus-

tory remedies or common law nuisance actions.[11] Although several later statutes, such as the Trans-Alaska Pipeline Authorization Act (TAPAA),[12] the Deepwater Ports Act (DPA),[13] and the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLAA),[14]

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trated in their hopes of recovery for damages resulting from spills).

[11] *See* Fireman's Fund Ins. Co. v. Standard Oil Co., 339 F.2d 148 (9th Cir. 1964) (upholding trial court judgment that the City of Los Angeles and others were liable for negligent operation of an oil pipeline); *In re* New Jersey Barging Corp., 168 F. Supp. 925 (S.D.N.Y. 1958) (allowing such an action for an oil spill from a ship). A public nuisance action, which is based on the sovereign's power to act on behalf of the general public, was often the most effective means for a state government to obtain cleanup costs, because it is something akin to a strict liability action, and requires only that the state show there was an interference with a right common to the general public. *See, e.g.*, Pennsylvania v. Barnes & Tucker Co., 353 A.2d 471, 473-74 (Pa. Commw. Ct. 1976) (explaining the rationale behind actions in equity by state governments to abate public nuisances). Private citizens did not enjoy the same advantages as state governments, however, and were often forced to bring private nuisance actions to recover damages or cleanup costs. *See, e.g., In re* New Jersey Barging Corp., 168 F. Supp. 925, 934-35 (S.D.N.Y. 1958) (allowing beachfront property owners to recover in private nuisance suit). In a private nuisance action, the plaintiff is required to show causation and either negligence or intent. *See id.* More importantly, such actions do not permit claims based on lost profits or earning capacity without damage to a proprietary interest. *See id.*

[12] 87 Stat. 584 (1973) (partially repealed, current version at 43 U.S.C. §§ 1651-55 (1994)). TAPAA created a $100 million fund financed by a five-cent-per-barrel tax on all oil passing through the Trans-Alaska pipeline. *See* 43 U.S.C. § 1653(c)(5) (1994). The fund is available to pay cleanup costs incurred in a spill. *See id.* § 1653(c)(3). Vessel owners are strictly liable for the first $14 million in damages. *See id.* § 1653(c)(1)-(3). TAPAA permits a broader range of recovery, allowing "all damaged parties, public or private, without regard to fault for such damages, and without regard to ownership of any affected lands, structures, fish, wildlife, or biotic or other natural resources. . . ." *Id.* § 1653(a)(1).

[13] DPA, 88 Stat. 2126 (1975) (partially repealed, current version at 33 U.S.C. §§ 1501-1524 (1994)). The DPA applies to spills occurring at ports occurring outside the three-mile limit. *See id.* § 3(10), 88 Stat. at 2128, 33 U.S.C. § 1502(10). It originally created a $4 million fund financed by a two-cent-per-barrel tax on oil loaded or unloaded at deepwater ports. *See id.* § 18(f)(3), 88 Stat. at 2143 (repealed 1990). Shipowners were strictly liable for cleanup costs and damages up to a limit of $150 per gross rate ton or $20 million, whichever was less. *See id.* § 18(d), 88 Stat. at 2142 (repealed 1990). Moreover, gross negligence subjected the shipowner to unlimited liability. *See id.* The DPA permitted private individuals to maintain suit for damages, and also authorized the U.S. Attorney General to maintain a class action on behalf of property owners. *See id.* § 18(i)(1), 88 Stat. at 2144 (repealed 1990).

[14] OCSLAA, 92 Stat. 629 (1978) (codified as amended in scattered sections of 43 U.S.C., and repealed in part by Pub L. No. 101-380, tit. II § 2004, 104 Stat. 507 (1990)). The OCSLAA provided for strict liability for owners and operators of offshore drilling facilities and on vessels carrying oil from the Outer Continental Shelf. *See id.* § 304(a), 92 Stat. at 675. The liability of a vessel owner was limited to $250,000 or $300 per gross rate ton, whichever was greater, except when the owner failed to provide all reasonable assistance in cleaning up the oil, in which case, it was liable in full. *See id.* § 304(b)(1), 92 Stat. at 675. The operator of an offshore facility was liable in full for all cleanup costs and a maximum of $35 million for damages. *See id.* § 304(b)(2), 92 Stat.

impose greater liability and permit wider recovery than the statutes of general application, they are of limited value because they are applicable only to spills occurring in specific locations. Thus, while each of these three statutes improved the oil pollution regime as applied in limited circumstances, they are best regarded as merely supplemental legislation.

The inadequacies of the FWPCA were subject to a great deal of criticism.[15] Concern increased as the size of tankers and their cargoes increased: larger cargoes increased the potential size of disasters. Congress had long considered altering the federal oil pollution liability scheme, but legislation remedying the defects perceived in the earlier statutes lay dormant for several years.[16]

A series of catastrophic oil spills in 1989 galvanized congressional support for drastic change in the nation's environmental laws. The grounding of the *Exxon Valdez* focused public attention on the potentially catastrophic nature of oil spills. The *Exxon Valdez* spill was closely followed by a series of oil spills, three of which occurred in the same month. In June 1989, the *World Prodigy* spill into Narragansett Bay, the *Rachel-B* spill into the Houston Ship Channel, and the *President Rivera* spill into the Delaware

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at 676. The OCSLA permitted a wide range of public and private entities to make claims, including claims for economic loss. *See id.* § 303(a)(1), (a)(2)(A)-(E), 92 Stat. at 674. The OCSLA also established a fund of $200 million, financed by a three-cent-per-barrel tax on oil obtained from the Outer Continental Shelf. *See id.* § 302(a), (d)(1), 92 Stat. at 672-73. The fund was used to compensate a claimant when it appeared that the discharger was incapable of compensating the claimant or when the discharger had paid claims to the limits of its liability. *See id.* § 307(d), 92 Stat. at 697.

[15] For example, Gilmore and Black wrote:

> [T]he Act is as soft and spineless in its drafting as it is muddle-headed in its policy. If it is destined to remain on the books, the courts will have their work cut out for them in making some sort of sense out of its vague, ambiguous and contradictory provisions.

GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 827-28 (2d ed. 1975); Judith R. Eaton, Note, *Oil Spill Liability and Compensation: Time to Clean Up the Law*,19 GEO. WASH. J. INT'L. L. & ECON. 787 (1985) (arguing that the FWPCA should be supplanted by adoption of the International Convention on Civil Liability for Oil Pollution Damage); Note, *Oil Spills and Cleanup Bills: Federal Recovery of Oil Spill Cleanup Costs*, 93 HARV. L. REV. 1761 (1980) (arguing that the FWPCA has led to confusion and doubtful judicial interpretations).

[16] *See* Thomas J. Wagner, *Recoverable Damages Under the Oil Pollution Act of 1990*, 5 U.S.F. MAR. L.J. 283 (1993) (describing how the *Exxon Valdez* disaster pushed Congress to unanimously enact OPA); Walter B. Jones, *Oil Spill Compensation and Liability Legislation: When Good Things Don't Happen to Good Bills*, 19 ENVT'L L. REP. (Envt'l. L. Inst.) 10, 333 (1989) (providing a historical account of three decades of inadequate oil spill legislation).

River all occurred in a single twenty-four hour period. These helped convince Congress that oil pollution from accidental tanker spills is a continuing threat to the public health and welfare and the environment.[17] No environmentalist conspiracy could have been more effective in bringing about comprehensive oil spill reform.[18]

B. The Oil Pollution Act of 1990

In August, 1990, Congress enacted the Oil Pollution Act of 1990, (OPA),[19] which greatly altered the statutory regime governing oil pollution. OPA abrogated many traditional admiralty principles in order to increase the resources available to pay pollution claims. Congress attempted to address the problems of maritime transport it believed to have contributed to accidents like the *Exxon Valdez* spill.[20] Accidents have frequently influenced federal maritime policy,[21] but few have had as much effect as the *Exxon Valdez* spill: OPA, passed in its aftermath, drastically altered the oil pollution liability regime in ways that have yet to be fully understood.

OPA's primary aim is to make those engaged in the oil trades pay the costs of oil pollution incidents.[22] It uses at least four

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[17] SEN. REP. NO. 101-94, at 2 (1989), *reprinted in* 1990 U.S.C.C.A.N. 723.

[18] *See* Benjamin H. Grumbles & Joan M. Manley, Comment, *The Oil Pollution Act of 1990: Legislation in the Wake of a Crisis*, NAT. RESOURCES & ENV'T, Fall 1995, at 35 (1995). In truth, the events of 1989, were only the latest in a long series of dramatic oil pollution incidents. On March 18, 1967, the *Torrey Canyon* was stranded on rocks off the southwest coast of England, spilling over 60 thousand tons of crude oil into the English Channel. The break-up of the *Amoco Cadiz* off the coast of France in March 1978 involved the loss of her cargo of 230 thousand tons of oil. *See In re* Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978, 1984 A.M.C. 2123 (N.D. Ill. 1984). Both incidents served to heighten public awareness of the dangers inherent in the transport of large quantities of oil products by ship.

[19] Oil Pollution Act of 1990, 104 Stat. 484 (1990) (codified as amended at 33 U.S.C. §§ 2701-2761 (1994); 26 U.S.C. §§ 4611, 9509 (1994)).

[20] Richard D. Stewart, *Maritime Safety and Environmental Regulation, in* UNITED STATES SHIPPING POLICIES AND THE WORLD MARKET, at 171, 174 (William A. Lovett ed., 1996).

[21] The sinking of the Titanic in 1912 led to the implementation of the Safety of Life at Sea (SOLAS) regulations. *See id.* at 171-72. The *Morro Castle* disaster of 1934, in which 124 passengers and crew died in a fire, prompted increased attention to fire safety regulations as served as the impetus behind the founding of the U.S. Merchant Marine Academy. *See id.* at 172. The grounding of the *Argo Merchant*, along with the subsequent loss of her oil cargo, gave added urgency to the passage of the 1977 amendments to the FWPCA, as well as increased Coast Guard regulation and inspection of vessels in U.S. ports. *See id.* at 171-73.

[22] The Senate report accompanying the draft legislation contained the following

methods to do this. First, it implements a "polluter pays" policy by increasing limits of liability for cleanup costs and by expanding the types of damages recoverable by governments and private parties. Second, it increases the role of the federal government in pollution cleanup and compensation by federalizing oil spill cleanup operations and by increasing the importance of the federally-maintained Oil Spill Liability Trust Fund. Third, it places added emphasis on pollution prevention measures through the use of provisions requiring contingency planning, double hulls, and increased manning and training. Fourth, it permits states to supplement its provisions with their own liability and compensation schemes.

1. Making the Polluter Pay

OPA remedies many of the deficiencies of prior law, in that it (1) increases the limits on the liability to which polluters are subject, (2) expands the types of parties entitled to make claims, and (3) broadens the range of damages that may be recovered.

OPA provides that "each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages" incurred as a result of the spill.[23] This language has been taken to impose strict liability, making a vessel or facility liable in the first instance for all cleanup costs and damages associated with the spill. In the case of a vessel, "responsible party" means any person owning, operating, or demise chartering the vessel.[24]

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complaint:

> [F]our major oil spills within a three-month period suggest that spills are still too much of an accepted cost of doing business for the oil shipping industry. At the present time, the costs of spilling and paying for its clean-up and damage is [sic] not high enough to encourage greater industry efforts to prevent spills and develop effective techniques to contain them. Sound public policy requires reversal of these costs.

S. REP. NO. 101-94, at 3 (1989), *reprinted in* 1990 U.S.C.C.A.N. 723.

[23] 33 U.S.C. § 2702(a) (1996).

[24] 33 U.S.C. § 2701(32)(A) (1996). This phrase is taken directly from the FWPCA and was not thought to create a great deal of difficulty when used in connection with that act. The FWPCA in most cases only imposed liability for cleanup costs. Because there is a very real possibility of unlimited liability under OPA, however, it is expected that the question of "ownership" will be the subject of a great deal of litigation. In the shipping world, where a vessel may be owned, demised, chartered and sub-chartered, ownership can be a very tenuous thing. *See, e.g., id.* § 2701(26) (defining the term "owner-

OPA balances the cost to carriers of strict liability with a limit on damages. In most cases, OPA caps the liability for removal costs and damages of a vessel of over 3,000 gross registered tons (GRT), to the greater of $1,200 per GRT, or $10 million. Tank vessels of less than 3,000 GRT are capped at the greater of $1,200 per ton or $2 million. Other vessels' liability is capped at the greater of $600 per GRT, or $500,000.[25] The statute thus makes it clear that *strict* liability does not mean *unlimited* liability. Costs and damages in excess of the statutory limits must be recovered from other sources, such as the Oil Spill Liability Trust Fund or third parties whose negligence contributed to the spill.[26] This limit may be critical in the context of large spills: removal costs after the *Exxon Valdez* spill have exceeded $2.5 billion.[27]

OPA's liability limits may be avoided under certain circumstances. The most important of these arises when the spill is the result of "gross negligence or willful misconduct"[28] on the part of the responsible party or its employees, agents contractors or servants. This provision results in unlimited liability to vessel owners even when the acts causing the incident are the result of negligent conduct on the part of independent contractors.[29] Liability is also unlimited where the incident is proximately caused by a violation of a federal safety, construction, or operating regulation. This exception covers acts undertaken by the potentially responsible party, its agents, employees, and those carrying out contracts with the potentially responsible party.[30]

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ship"). However, Coast Guard regulations promulgated in the wake of the Act attempt to anticipate some of these debates. *See* 33 C.F.R. § 138.20(b) (1996).

[25] *See* 33 U.S.C. § 2704(a)(2) (1996). A "tank vessel" is a vessel that is "constructed or adapted to carry, or that carries, oil or liquid hazardous material in bulk as cargo or cargo residue. . . ." 33 C.F.R. § 138.20(b) (1996). Thus a 100,000 ton tanker would have a limit of liability of $120,000,000 ($1,200 x 100,000 GRT = $120 million). *See* 33 U.S.C. § 2704(a) (1996). A tank vessel of 2,000 tons would have a limit of $2,400,000 ($1,200 x 2,000 GRT = $2,400,000). *See id.* § 2704(a)(1)(b). A non-tank vessel of 10,000 tons, such as a dry cargo vessel or container ship, would have a limit of 6,000,000 ($600 x 10,000 GRT = $6,000,000). *See id.* § 2704(a)(2). Non-tank vessels have lower limits of liability because they pose less of a danger of a catastrophic spill.

[26] *See infra* text accompanying notes 41-43.

[27] *See* Helen R. MacLeod, *Exxon Case Goes to Jury*, J. OF COM., June 10, 1996, at 8A.

[28] 33 U.S.C. § 2704(c)(1)(A) (1996).

[29] This provision codifies the result in cases like *LeBeouf Bros. Towing v. United States*, 621 F.2d 787 (5th Cir. 1980), in which parties with whom the discharger was in a contractual relationship were not considered third parties for purposes of the FWPCA's "sole cause" exceptions to liability. 33 U.S.C. § 1321(g) (1994).

[30] *See* 33 U.S.C. § 2704(c)(1)(B) (1996). This exception to the cap appears overly

There are few defenses available to responsible parties under OPA. It is a defense that the spill was caused by (1) an act of God, (2) an act of war; or (3) an act or omission of a third party, not including an agent, servant, employee, or contractor.[31] The third party defense is not as broad as it appears, however as, it excludes from the definition of "third party" those with whom the potentially responsible party is in privity,[32] and it requires the potentially responsible party prove it took all reasonable steps to protect against foreseeable acts or omissions of the third party.[33]

OPA not only increases the possibility a polluter will be held a responsible party, it also expands the range of recoverable damages. It seeks to enforce the "polluter pays" policy in two ways. First, OPA provides remedies both to government and to private parties, thus correcting a major failing of the FWPCA.[34] Second, OPA permits recovery for a broader variety of injuries, including both removal costs and damages to various governmental and private interests. Under OPA both private parties and governments are entitled to compensation for damage to a wide range of interests.[35]

The expanded range of recoverable damages, along with the expansion in the types of parties entitled to make claims furthers Congress's intent that responsible parties be accountable for all the consequences of an oil spill.[36] This accountability is limited by

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broad, but it will be left to the courts to determine exactly how close the nexus must be between the regulatory violation and the incident. A broad view of the concept of proximate cause might make limitation under OPA a forlorn hope. Finally, OPA's liability limits will not apply where the responsible party either fails to report the spill or refuses to cooperate in its removal. *See id.* § 2704(c)(2).

[31] *See id.* § 2703(a)(1)-(3).

[32] *See id.* § 2703(a)(3).

[33] *See id.* § 2703(c)(1)(B) (1996). Moreover, even if the potentially responsible party can show that it is not at fault, it must still pay removal costs and damages to claimants if the third party refuses to do so. The responsible party is then left to seek indemnity from the party whose acts caused the spill. *See id.* § 2702(d)(1)(B). OPA's more limited defenses are designed to eliminate the ambiguities in the FWPCA.

[34] *See supra* text accompanying note 9.

[35] OPA lists six categories of damages: (1) injury or destruction of natural resources; (2) loss or injury to real or personal property; (3) loss of subsistence use of natural resources; (4) the net loss of taxes, royalties, rents, or fees due to a governmental entity arising from the destruction or loss of natural resources; (5) lost profits or "impairment of earning capacity" due to the loss or destruction of real or personal property or natural resources, and (6) the net cost of providing increased or additional public services during or after removal activities. 33 U.S.C. §§ 2702(b)(2)(A)-(F) (1996).

[36] OPA's liability provisions are strengthened by a requirement that shipowners are required to obtain a "Certificate of Financial Responsibility" from an insurer or other guarantor. *See* 33 U.S.C. § 2716(a) (1996). This Certificate permits direct actions against

the statutory limits on what a responsible party typically can be required to pay.[37] Moreover, payments made by the responsible party itself for cleanup count against the statutory limit.[38] Thus, the owners of a 2,500 ton vessel who spend $8 million cleaning up a spill can only be required to pay $2 million in removal costs and damages to government and third parties, regardless of the extent of such costs outstanding. While a larger vessel may have a higher liability limit, the total recoverable still may not be adequate to compensate all claimants.[39]

OPA balances expanded rights of recovery against limitation of liability of the responsible party. Congress was concerned that vessel owners and others engaged in the oil trades should not be subjected to "potentially crushing liability."[40] Unlimited liability exists only where some fault or negligence can be proved. Congress, thus, attempted to make responsible parties assume as much of the burden for prevention and cleanup as possible without subjecting them to financial ruin. In so doing, it hoped to spare the federal government an ever-increasing burden of uncompensated cleanup costs.

2. "Federalizing" Oil Spills

a. The Oil Spill Liability Trust Fund

OPA contains conforming amendments which establish a single fund to compensate public and private claimants for cleanup costs and damages incurred as a result of oil pollution. While earlier legislation made provision for similar funds, they were rarely adequate to cover the actual costs resulting from a spill.[41]

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the issuer or guarantor. *See id.* § 2716(f). However, the guarantor is not liable for any amounts in excess of that required under the Act. *See id.* § 2716(g). If an owner has more than one vessel, the certificate may cover a fleet as long as it is in an amount large enough to cover the largest vessel. *See id.* § 2716(a).

37. *See supra* text accompanying notes 25-27.

38. *See* 33 U.S.C. § 2704(a) (1996).

39. A 2,500 ton barge would have a $10 million cap under OPA. *See id.* § 2704. A 100,000 ton vessel might have a liability cap of $120 million. *See id.* Yet even this fund may be inadequate where natural resource damages are involved. *See supra* text accompanying note 24.

40. United States v. Dixie Carriers, Inc., 627 F.2d 736, 739 (5th Cir. 1980) (interpreting the congressional intent in the enacting of the FWPCA).

41. The TAPAA fund had a maximum level of $100 million. *See* TAPAA § 204(c)(5), 87 Stat. 576, 586-87 (repealed 1990). The OCSLA fund had a limit of $200 million. *See* OCSLAA § 302, 92 Stat 629, 629 (repealed 1990). Yet the FWPCA fund is set at a

OPA consolidated all preexisting oil spill funds into the Oil Spill Liability Trust Fund (OSLTF).[42] The purpose of the OSLTF is to ensure prompt and efficient cleanup of spills by making funds immediately available for removal costs. Because it is funded by a tax on all imported and domestic oil, the OSLTF helps to ensure that the costs of oil spills are borne by "all users of oil."[43]

b. Federal Supervision of Cleanup

OPA represents a departure from earlier statutes in that it requires the federal government to take primary responsibility for cleanup. Prior to OPA, the EPA and Coast Guard were authorized to undertake the cleanup only when the discharger refused to take action.[44] OPA, however, requires that the federal government "coordinate and direct all public and private cleanup efforts whenever there is a substantial threat of a pollution hazard to the public

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maximum of only $35 million. FWPCA § 311(k), 86 Stat 816, 864 (1972) (repealed 1990). More importantly, the FWPCA fund was never funded at the $35 million level. *See* S. REP. NO. 99-479, at 3 (1986). The DPA fund was originally set at $100 million, and then decreased to a total of only $4 million. *See* The Deepwater Port Act Amendments of 1984 § 4(a)(2), 98 Stat. 1607, 1608-09 (1984) (repealed 1990); *see also* Glenn Fjermedal, Comment, *Federal Oil Spill Legislation: A Future Standard*, 53 ALB. L. REV. 161, 182-86 (1988) (arguing that then-current oil spill funds were inadequate and should have been consolidated and increased).

[42] *See* Oil Pollution Act of 1990 § 2002(b), 104 Stat. 484, 507 (1990) (repealing 33 U.S.C. § 1321(k) (1994)); *see also id.* § 2003(b), 104 Stat. at 507 (repealing 33 U.S.C. § 1517 (1994)); § 2004, 104 Stat. at 507; § 8102, 104 Stat. at 565.

[43] S. REP. NO. 101-94, at 6 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 727. The OSLTF was actually created in 1986 to pay removal costs arising from oil pollution incidents. *See id.* The OSLTF was created by the Omnibus Budget Reconciliation Act of 1986 § 8033, 100 Stat. 1874, 1959-62 (1986) (codified as amended at 26 U.S.C. § 9509 (1994)). Congress enacted the Superfund Amendments and Reauthorization Act of 1986 (SARA), 100 Stat. 1613 (1986), which included provisions authorizing a tax to be used for maintaining the OSLTF. The OLSTF is financed by a five cent per barrel tax on all imported and domestic oil. *See* 26 U.S.C. § 4611(c)(2)(B) (1994). The OLSTF provides payment of (1) removal costs incurred by states or the federal government, (2) costs of assessing natural resources damages and making repairs to damaged areas, (3) claims for uncompensated removal costs, and (4) costs of implementing and enforcing OPA. *See* 33 U.S.C. § 2712 (1994). The Coast Guard administers the OSLTF through the National Pollution Funds Center (NPFC) in Virginia. *See* Lawrence I. Kiern, *The Oil Pollution Act of 1990 and the National Pollution Funds Center*, 25 J. MAR. L. & COM. 487 (1994) (describing the operation of the OSLTF and the administration of the fund by the Coast Guard). Regulations concerning claims on the Fund are promulgated at 33 C.F.R. § 136 (1996).

[44] The President is "authorized to remove or arrange for the removal of . . . [oil] at any time, unless he determines that such removal will be done properly by the owner or operator of the vessel, onshore facility, or offshore facility from which the discharge occurs." 33 U.S.C. § 1321(c)(1) (1994).

health or welfare."[45] OPA also establishes contingency planning requirements for ports and vessels and creates several new offices and agencies to consult with the Coast Guard on oil spill recovery technology and operations.[46]

3. Pollution Prevention

OPA not only seeks to ensure that oil spills are cleaned up promptly, it also endeavors to prevent such spills from occurring if they are at all avoidable. The Act includes provisions intended to minimize the frequency of spills and to limit their potential to do damage. These include rules requiring the use of double hulls,[47] the suspension of crew members' licenses for alcohol or drug abuse,[48] improvements in the Vessel Traffic Service System,[49] and modifications to pilotage laws.[50]

4. Preemption

In drafting OPA, Congress deliberately chose not to preempt state laws governing oil pollution liability and compensation. OPA contains a "non-preemption" clause designed to give states the right to impose greater liability requirements than those in the federal scheme:

> The theory . . . is that the Federal statute is designed to provide basic protection for the environment and victims damaged by spills of oil. Any state wishing to impose a greater degree of protection for its own resources and citizens is entitled to do so. On the other hand, a state may feel adequately protected by the Federal statute and therefore choose not to enact additional state law. In any event, the Committee chose not to impose, arbitrarily, the constraints of the Federal regime on the states while at the same time preempting their rights to their own laws.[51]

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[45] S. REP. NO. 101-94, at 8 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 729. This change is accomplished through conforming amendments to section 311(c) of the Clean Water Act. *See* 33 U.S.C. § 1321(c) (1994).

[46] *See, e.g.*, 33 U.S.C. § 2731 (1994) (creating the Oil Spill Recovery Institute); *id.* § 2732 (establishing the Oil Terminal Facilities and Oil Tanker Operations Association).

[47] *See* 46 U.S.C. § 3708 (1994).

[48] *See id.* § 4103 (codified at 46 U.S.C. § 7703(2)-(3) (1994)).

[49] *See* 33 U.S.C. § 2734 (1994).

[50] *See* Oil Pollution Act of 1990 § 4108 (codified at 46 U.S.C. § 9302(b) (1994)).

[51] S. REP. NO. 101-94, at 6 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 728.

Congress included a provision stating that nothing in OPA should be considered to affect the right of any state to impose greater liability on a responsible party for oil spill incidents occurring within a state.[52] OPA thus explicitly preserves the right of the states to enact more stringent liability regimes. Permitting states to legislate in this area was a source of great concern, and OPA was roundly criticized by many both within and outside the shipping industry because of this decision.[53] Most coastal and Great Lakes states have since passed some form of comprehensive oil spill liability and compensation legislation. Many of these provide for unlimited liability for discharges in state waters.[54]

Congress further provided that states might create their own compensation funds—similar to the Federal OSLTF—to be funded and maintained with state taxes on the oil or shipping industry.[55] This provision goes beyond merely "grandfathering" already-existing state funds. Rather, it is clear that Congress envisioned that states would establish new oil spill compensation funds and that

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[52] *See* 33 U.S.C. § 2718(a) (1994).

[53] *See* Daniel Kopec & H. Philip Peterson, *Crude Legislation: Liability and Compensation under the Oil Pollution Act of 1990*, 23 RUTGERS L.J. 597, 624-25 (1992) (criticizing the preservation of state authority); *see also* Robin Buckner Price, *U.S. Oil Spill Law to Cause Growing Tanker Problem*, OIL & GAS J., Sept. 30, 1991, at 21 (detailing criticisms of industry of OPA and predicting that responsible oil carriers would leave the U.S. trade rather than submit to new regime). *But see* Janet Porter, *Spill Plan Worries Small Tanker Owners*, J. COM., Feb. 14, 1992, at 5B (noting that few oil carriers left the U.S. market); *Oil Industry Announces Formation of Spill Cleanup Response Organization*, 21 INT'L ENV'T REP. (B.N.A.) 901 (Sept. 14, 1990) (discussing industry plans to create Marine Spill Response Corporation, a not-for-profit company formed to provide immediate spill response capability).

[54] The vast majority of coastal states have enacted unlimited liability statutes. *See* ALA. CODE §§ 22-22-1 to -14 (1990); ALASKA STAT. §§ 46.03.758 to .759 (Michie 1996); CAL. GOV'T CODE § 8670.25 (West 1992); CONN. GEN. STAT. ANN. § 22a-451 (West 1995); DEL. CODE ANN. tit. 7, § 6208 (1991); FLA. STAT. ANN. § 367.12 (West 1997); GA. CODE ANN. § 12-5-51 (1996); HAW. REV. STAT. § 128D-6 (1993); LA. REV. STAT. ANN. §§ 2004, 2025, (West 1989); ME. REV. STAT. ANN. tit. §§ 551, 552 (West 1989); MD. CODE ANN., ENVIR. §§ 4-401, -410 (1996); MASS. GEN. LAWS ANN. ch. 21E, § 5 (West 1994); N.H. REV. STAT. ANN. § 146A:3-a (1996); N.J. STAT. ANN. § 5858:10-23.11g (West 1992); N.Y. NAV. LAW § 181 (McKinney 1989); N.C. GEN. STAT. 143 § 143-215.83 (1996); OR. REV. STAT. § 468B.90 (1995); R.I. GEN. LAWS. § 46-12.5-6 (1996); S.C. CODE ANN. § 48-43-580 (Law Co-op. 1987); VA. CODE ANN. § 62.1-44.34:18 (Michie 1992); WASH. REV. CODE ANN. § 90-48.336 (West 1992). Texas has a statute containing liability limits similar in structure to OPA. *See* TEX. NAT. RES. CODE ANN. § 40.202 (West 1997). Pennsylvania law gives the commonwealth a cause of action in nuisance. *See* 35 PA. CONS. STAT. ANN. § 691-401 (West 1993). Puerto Rico law gives the commonwealth a chose in action. *See* P.R. LAWS ANN. tit. 24 § 600 (1980).

[55] *See* 33 U.S.C. § 2718(b) (1994).

these funds would be supported by taxing "oil landings."[56] States would be free to set their own rates, and the federal tax rate would neither be a ceiling nor a floor for state rates.[57] The intent behind this provision is to leave the states flexibility in funding their responses to oil pollution incidents:

> Preemption of the States' funds would compromise a state's ability to prevent or limit oil spill damage to the natural resources and property of its citizens. Unfortunately, situations have arisen in the past where Federal cleanup efforts have been inadequate. Preemption of State funds would make the States wholly dependent on the Federal funds and response system. The result might be a decrease in the degree of protection from oil spill damage, rather than an increase.[58]

Under OPA, then, not only may states create their own liability regimes, possibly providing for unlimited liability for oil spill costs and damages, they may also establish independent oil pollution compensation funds.[59] Hence the liabilities to which a responsible

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[56] *See* S. REP. NO. 101-94, at 6 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 728.

[57] *See id.*

[58] *See id.* at 7, 1990 U.S.C.C.A.N. at 728.

[59] Congress's decision not to preempt state action has had some unintended effects. Following passage of OPA, a number of states have sought to impose added design and safety requirements on vessel operating in state waters. This is in spite of the fact that in crafting OPA's preemption clause, Congress appears to have intended that states be permitted to supplement the liability provisions of federal law. The clause does not seem to address the question of whether states may supplement federal vessel *safety and construction standards* with legislation imposing greater requirements or restrictions on vessel operation and manning. *See* H.R. CONF. REP. NO. 101-653, at 122 (1990), *reprinted in* 1990 U.S.C.C.A.N. 722, 800-01.

Yet at least one court has recently held that OPA does not prevent a state from imposing greater construction and safety standards on tankers than are provided in the federal regulatory scheme. In *International Association of Independent Tanker Owners ("Intertanko") v. Lowry*, 947 F. Supp. 1484 (W.D. Wash. 1996), a federal district court in Washington State upheld Washington's "Best Achievable Protection Standards for Tankers" (BAPS). *See* WASH. ADMIN. CODE § 317-21-020 (1995). The BAP standards were promulgated by Washington's Office of Marine Safety in an effort to implement the State's tank vessel pollution prevention plan requirement. *See* WASH. REV. CODE ANN. § 88.46.040 (West 1992). The statute requires that all vessels operating in state waters have approved pollution prevention plans, designed to provide "the best achievable protection" from oil spills. *See id.* § 88.46.040(3). "Best achievable protection" is defined as "the highest level of protection that can be achieved through the use of the best achievable technology and those staffing levels, training procedures, and operational methods that provide the greatest degree of protection available." *Id.* § 88.46.010(2).

The BAP standards impose a variety of other regulations on tanker operators as well.

party is subject under OPA's federal liability rules may be supplemented by state legislation.

5. OPA as Compromise

The concessions made to pass OPA are evident in the tradeoffs made between strict and unlimited liability and in the types of defenses that can be asserted. Although a responsible party is strictly liable, that liability is limited to a statutory amount. This statutory limit was the result of an attempt to find the middle ground between unlimited liability and the inadequate liability limits of the FWPCA. Whether a vessel owner ought to be able to limit liability at all is a question that animated much of the congressional debates. Many in Congress and the environmental movement sought to make vessel owners liable for *all* damages resulting from oil spill incidents. OPA is designed to strike a balance between the need to obtain accountability from the industry and the need to prevent a draconian liability regime from driving out responsible owners and operators.

The statute requires that certain equipment, such as a global positioning system and two separate radar systems, be carried on board vessels. *See* WASH. ADMIN. CODE § 317-21-265(1) (1995). It also requires that vessels be modified to permit towing from the bow and stern. *See id.* § 317-21-256(2). The standards also require random, pre-employment and post-incident drug testing. *See id.* § 317-21-235(2). Finally, it imposes Washington's work hours and language requirements on all vessels. *See id.* §§ 317-21-245, 317-21-250.

Intertanko had argued that such regulations were invalid to the extent they exceeded the requirements of federal statutes or international treaties to which the United States was a signatory. *See* 947 F. Supp. at 1489-90. In upholding the standards, the district court undertook a preemption analysis and determined that OPA evidenced an intent on the part of Congress to permit states to supplement federal legislation designed to prevent oil pollution. *See id.* at 1491. In so doing, however, the court seems to have overlooked the very real difference between regulations governing liability and removal and those affecting design, construction, and manning. The former, quite obviously, "are concerned with all events which follow the unlawful discharge of oil," while the latter are intended to prevent a casualty. Robert E. Falvey, *A Shot Across the Bow: Rhode Island's Oil Pollution Prevention and Control Act*, 2 ROGER WMS. U. L. REV. 363, 384 (1997). The court thus read OPA's preemption clause as permitting almost any type of state action so long as it does not directly conflict with a federal statute or regulation. *See Intertanko*, 947 F. Supp. at 1491. This seems clearly contrary to the language of the clause which permits state regulation imposing additional "*liability or requirement with respect to the discharge of oil . . . or any removal activities in connection with such a discharge.*" 33 U.S.C. § 2718(a) (1994) (emphasis added). Congress seems to have had a somewhat more restrictive view of what was being preempted than did the district court in *Intertanko*. Nonetheless, there are other commentators who tend to support the court's view. *See, e.g.*, Laurie L. Crick, *The Washington State BAP Standards: A Case Study in Aggressive Tanker Regulation*, 27 J. MAR. L. & COM. 641, 646 (1996) (arguing that the BAP standards are constitutional).

By strictly limiting the scope of defenses to liability, OPA avoids many of the ambiguities that reduced the accountability of polluters under the FWPCA. This is particularly so in its treatment of third parties: OPA makes owners and operators pay the costs resulting from the acts of irresponsible parties with whom they are in privity. The statute thus creates incentives for vessel owners to ensure that contractors and subcontractors are competent and reliable. OPA permits a third party defense only when a potentially responsible party has taken precautions against foreseeable acts of third parties, even when they are truly "strangers,"[60] thus offering an incentive to operate with a high degree of vigilance and care.

The decision to leave states free to increase a discharger's liability and require that the industry contribute to state funds has been one of the most controversial aspects of OPA. By so doing, Congress was seeking to maximize the state and federal resources available for oil spill prevention and cleanup, but it is this choice that poses the most serious constitutional difficulties for OPA.

II. THE CONSTITUTIONALITY OF OPA'S GRANT OF POWER TO THE STATES

OPA's non-preemption clause appears straightforward:

> Section 2818. Relationship to Other Law
>
> (a) Preservation of State Authorities . . .
>
> Nothing in this Act or the Act of March 3, 1851 [The Shipowner's Limitation of Liability Act] shall—
>
> (1) affect, or be construed or interpreted as preempting, the authority of any state or political subdivision thereof from imposing any additional liability or requirement with respect to—
>
> (A) the discharge of oil or other pollution by oil within such State; or
>
> (B) any removal activities in connection with such a discharge. . . .[61]

It is clear that Congress intended by this provision to grant the states authority over marine oil pollution at least equal to the authority given to the federal government in the other provisions of OPA.[62] The result has been to make those who discharge oil into

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[60] *See* 33 U.S.C. § 2703(a)(3)(B) (1994).

[61] 33 U.S.C. § 2718(a) (1994).

[62] *See* Gregg L. McCurdy, *An Overview of OPA 1990 and its Relationship to Other*

waters of most states subject to more than one set of liability laws. Where state legislation provides for strict and unlimited liability, the limit on damages provided in OPA may be meaningless.[63] For instance, a 2,000 ton barge which discharges oil into state waters would have its damages capped by OPA at $2.4 million,[64] but in a state with an unlimited liability statute its owners or operators would nevertheless be responsible for *all* removal costs and damages arising from an incident.[65]

Congress recognized that a number of local statutory regimes might apply to spills, but it allowed this result, and even permitted states to impose unlimited liability because of its concern that "a polluter should pay in full for the costs of oil pollution caused by that polluter; and, a victim should be fully compensated."[66] Yet, in creating this situation, Congress undercut the value of the compromises it made in crafting the liability and limitation provisions in OPA. Allowing states to impose additional liabilities on polluters, arguably on the grounds that such a regime would be beneficial in making polluters fully accountable, seems inconsistent with a federal regime that purportedly attempts to strike a balance between unlimited liability and liability without fault. This balance was to be achieved by permitting shipowners to limit their liability where there was no evidence of recklessness or gross negligence.[67] Amounts above these limits were to be recovered from the OSLTF. In this way, OPA was to spread the cost of most oil pollution incidents among all potential users of oil. Unlimited liability was to be reserved only for those whose conduct was grossly negligent or reckless.

This finely crafted balance was disrupted by the inclusion of the non-preemption clause, which permits states to ignore the limitations granted shipowners by the other provisions of OPA. In yielding to the states' demands[68] that OPA not preempt that which

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Laws, 5 U.S.F. MAR. L.J. 423, 440 (1993).

63. *See* 33 U.S.C. § 2704; *see also supra* text accompanying notes 59-60.

64. *See* 33 U.S.C. §§ 2704(a)(1)(B)(ii) (1994) (2000 GRT x $1,200 = $2.4 million).

65. *See, e.g.*, Rhode Island Environmental Injury Compensation Act, R.I. GEN. LAWS § 46-12.3-1 to 46-12.3-8 (1996) (providing for strict, unlimited liability for all costs and damages arising from an oil pollution incident, including natural resources damages, economic damages, damage to real and personal property, and attorneys' fees).

66. S. REP. NO. 101-94, at 7 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 728.

67. *See* 33 U.S.C. § 2704 (1994).

68. *See* Richard L. Jarashow, *Survey of State Legislation*, 5 U.S.F. MAR. L.J. 447, 448 (1993) ("The lawmaking process in the United States has been weaned on the concept of taking the path of least resistance. . . .").

is arguably within the states' police power,[69] Congress negated one of the purposes for which OPA had been proposed: replacing the "fragmented collection of Federal and state laws providing inadequate cleanup and damage remedies"[70] with a unified statutory regime.

OPA's non-preemption clause does not satisfy the constitutional requirement of uniformity in the maritime law. That Congress has the power to regulate maritime affairs is not in doubt: At least two different constitutional provisions grant it this power. The Commerce Clause gives Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[71] The Article III grant of admiralty jurisdiction to the federal courts is held to give the federal government "the paramount power to fix and determine the maritime law."[72] Because the commerce and admiralty powers are of different textual origin, determining the constitutionality of a statute affecting maritime commerce requires a consideration of the purposes and applicability of the statute in light of these two constitutional provisions. The problem, of course, is that it is often difficult to determine which powers are implicated by a particular enactment. Where statutes affecting admiralty matters are concerned, it is not often clear whether Congress is acting pursuant to the Commerce Clause power alone or under the Admiralty Clause. Yet, such an analysis is necessary because of the special place which admiralty occupies in the constitutional scheme.

While the admiralty power might reasonably be considered a subset of the power to regulate interstate commerce, the Framers intended to treat admiralty differently from other commercial matters. The difficulties posed for interstate commerce by the lack of central government control under the Articles of Confederation was the primary motivation for the inclusion of the Commerce Clause in the earliest drafts of the Constitution. The Framers felt the need to prevent states from erecting barriers to commerce or from interfering in the smooth conduct of foreign relations by adopting dif-

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[69] *See* Grumbles & Manley, *supra* note 18, at 38 ("The 'preemption approach' seems to have given way to the 'pile it on' approach. This approach is likely to continue even with the recent trend to restrict environmental liabilities and 'downsize' the federal government. Why? The states' rights argument has become too strong to challenge.").

[70] S. REP. NO. 101-94, at 2 (1989), *reprinted in* 1990 U.S.C.C.A.N. 723.

[71] U.S. CONST. art. I, § 8, cl. 3.

[72] *See* Southern Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917); *see also* U.S. CONST. art. III, § 2.

ferential tariffs for foreign goods. The reason for the incorporation of the Commerce Clause into the Constitution was to ensure the uniform treatment of commerce throughout the *states*.[73] Although it, too, was designed to ensure uniformity of law among the states, the admiralty power was also designed to ensure uniformity on an *international* scale. The special grant of admiralty power was intended to allow Congress to make the maritime law of the United States conform to other maritime powers. Uniformity in maritime law was seen as an aid not only to commercial development but to international relations.[74] Although the Commerce Clause was intended to ensure undisrupted trade among the states, and between the United States and the world, it has never been thought to require America's commercial laws be in harmony with those of other countries. The Admiralty Clause, on the other hand, was intended to accomplish just such a purpose.

Federal statutes affecting maritime affairs must be consistent with the purposes of the Admiralty Clause, and not just those of the Commerce Clause. Although Congress may permit states to enact non-uniform legislation pursuant to the Commerce Clause, the Admiralty Clause prohibits Congress from allowing states to enact non-uniform rules applying to maritime commerce. This section will show that OPA's non-preemption clause does not offend the Commerce Clause because states have been traditionally thought to have a residual power under the Commerce Clause to regulate commerce within their borders. Such powers exist to allow states to provide for the health and safety of the population.[75] Local statutes imposing liability for discharges of oil in state waters may be permissible under a Commerce Clause analysis simply because Congress has chosen not to preempt them. This section will also show that these same statutes may nevertheless be unconstitutional when viewed in the light of the Admiralty Clause. Specifically, this section will demonstrate that the uniformity envisioned by the Framers in vesting Congress with admiralty power is inconsistent with the delegation of that power to the states. Thus, an act such as OPA which permits states to impose such non-uniform burdens on maritime commerce will be seen to be constitutionally defective.

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[73] *See infra* notes 76-80.

[74] *See infra* text accompanying note 129.

[75] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824).

A. OPA and the Commerce Clause

Commerce between the American colonies encountered few legal barriers because the Crown provided a strong legal and administrative framework for the management of trade. The navigation acts passed during the 17th and 18th centuries not only ensured that England remained the center of imperial trade, but also provided uniform laws to govern the export and import of goods between the colonies and the mother country.[76] This system inevitably broke down with the outbreak of revolution. Under the Articles of Confederation, "the conflicting economic interests of the new states led to what may best be described as economic chaos."[77] In fact, the Articles specifically prohibited Congress from limiting state power over commerce or the taxation of imports or exports.[78] As a result, individual states erected trade barriers against competing products from other states.[79] The fractured legal regime affecting interstate commerce convinced many that the powers of the national government needed to be enhanced.[80]

Surprisingly little debate attended the inclusion of the Commerce Clause in the Constitution. While there was some concern that Congress might use the commerce power to favor the interests of one region over another in international trade,[81] there was gen-

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[76] *See* Matthew P. Harrington, *The Legacy of the Colonial Vice-Admiralty Courts (Part I)*, 26 J. MAR. L. & COMM. 581, 591-595 (1995) (describing the English navigation acts and the creation of the admiralty courts); *see also* LAWRENCE HARPER, THE ENGLISH NAVIGATION LAWS, 375-378 (1939) (assessing the effect of the early English navigation laws).

[77] JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW, 144 (2d ed. 1983) (tracing the course of events leading to the adoption of the Commerce Clause).

[78] *See* UNITED STATES ARTICLES OF CONFEDERATION, art. IX, § 1 (1777). ("[N]o treaty of commerce shall be restrained from imposing such imposts and duties on foreigners as their own people are subject to, or from Prohibiting the exportation or importation of any species of goods or commodities. . . .").

[79] *See* RICHARD B. MORRIS, THE FORGING OF THE UNION 1781-1789 149-52 (1987) (discussing the impact of state-imposed tariffs).

[80] *Id.* at 151 ("It is hard to uncover any other issue in American history upon which there was so much general agreement as there was on conferring upon Congress the supreme power over commerce.").

[81] The South in particular was concerned that Congress would ban the importation of slaves. *See* NOWAK, *supra* note 77, at 145. These fears were allayed by the inclusion of a provision preventing Congress from enacting such a ban until 1808. *See* U.S. CONST. art. I, § 9, cl. 1. Southern fears that a Congress dominated by Northern interests would favor Northern trade at the expense of Southern agriculture were dispelled by the inclusion of a provision stating that no preference would be given to the ports of any state and that no export duties could be imposed. *See* U.S. CONST. art I, § 9, cl. 5, 6.

eral agreement that the central government should have the paramount power to legislate in the area of interstate commerce.[82] Concerns that the commerce power was broad enough to swallow up the states' police powers were answered by the assertion that the commerce power was necessary to prevent trade barriers and restrictions from hindering intercourse among the states and between them and other nations.[83]

1. The Interstate Commerce Clause

The Supreme Court has always given great deference to Congress's right to legislate pursuant to the Commerce Clause. In *Gibbons v. Ogden*,[84] the Court upheld the broadest possible scope for the exercise of the interstate commerce power. Writing for the majority, Chief Justice Marshall asserted that the Commerce Clause power is "the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in the Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."[85] Congressional power thus extends to "that commerce which concerns more states than one."[86] Nonetheless, while Congress may not regulate the internal commerce of a state, the commerce power "cannot stop at the external boundary-line of each State, but may be introduced into the interior."[87]

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[82] *See generally* Morris, *supra* note 79.

[83] *See* The Minnesota Rate Cases, 230 U.S. 352, 398 (1913):

> The conviction of [the Commerce Clause's] necessity sprang from the disastrous experience under the Confederation when the States vied in discriminatory measures against each other. In order to end these evils, the grant in the Constitution conferred upon Congress an authority at all times adequate to secure the freedom of interstate commercial intercourse from state control.

For more arguments of the necessity of the Commerce Clause, see THE FEDERALIST No. 11 (Alexander Hamilton) (arguing that a federal commerce power was necessary to allow the United States to compete with the colonial powers) and THE FEDERALIST No. 45 (James Madison) (arguing that a federal commerce power was needed to counteract the parochial tendencies of the states).

[84] 22 U.S. (9 Wheat.) 1 (1824). In this case, New York had granted a steamboat monopoly to Livingston and Fulton, who in turn, assigned it to Ogden. Gibbons began operating a steamboat in New York waters on the basis of a federal license. Ogden sued to enjoin the continued operation of Gibbons' boat. Gibbons argued that the state monopoly was a violation of the federal commerce power.

[85] *Id.* at 196.

[86] *Id.* at 194.

[87] *Id.*

That the states retain some power to regulate commercial activity, even when such regulation affects interstate commerce, is not in doubt. Although the Commerce Clause vests supreme authority over interstate commerce in Congress, the Supreme Court has long recognized the legitimacy of state action under their inherent police powers. In a series of cases decided in the early part of the nineteenth century, the Supreme Court struggled to define exactly how far the states might go. In *Willson v. Black-Bird Creek Marsh Co.*,[88] the Court upheld a state law authorizing a private company to erect a dam across an interstate waterway, even though the dam obstructed interstate commerce. Writing again for the majority, Chief Justice Marshall noted that the restriction on commerce posed by the dam was non-discriminatory, affecting intrastate and interstate commercial traffic equally. The Court also recognized the right of the states to regulate commerce in the interest of local heath and safety. In *New York v. Miln*,[89] the Supreme Court upheld a New York statute requiring the master of every vessel discharging passengers embarking from a port outside of New York to file a report identifying the passengers. The statute was alleged to protect the local populace against the arrival of undesirables. In *The Passenger Cases*,[90] however, the Court struck down state legislation imposing an arrival tax on passengers arriving from a foreign port.

The right of the states to regulate navigation was upheld in *Cooley v. Board of Wardens*.[91] This case involved a Pennsylvania statute requiring vessels transiting the Delaware River to engage a local pilot. The Supreme Court declared that "the power to regulate commerce includes the regulation of navigation"[92] and that "[t]he power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used."[93]

That *Congress* possessed the power to control local pilotage was never in doubt.[94] The critical question was whether the

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88. 27 U.S. (2 Pet.) 245 (1829).
89. 36 U.S. (11 Pet.) 102 (1837).
90. 48 U.S. (7 How.) 28 (1849).
91. 53 U.S. (12 How.) 299 (1851).
92. *Id.*
93. *Id.* at 316.
94. *Id.* ("If Congress has power to regulate the seamen who assist the pilot in the management of the vessel, a power never denied, we can perceive no valid reason why the pilot should be beyond the reach of the same power.").

Constitution's grant of the commerce power to Congress deprived the *states* of concurrent power over the same subject.[95] The Court answered in the negative and acknowledged a residual power in the states to regulate interstate commerce, including the right to impose regulations on navigation in state waters. Nonetheless, the Court recognized that Congress possessed the paramount power to regulate navigation and commerce. The states, however, may exercise power over commerce in the absence of preemptive federal regulation:

> The grant of commercial power to Congress does not contain any terms which expressly exclude the States from exercising an authority over its subject-matter. . . . [T]he mere grant of such a power in Congress, did not imply a prohibition on the States to exercise the same power; . . . it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and . . . the States may legislate in the absence of congressional regulations.[96]

The essence of *Cooley* is the recognition of a residual commerce power in the states and of the constitutionality of concurrent state regulation of navigation in the absence of congressional action. The Court affirmed Congress's prerogative to establish a uniform, national rule where necessary, but it deferred to Congress's determination that such a rule was not required where local regulation of the subject matter would be more desirable.[97]

Having established the primacy of Congress in the regulation of interstate commerce in *Cooley*, the Court still had to determine the limits of the acceptable use of concurrent state power. *Cooley* ended any possible doubt that states have the power to enact legislation that affects interstate commerce,[98] but the precise limits of their power depends on whether Congress has passed laws in the area in which the states wish to regulate. Where Congress has acted, the Supremacy Clause[99] will operate to make federal law

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95. *See* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 318 (1851).
96. *See id.* at 318-19.
97. *See id.* at 320-21.
98. *See id.* at 299.
99. U.S. CONST. art VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in

override state law.[100] Where no federal statute is in effect, the "dormant" aspect of the Commerce Clause will determine the analysis.

Congress preempts any state regulation of interstate commerce when in a statute it clearly manifests its intent to do so:[101] "It is well-established that within Constitutional limits Congress may preempt state authority by so stating in express terms."[102] Absent express preemption, Congress's intent to preempt state legislation may also be found in "a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it."[103] Even where Congress seems to have left room for state action, local legislation is preempted to the extent it actually conflicts with a federal statute. This occurs when "compliance with both federal and state regulation is a physical impossibility"[104] or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[105]

Because the Commerce Clause has been held to contain an "implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce,"[106] state regula-

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Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

100. *See* Pennsylvania v. Nelson, 350 U.S. 497 (1956) (holding that the federal Smith Act preempts the Pennsylvania Sedition Act); Rice v. Santa Fe Elev. Corp., 331 U.S. 218 (1947) (holding that the Federal Warehouse Act was intended by Congress to preempt state laws addressing the same issues); Hines v. Davidowitz, 312 U.S. 52 (1941) (holding that, in light of the potential conflict between state and federal law, the Court must determine the validity of the Pennsylvania Alien Registration Act).

101. *See* Napier v. Atlantic Coast Line R.R., 272 U.S. 605, 611 (1926) (holding that Congressional action may preclude state regulation of locomotive equipment used in interstate commerce).

102. Pacific Gas and Elec. Co. v. State Energy Resources Cons. & Dev. Comm'n., 461 U.S. 190, 203 (1983) (holding that California regulations of nuclear power plant waste disposal were not preempted by federal statute).

103. Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) (holding that a Federal Home Loan Board regulation barred the application of a conflicting state rule).

104. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) (holding that a California regulation did not impair federal authority, and consequently was not preempted).

105. Hines v. Davidowitz, 312 U.S. 52, 67-68 (1941).

106. Healy v. Beer Inst., Inc., 491 U.S. 324, 326 n.1 (1989) (holding that a Connecticut law that set price scales that affected other states was a violation of the Commerce Clause).

tions may still be found to violate the Commerce Clause even in the absence of congressional action. State statutes may be declared invalid if they impose an undue burden on interstate commerce or are designed to favor local interests at the expense of other states.[107]

OPA's *liability* provisions encounter no difficulty under the interstate Commerce Clause; there is no statutory preemption problem because Congress has specifically expressed its intent *not* to preempt state legislation.[108] Similarly, a dormant Commerce Clause analysis is made redundant by an explicit grant of power by Congress to the states.[109] States are, therefore, free under the Commerce Clause to impose greater liability for discharges in state waters.

The only question remaining is whether a particular state statute conflicts with OPA's other provisions. This may occur if states impose construction or design requirements different from those provided for in OPA. Thus, a state statute requiring double hulls on barges or tankers before the year 2015[110] (the year such designs are required by OPA)[111] might be invalid because it directly

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[107] *See* City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (invalidating on Commerce Clause grounds a New Jersey law that prohibited the importation of out-of-state waste). The "dormant" Commerce Clause was first used by the Supreme Court to strike down state legislation in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1852), in which it held that a Virginia statute authorizing the construction of a bridge over the Ohio River which obstructed traffic was unconstitutional. The Court had previously flirted with the concept in both *Gibbons v. Ogden*, 17 U.S. (4 Wheat.) 316 (1819), and *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829).

[108] *See* 33 U.S.C. § 2718 (1994).

[109] *See* Western and Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 652-53 (1981):

> Congress may "confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to the Commerce Clause challenge.

(citations omitted).

[110] *See* Rhode Island Oil Spill Pollution Prevention and Control Act, R.I. GEN. LAWS § 46-12.5-24(a) (1996) (requiring that, effective June 1, 1997, any vessel transiting Rhode Island waters with oil in bulk in limited visibility have either a double hull or tug escort). A single-hulled tanker transiting these waters in 2002, would be in violation of the Rhode Island statute while still in compliance with OPA. *See id.* § 46-12.524(b); *see also* Flavey, *supra* note 59 (giving a full discussion of the Rhode Island OSPPCA).

[111] *See* 46 U.S.C. § 3703(a) (1994). OPA actually provides for a phase-in requirement. *See id.* Double hulls are required at different times depending on vessel size and age. *See id.*

conflicts with federal law.[112]

2. The Foreign Commerce Clause

The states' power over foreign commerce is substantially more limited than their power over intrastate commerce. In *DiSanto v. Pennsylvania*,[113] the Supreme Court struck down a Pennsylvania statute requiring steamboat ticket sellers to obtain a license from the state. Pennsylvania argued that the regulation was a valid exercise of its police powers, designed to protect the public from fraud, but the Court struck down the statute as unwarranted burden on foreign commerce. In so doing, the Supreme Court seemed to adopt a different standard for state regulation affecting foreign commerce. In the Court's view, foreign commerce required uniform treatment, and any state regulation would necessarily result in variable burdens being created. A national approach to foreign commerce is necessary to preserve a national foreign policy. Half a century later, the Court was to expand on this theory, holding that "[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power."[114]

The aim of the Commerce Clause is "to prevent discrimination and the erection of barriers or obstacles to the free flow of commerce, interstate or foreign."[115] The preemption analysis applicable to state regulation under the Foreign Commerce Clause is almost identical to that applicable to the Interstate Commerce Sub-Clause.[116] The need for a single national foreign policy is the ex-

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[112] *See, e.g.*, Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) (invalidating that part of then-existing Washington state law requiring more stringent construction and design standards than those provided for in federal law); *see also* H.R. CONF. REP. No. 101-653 (1990), *reprinted in* 1990 U.S.C.C.A.N. 722, 800 (discussing OPA's non-preemption clause and stating that OPA is not intended to "disturb the Supreme Court's decision in *Ray v. Atlantic Richfield Company*"). *But see* International Association of Independent Tanker Owners v. Lowry, 947 F. Supp. 1484 (W.D. Wash. 1996) (upholding Washington State's BAP standards); Michael P. Mullahy, Note, *States' Rights and the Oil Pollution Act of 1990: A Sea of Confusion?*, 25 HOFSTRA L. REV. 607 (1996) (arguing that Washington State BAP standards are not preempted by the OPA).

[113] 273 U.S. 34 (1927).

[114] Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979) (invalidating a California tax law that caused multiple taxation of foreign commerce on the grounds that it interfered with the Congressional power to regulate foreign commerce).

[115] *DiSanto*, 273 U.S. at 43 (Stone, J., dissenting).

[116] Some commentators have actually urged the end of a separate analysis under the foreign commerce power. *See* Peter J. Spiro, *The State and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 167 (1994) (examining the prospect of

tra ingredient added to foreign commerce power analysis. Nonetheless, the fact that Congress has permitted states to supplement OPA's liability provisions would probably preclude any argument that OPA violates the Foreign Commerce Clause.

Absent any explicit preemption,[117] state power might reach the regulation of oil pollution in state waters without violating the Commerce Clause. *Cooley v. Board of Wardens*[118] certainly stands for the proposition that the Commerce Clause, at least in its dormant aspect, does not invalidate all state regulation of commerce. This is particularly true where the subject matter of the regulation is essentially one of local concern. The regulation of pilotage, one such local concern, was thought to be an appropriate subject for state regulation until such time as Congress chose to preempt local legislation. As a result, in the absence of any express congressional preemption, states retain power under the Commerce Clause to regulate oil pollution consistent with the principles announced in *Cooley*.

OPA specifically authorizes state action, however.[119] There is, then, no real argument that traditional statutory preemption analysis would result in the invalidation of state liability statutes.[120] Congress's explicit choice not to preempt makes a statutory preemption analysis unnecessary because there simply can be no conflict between any *permitted* state regulation and the federal statute.

The only remaining argument is that Congress lacks power under the Commerce Clause to allow states to enact non-uniform pollution statutes. Yet while the Constitution has explicitly granted power to Congress to legislate in the area of interstate and foreign commerce, that power is not exclusive.[121] Congress may authorize state action that might otherwise violate the dormant Commerce Clause, even when such legislation has previously been struck down by the Supreme Court.[122] The deference given Congress's

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heightened state involvement in immigration control); *see also* Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 78 (1993) (Scalia, J., concurring in part and concurring in the judgement) ("[N]o state can ever actually 'prevent this Nation from speaking with one voice.'") (quoting *Japan Line*, 441 U.S. at 451).

[117] *See* Pacific Gas & Elec. Co. v. State Energy Resources Cons. & Dev. Comm'n, 461 U.S. 190, 203-08 (1983) (discussing Congressional power to preempt state action under the Commerce Clause).

[118] 53 U.S. (19 How.) 299 (1851); *see also supra* text accompanying notes 91-98.

[119] *See* 33 U.S.C. § 2718(a) (1994).

[120] *See* Pacific Gas & Elec., 461 U.S. at 204; *see also supra* text accompanying notes 101-05.

[121] *See* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

[122] In the Wheeling River Bridge Cases, the Supreme Court first struck down a Vir-

decisions by the Supreme Court substantially negates the argument that Congress cannot delegate its commerce power to the states.[123]

Under this analysis, OPA's failure to preempt supplementary state action is not violative of the Commerce Clause.

B. OPA and the Admiralty Clause

1. Uniformity and the Admiralty Clause

The text of the Constitution does not explicitly grant power to Congress to regulate maritime affairs. Instead, federal power over admiralty is derived from the Article III grant of admiralty jurisdiction to the federal courts.[124] This grant, in conjunction with the power vested in Congress "[t]o make all laws which may be necessary and proper" for carrying into execution the powers enumerated under the Constitution, has been held to give Congress power to create and modify the substantive admiralty law:

> [I]t must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. And further, that in the absence of some controlling statute the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction.[125]

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ginia statute authorizing the construction of a bridge over the Ohio River. *See* Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1851). Congress then passed a statute authorizing the bridge construction. The Court then held that Congress could retroactively validate otherwise invalid state regulation. *See* Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856).

[123] In *Leisey v. Hardin*, 135 U.S. 100 (1890), the Supreme Court struck down an Iowa law banning the importation of intoxicating liquors. Congress countered by enacting a statute that made the importation of alcoholic beverages subject to local control, and the Supreme Court upheld that statute, rejecting the argument that Congress could not delegate its commerce power. *See In re* Rahrer, 140 U.S. 545 (1891); *see also* Northeast Bancorp v. Board of Governors, 472 U.S. 159, 175 (1985) ("When Congress so chooses, State actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."); Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) (reaffirming that state regulation otherwise invalid under a dormant Commerce Clause analysis may be legitimized by affirmative Congressional action).

[124] U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, . . . and to all Cases of admiralty and maritime jurisdiction. . . .").

[125] Southern Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917) (citations omitted).

That Congress has the power to "fix and determine" the substantive maritime law is not itself a revolutionary idea. Such a power is consistent with the view of the Framers that the maritime law should be uniform throughout the nation. It was obvious to them that Congress should exercise primary responsibility for ensuring uniformity of the law. The Framers believed uniformity served two purposes: aiding in the development of interstate and international commerce and preventing the new nation from becoming embroiled in maritime disputes with other nations. According to the Supreme Court:

> Comity with other nations and among the States was a primary aim of the Constitution. At the time of the framing, it was essential that our own prospective foreign trading partners know the United States would uphold its treaties, respect the general maritime law and refrain from erecting barriers to commerce. The individual States needed similar assurances from each other.[126]

As one commentator has noted, "the founders understood the importance of commerce to the new nation, and they understandably chose to delimit an area of law that would provide uniformity with those of our trading partners."[127]

The admiralty power is akin to the commerce power, at least in so far as there is an emphasis on uniformity. The admiralty power differs from the commerce power in that Congress is not free to delegate its authority over maritime affairs to the states: such a delegation would completely disrupt the uniformity of the substantive maritime law in its international and interstate aspects. Uniformity in maritime matters is, thus, a constitutional imperative: The maritime law was viewed by the Framers as a single body of law applicable throughout the nation, and indeed the world, with a minimum of variation. The Admiralty Clause operates as a substantive limitation on the power of Congress to impair the uniformity of the maritime law. The Admiralty Clause also grants federal courts the power to enforce uniformity in the face of attempts by the legislatures to corrupt it.

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[126] American Dredging Co. v. Miller, 510 U.S. 443, 466 (1994).

[127] Steven R. Swanson, *Federalism, the Admiralty, and Oil Spills*, 27 J. MAR. L. & COM. 379, 381 (1996) (evaluating "how best to deal with the legal ramifications of oil spills" under admiralty law).

The evidence that the Admiralty Clause creates a substantive requirement for uniformity is found in the fact that admiralty constituted a distinct body of law at the formation of the Union. This body of law was implicitly adopted by the Framers as the substantive law of the United States:

> That we have a maritime law of our own, operative throughout the United States cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." . . . One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been intended to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.[128]

The international character of maritime law makes uniformity all the more necessary:

> It is obvious that this class of [civil admiralty] cases has, or may have, an intimate relation to the rights and duties of foreigners in navigation and maritime commerce. It may materially affect our intercourse with foreign states; and raise many questions of international law, not merely touching private claims, but national sovereignty, and national reciprocity. . . .
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> [W]e see, that the admiralty jurisdiction naturally connects itself, on the one hand, with our diplomatic relations and duties to foreign nations, and their subjects; and, on the other hand, with the great interests of navigation and commerce, foreign and domestic. There is, then, a peculiar wisdom in giving to the national government a jurisdiction of this sort, which cannot be wielded, except for the gener-

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[128] The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1874).

> al good; and which multiplies the securities for the public peace abroad, and gives commerce and navigation the most encouraging support at home.[129]

Although Congress has the paramount power to determine the substantive maritime law, states nevertheless retain a residual power derived from their police powers[130] to enact local regulations that may affect navigation. And, while the Supreme Court has upheld state regulations that marginally impact maritime commerce, it has never explicitly held that the states possess any power at all to enact or alter substantive admiralty law. That power is reserved for Congress alone. State legislation regulating maritime affairs is, therefore, best viewed as an exertion of the states' police power and applicable only by the virtue of the Commerce Clause. Thus, the pilotage regulations upheld in *Cooley v. Board of Wardens* are more properly considered legislation applicable and valid under the commerce power only because Congress had not chosen to preempt them.[131] At no time did the Court entertain the suggestion that the states had any admiralty power at all.[132] A state law might thus be both a valid exercise of the state's police powers under Commerce Clause and unconstitutional as a violation of the Admiralty Clause.

Lacking any inherent admiralty power, states may only affect navigation and maritime commerce through the exercise of that authority which is inherent in their police power and which is neither prohibited by the dormant Commerce Clause nor preempted

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[129] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1664, 1666 (1833); *see also* United States v. The William, 28 F. Cas. 614, 621 (D. Mass. 1808) (No. 16,700) ("The navigation system has long stood prominent. The interests of commerce are often made subservient to those of shipping and navigation. Maritime and naval strength is the great object of national solicitude; the grand and ultimate objects are the defense and security of the country.").

[130] Chief Justice Marshall described the inherent police power as:

> [T]hat immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824).

[131] *See* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851) (holding that the granting of the commerce power to Congress does not, by itself, prevent the states from passing pilotage laws).

[132] *See id.* at 318-21.

by federal action. Thus, although Congress might suffer the states to enact non-uniform commercial legislation under the Commerce Clause,[133] the admiralty power does not permit the same freedom. On the contrary, the Admiralty Clause envisions a generally uniform system of maritime law that cannot be corrupted by inconsistent state legislation.[134] This body of law is composed of both judge-made rules of law as well as the statutes of the United States.[135]

2. How Far Can the States Go?

a. *Jensen* and Preemption

The Supreme Court has traditionally prevented the states from enacting legislation that disturbs the essential harmony of the maritime law, holding that the Constitution's admiralty grant was adopted to ensure the nation would have a uniform set of maritime laws. At the same time, however, the Supreme Court has recognized the states have a strong interest in regulating activities within their borders. The task throughout the years has been to determine exactly how far state power extends before it will be found to

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[133] *See* Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856).

[134] *See* Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917) ("And plainly, we think, no such [state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law. . . .").

[135] *See id.*; *see also* Thompson v. The Catharina, 23 F. Cas. 1028, 130-31 (D. Pa. 1795) (No. 13,949). The court in *Thompson* stated:

> But the change in the form of our government has not abrogated all the laws, customs and principles of our jurisprudence, we inherited from our ancestors; and possessed at the period of our becoming an independent nation. The people of these states, both individually and collectively, have the common law, in all cases, consistent with the change of our government, and the principles on which it is founded. They possess, in like manner, the maritime law, which is part of the common law, existing at the same period; and this is peculiarly within the cognizance of courts, invested with maritime jurisdiction; although it is referred to, in all our courts on maritime questions. It is, then, not to be disputed, on sound principles, that this court must be governed in its decisions, by the Maritime Code we possessed at the period before stated; as well as by the particular laws since established by our own government, or which may hereafter be enacted. These laws and the decisions under them, must be received as authorities, in this and other courts of our country "in all cases of admiralty and maritime jurisdiction," to which, by the constitution, it is declared "the judicial power of the United States shall extend."

Id.

disrupt the essential harmony of the maritime law. In *Southern Pacific Co. v. Jensen*, the Supreme Court adopted a view of Admiralty Clause that made it something akin to the Supremacy Clause,[136] holding state legislation cannot be valid if it "contravenes the essential purpose of an Act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony of that law in its international or interstate relations."[137] In the Court's view, Congress's power to legislate in the area of maritime law was similar to that granted to it in the Commerce Clause: Congress might modify the general maritime law, but states may not act to regulate maritime matters if such regulation would adversely affect an exercise of federal power.[138] The so-called "*Jensen* doctrine" effectively provided for federal supremacy over admiralty matters, prohibiting the states from acting to contravene a federal maritime law. Difficulties in applying the *Jensen* doctrine have proved to be a source of a great deal of confusion and uncertainty over the years, and the decision itself has been the subject of repeated criticism.[139] None-

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[136] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[137] Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917). Jensen involved a Constitutional challenge to the applicability of New York State's workers' compensation law to longshore workers. *Id.* at 213. The employer succeeded by arguing that the statute would interfere with the harmony of the maritime law. *See id.* at 216.

[138] The *Jensen* Court stated:

> A similar rule in respect to interstate commerce deduced from the grant to Congress of power to regulate it is now firmly established. "Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States . . . Congress can alone act upon it and provide the needed regulations."

Id. (quoting Bowman v. Chicago & Northwestern Ry. Co., 125 U.S. 465, 507-08 (1888)).

[139] *See, e.g.*, American Dredging Co. v. Miller, 510 U.S. 443, 452 (1994) ("It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernable in our admiralty jurisprudence. . . ."); Calhoun v. Yamaha Motor Corp. U.S.A., 40 F.3d 622, 628 (3rd Cir. 1994) ("[T]he *Jensen* language is little more than a convenient slogan, providing little guidance."), *aff'd*, 116 S. Ct. 619 (1996); *see also* GILMORE & BLACK, *supra* note 14, at 642 (claiming that *Jensen* is tied with *The General Smith*, 17 U.S. (4 Wheat) 438 (1819), which established the home port lien doctrine, as the "most ill-advised admiralty decision ever handed down by the Supreme Court").

Jensen's uniformity principle is probably easier to state that to apply in concrete situations. Courts usually attempt to balance the interests of both state and federal interests where the question is whether state law should apply. In many cases the interests are not at all clear. The Eleventh Circuit summed up some of the difficulties thus:

theless, the principle of uniformity retains "vitality."[140]

OPA's preemption clause is not a *Jensen* problem, however, as state legislation regulating oil pollution in this situation is not enacted contrary to an express purpose of Congress. Indeed, it can be fairly argued that Congress invited state action. The real question is whether Congress may delegate to the states the power to supplement the federal oil pollution regime, even when state legislation affects maritime interests.

b. *Knickerbocker* and the Non-Delegation Principle

The question of whether delegation is permissible would seem to have been answered by the Supreme Court's decision in *Knickerbocker Ice Co. v. Stewart*,[141] wherein it held Congress could not constitutionally delegate its admiralty power:

> [Congress's] power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the Constitution. . . . The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.[142]

> One must identify the state law involved and determine whether there is an admiralty principle with which the state law conflicts, and, if there is no such admiralty principle, consideration must be given to whether such an admiralty rule should be fashioned. If none is to be fashioned, the state rule should be followed. If there is an admiralty-state law conflict, the comparative interests must be considered—they may be such that admiralty shall prevail or if the policy underlying the admiralty rule is not strong and the effect on admiralty is minimal, the state law may be given effect. . . .

Steelmet, Inc. v. Caribe Towing Corp., 779 F.2d 1485, 1488 (11th Cir. 1986) (citations omitted).

There are thus very few standards for courts to use when determining where a particular state law is preempted by an admiralty rule. This lack of standards has resulted in a series of conflicting approaches to the problem of uniformity. *See* Robert D. Peltz, *The Myth of Uniformity in Maritime Law*, 21 TUL. MAR. L.J. 103 (1996) (discussing conflicts in approaches to the uniformity problem).

[140] *See* Askew v. American Waterways Operators, Inc., 411 U.S. 325, 344 (1973).

[141] 253 U.S. 149 (1920). In response to *Jensen*, Congress amended the savings clause of the Judiciary Act to permit the application of state workers' compensation laws. *Id.* at 163.

[142] *Id.* at 164; *see also* Washington v. W.C. Dawson & Co., 254 U.S. 219 (1924).

The non-delegation principle of *Knickerbocker* is thus properly thought to be a consequence of the requirement of uniformity. Preventing Congress from delegating its power to legislate in admiralty matters ensures "the proper harmony of that law in its international or interstate relations" is maintained.

The foundation of the uniformity principle is that the body of admiralty law existing at the time of the ratification of the Constitution was incorporated wholesale into the law of the United States:

> As there could be no cases of "admiralty and maritime jurisdiction," in the absence of some maritime law under which they could arise, the [Admiralty Clause] presupposes the existence in the United States of a law of that character. Such a law or system of law existed in colonial times and during the Confederation, and commonly was applied in the adjudication of admiralty and maritime cases. It embodied the principles of the general maritime law, sometimes called the law of the sea, with modifications and supplements adjusting it to conditions and needs on this side of the Atlantic. The framers of the Constitution were familiar with that system and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but to place the entire subject—its substantive as well as its procedural features—under national control, because of its intimate relation to navigation and to interstate and foreign commerce. In pursuance of that purpose the constitutional provision was framed and adopted. Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicitly investing such power in the United States. Commentators took that view. Congress acted on it, and the courts, including this court, gave effect to it. Practically therefore the situation is as if that view were written into the provision. After the Constitution went into effect, the substantive law theretofore in force was not regarded as superseded or as being only the law of the several states, but as having become the law of the United States—subject to power in Congress to alter, qualify, or supplement it as

experience or changing conditions might require.[143]

Nonetheless, while the power of Congress "extends to the entire subject,"[144] Congress is not completely free to alter the general maritime law. Congress cannot exclude a traditional maritime subject from the admiralty, nor can it include a non-maritime subject within its scope.[145] Most important, Congress is bound to preserve the uniformity of the maritime law except where the subject to be regulated is of purely local concern: "[T]he spirit and purpose of the constitutional provision require that [congressional] enactments—when not relating to matters whose existence or influence is confined to a more restricted field, as in Cooley v. Board of Wardens, . . . —shall be coextensive with and operating uniformly in the whole of the United States."[146]

Congress, then, may permit local regulation, but only when the subject matter is exclusively local and will not have a substantial impact on maritime commerce in general or otherwise affect substantive maritime rights and obligations. The pilotage regulations upheld in *Cooley* are an example of a regulation that meets these criteria. Whether a vessel takes on a pilot entering or exiting the Port of Philadelphia is of concern to the Commonwealth of Pennsylvania, but of very little concern to others. To the extent such regulations impose minimal burdens of compliance, as perhaps in some modest fee for the service, they should be upheld. Were the same regulations to alter the liabilities of vessel owners for damage caused by the negligence of a pilot,[147] they might rightfully be held invalid. Such a regulation would not only affect interests far beyond the purely local, it would also impose substantial burdens on maritime commerce and destroy uniformity.

The Supreme Court has said elsewhere that "[e]venhanded local regulation to effectuate a legitimate local public interest is valid unless preempted by federal action . . . or unduly burdensome on

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143. Panama R.R. Co. v. Johnson, 264 U.S. 375, 385-86 (1924).

144. *Id.* at 386.

145. *Id.*

146. *Id.* at 386-87 (citation omitted).

147. A compulsory pilot is liable for his own negligence for damage to the vessel and third parties. *See* Burgess v. M/V Tamano, 564 F.2d 964 (1st Cir. 1977). Where damage results to third parties, the vessel owner is not liable *in personam* for the neglect of a compulsory pilot, although the vessel is liable *in rem*. *See* Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique, 182 U.S. 406 (1901); The China, 74 U.S. (7 Wall.) 53 (1869). A vessel owner is liable *in personam*, however, for the negligence of a pilot where the pilotage is voluntary. *See Homer Ramsdell*, 182 U.S. at 415-16.

maritime activities," and that a state "may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary."[148] The primary question in this regard is whether the subject matter at issue requires uniformity of regulation. In discussing the Commerce Clause, the Supreme Court has held local regulations are invalid where uniformity is required to effect the purposes of the constitutional grant:

> The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that *as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive.* In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation.[149]

The international character of maritime affairs makes the need for uniformity more acute in admiralty than is otherwise required in the context of interstate commerce.[150] Nonetheless, where the subject at issue is of purely local concern, state regulation may still be appropriate:

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[148] Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443-44 (1960) (citations omitted) (upholding a smoke abatement ordinance as applied to passing ships).

[149] The Minnesota Rate Cases, 230 U.S. 352, 399, 400 (1913) (emphasis added).

[150] *See* JONATHAN ELLIOT, 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 571 (1888) ("As our national tranquility and reputation, and intercourse with foreign nations, may be affected by admiralty decisions; as they ought, therefore, to be uniform; and as there can be no uniformity if there be thirteen distinct, independent jurisdictions,—this jurisdiction ought to be in the federal judiciary.") (quoting Edmund Randolph, Va.); *see also id.* at 532:

> As our intercourse with foreign nations will be affected by [admiralty] decisions . . . they ought to be uniform. This can only be done by giving the federal judiciary exclusive jurisdiction. Controversies affecting the interest of the United States ought to be determined by their own judiciary, and not be left to partial, local tribunals.

(quoting James Madison, Va.).

> [T]here necessarily remains to the states until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction though interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies. . . .[151]

Congress may, therefore, refrain from enacting a uniform system of regulation so as to permit local rules to govern. This is certainly true under the commerce power; but where maritime commerce is concerned, Congress's power to permit local regulation is more restricted.

Admittedly, the difficulty lies in determining the difference between a "legitimate local public interest" and a "material burden" on maritime commerce. While it is hard to state any exact rule, the general outlines seem clear: Congress may permit local regulation of maritime affairs as long as these local regulations affect purely local interests, are primarily directed to promoting health or safety, and do not impose substantial burdens on commerce or alter substantive maritime rights and remedies. To the extent that state legislation results in non-uniform obligations or subjects maritime commerce to significant non-uniform burdens, it must be invalid.

The Supreme Court has held that in determining whether a regulation places an unreasonable "burden on commerce," courts may consider whether the regulation imposes added costs of operation to comply, whether the regulation is discriminatory in its effects, and whether the added costs are excessive relative to the benefits ultimately obtained.[152] The Court's analysis in the context

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[151] The Minnesota Rate Cases, 230 U.S. at 401.

[152] *See* Southern Pac. Co. v. Arizona, 325 U.S. 761, 775-76 (1945):

> The decisive question is whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate com-

of the Commerce Clause is helpful in this regard:

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[153]

Whether a non-discriminatory regulation is unduly burdensome requires a determination of the added costs necessary to comply with the regulation relative to the "putative local benefits" obtained.[154] In the maritime context, this means the costs imposed on shipowners attempting to comply with local regulations must not be excessive in comparison to the additional safety or security that results. Reasonable local regulations governing pilotage,[155] wharfage,[156] tolls, and improvements to harbors and rivers[157] are valid, as are health regulations, such as quarantine restrictions[158]

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merce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect on the interstate [commerce] it interrupts.

[153] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citations omitted) (holding that an Arizona rule that prohibited export of uncrated cantaloupes was an unwarranted interference with interstate commerce); *see also* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 525, 527-30 (1959) (invalidating a state statute requiring a different mud guard on trucks than were permitted in forty-five other states).

[154] *See Pike*, 397 U.S. at 142.

[155] *See* Anderson v. Pacific Coast S.S. Co., 225 U.S. 187 (1912) (holding that American vessels sailing from California with stops at foreign ports are subject to California pilotage law); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

[156] *See* Ouachita River Packet Co. v. Aiken, 121 U.S. 444 (1887) (upholding a New Orleans wharfage fee ordinance); Parkersburg v. Transportation Co, 107 U.S. 691 (1882) (upholding a municipal wharfage fee ordinance).

[157] *See* Cummings v. Chicago, 188 U.S. 410 (1903) (requiring joint assent of state and federal government to allow a private party to build a dock on a river); Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1865) (permitting Pennsylvania to go forward with bridging a river); Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829) (allowing construction of a dam in Delaware that interfered with navigation to go forward).

[158] *See* Compagnie Francaise de Navigation a Vapeur v. Louisiana Bd. of Health, 186

or health inspections.[159] But where a state imposes regulations that are unreasonable in scope, or that intrude upon a uniform scheme, the regulations will be invalid. This would be the case if a state attempted to impose stringent design or construction standards on vessels entering its ports. Such regulations certainly will be struck down if they actually conflict with federal statute,[160] but they may be invalid even in the absence of federal regulation if they go beyond what is "plainly essential to safety and seaworthiness."[161]

A non-discriminatory regulation is also invalid when it results in the derogation of substantive maritime rights or remedies. While admiralty courts have traditionally enforced state-created remedies,[162] states have not been free to supplant maritime law and substitute remedies created by statute or common law. The continuing controversy over the applicability of state wrongful death remedies to maritime tort is an example of this limit on state power. Where interstate and international commerce is concerned, the Supreme Court has decreed that uniformity is required, and has created a wrongful death remedy in admiralty for those in maritime employment.[163] In the case of a non-seaman injured in state waters, the Court has allowed state law to provide a remedy for wrongful death.[164] Where admiralty does provide the remedy, however, it is worth bearing in mind that states cannot grant a

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U.S. 380 (1902); Railroad Co. v. Husen, 95 U.S. 465 (1877) (holding that state sanitary laws that interfere with transportation are permissible only when they are unavoidably necessary).

159. *See* Asbell v. Kansas, 209 U.S. 251 (1908) (upholding a Kansas law requiring that all cattle transported through the state be declared healthy by state or federal officials); Reid v. Colorado, 187 U.S. 138 (1902) (upholding a statute prohibiting the introduction of diseased cattle into the state); Morgan's S.S. Co. v. Louisiana Bd. of Health, 118 U.S. 455 (1886) (upholding a state imposed fee for the sanitary inspection of vessels).

160. *See* Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978) (invalidating Washington State's then-existing tanker law).

161. Kelly v. Washington *ex rel.* Foss Co., 302 U.S. 1, 15 (1937) (upholding a Washington State vessel inspection law).

162. State-created liens are enforced in admiralty courts. *See* The J.E. Rumbell, 13 S. Ct. 498 (1893) (superseded by statute) (giving precedence to a state lien on a vessel in its home port over a prior mortgage recorded under federal statute); *Ex parte* Hagar, 104 U.S. 520 (1881) (permitting federal admiralty jurisdiction over a case arising under a Delaware pilotage law); The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1874) (upholding federal enforcement of a Louisiana state law lien in favor of materialmen).

163. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1972) (superseded by statute).

164. *See* Yamaha Motor Corp., U.S.A. v. Calhoun, 116 S. Ct. 619 (1996) (holding that state law determines the damages available for the death of a jet skier).

plaintiff a means to opt out of the federal scheme. Thus, where seamen are concerned, states may not impose a liability other than that prescribed by the maritime law upon a vessel owner. As the Supreme Court has noted:

> [N]o State has the power to abolish the well recognized maritime rule of the measure of recovery and substitute therefor it the full indemnity rule of the common law. Such a substitution would distinctly change the settled maritime law; and would be destructive of the "uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other and foreign states."[165]

While Congress may make substantial alterations in the maritime law, it may not permit the states to do so. The need for uniformity in admiralty has traditionally been the paramount concern in fashioning maritime law. Permitting states to impose different regulations or burdens on maritime commerce flies in the face of the uniformity principle. The Supreme Court has already rejected the idea that Congress might delegate its admiralty powers to the states. In *Knickerbocker,* Congress attempted to permit states to apply their own distinctive workers' compensation schemes in maritime commerce. In *Washington v. W.C. Dawson & Co.*,[166] the Court struck down a somewhat modified version of the same federal statute it had previously invalidated in *Knickerbocker* precisely because such a delegation would destroy uniformity.[167] This time Congress sought to permit states to extend their workers' compensation schemes to longshoremen only, leaving injured seamen to seek traditional admiralty remedies. The Court refused to permit the delegation:

> This cause presents a situation where there was no attempt to prescribe general rules. On the contrary, the manifest purpose was to permit any State to alter the maritime law and thereby introduce conflicting requirements. To prevent this result the Constitution adopted the law of the sea as

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[165] Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 382 (1918) (quoting The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1874)). The negligence remedy sought by the plaintiff in this case was eventually adopted by Congress in the Jones Act, 46 U.S.C. app. § 688 (1994).

[166] 264 U.S. 219 (1924).

[167] *See supra* text accompanying notes 141-42.

> the measure of maritime rights and obligations. The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see. Of course, some within the States may prefer local rules; but the Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The subject is national. Local interests must yield to the common welfare. The Constitution is supreme.[168]

OPA repeats the same error. Whether the subject matter is remedies for oil pollution or workers' compensation for longshoremen, any federal statute that permits local regulations which alter the liabilities of vessel owners beyond those provided for in the federal scheme violates the principle of uniformity inherent in the Admiralty Clause and is, thus, constitutionally infirm.

The extent of state power to impose liability for marine pollution might seem to have been settled in *Askew v. American Waterways Operators*,[169] a case in which the Supreme Court upheld a Florida statute imposing strict and unlimited liability on those responsible for discharges of oil in state waters.[170] The Court was called upon to consider whether the unlimited liability scheme provided for in Florida's oil pollution statute[171] was permissible under the federal Water Quality Improvement Act of 1970, (WQIA),[172] the precursor to the FWPCA. As noted above, the WQIA provided for strict but limited liability for discharges occurring in the navigable waters of the United States.[173] It also contained a non-preemption clause that permitted the states to supplement the remedies provided in the federal scheme: "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

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168. Washington v. W.C. Dawson & Co. 264 U.S. at 228.

169. 411 U.S. 325 (1973).

170. *See id.*

171. *See* The Oil Spill Prevention and Pollution Control Act, 1970 FLA. LAWS 70-244, 749-50 (current version at Pollutant Discharge and Control Act, FLA. STAT. ANN. § 367.09 (West 1997)).

172. The Water Quality Improvement Act of 1970, 84 Stat. 91 (1970) (amended by the Federal Water Pollution Control Act of 1972 (FWPCA), 86 Stat. 816 (1972) current version at 33 U.S.C. §§ 1251-1376 (1994)); *see also supra* note 7 and accompanying text.

173. *See* 33 U.S.C. § 1321(c) (1994); *see also supra* note 9.

State."[174]

A three-judge panel of the District Court for the Middle District of Florida struck down Florida's law on the grounds that it was an "unconstitutional intrusion into the federal maritime domain"[175] and would effect the "destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish."[176] In so doing, the lower court rejected the argument that regulation of pollution in state waters was a purely local concern and would not encroach on a federal interest:

> [T]his is a case where the state purports to impose upon shipping and related industries duties which under the federal law they do not bear. It can hardly be said that Florida is not seeking to regulate conduct in the federal maritime jurisdiction. We need not belabor the point that to permit the states severally to regulate these industries as Florida seeks to do would sound the death knell to the principle of uniformity.[177]

Relying on the Supreme Court's decision in *Moragne v. States Marine Lines, Inc.*,[178] the district court also dismissed the idea that states are permitted to fill in gaps where the federal scheme provides no remedy. Admiralty courts, it said, are "fully capable of fashioning a remedy for the breach of substantive duties imposed by the general maritime law."[179] Most significantly, the district court rejected the argument that the WQIA authorized the states to supplement federal admiralty law in the area of marine pollution. The court firmly rejected the idea that Congress could delegate to the states the power to legislate in areas affecting maritime matters, where such delegation would effectively permit the states to exercise admiralty powers granted to Congress by the Constitution:

> It has long been recognized that Congress is powerless to confer on the states authority to legislate within the admiralty jurisdiction and we cannot presume that W.Q.I.A. was

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[174] *Id.* § 11(o)(2) (codified as amended at 33 U.S.C. § 1321(o)(2)).

[175] American Waterways Operators, Inc. v. Askew, 335 F. Supp. 1241, 1244 (M.D. Fla. 1971), *rev'd*, 411 U.S. 325 (1973).

[176] *Id.* at 1248, (quoting Southern Pac. Co. v. Jensen, 244 U.S. 205, 217 (1917)).

[177] *Id.*

[178] 398 U.S. 375 (1970) (superseded by statute) (creating a maritime wrongful death action for deaths occurring in state waters).

[179] American Waterways Operators, Inc. v. Askew, 335 F. Supp. at 1248.

> an attempt to do so. There is nothing in the language of the act which purports to grant any such legislative authority to the states. The statement that Congress did not intend to preclude state imposed liability for oil pollution simply means that the states are free to enforce pollution control measures that are within their constitutional prerogative.[180]

The Supreme Court heard the case as a direct appeal and reversed in a unanimous decision.[181] The Court placed great emphasis on the fact that the Florida statute did not directly conflict with the terms of the WQIA. This was true primarily because the WQIA did not address remedies available to states or private parties.[182] Florida's statute, on the other hand, addressed *only* damages and costs incurred by *non-federal* interests. In the Supreme Court's view, therefore, the Florida law was more properly considered complementary, rather than conflicting, legislation. Moreover, in reviewing the WQIA's non-preemption clause, the Court determined that the Federal Act does not preclude, but rather invites, state regulation.[183] The Court thus viewed the WQIA and the Florida statute as forming "harmonious parts of an integrated whole."[184]

The Supreme Court's treatment of the uniformity problem is the most intriguing part of the *Askew* decision. The Court asserted that where Congress failed to evidence any intent to preempt state action, the "issue comes down to whether a State constitutionally may exercise its police power respecting maritime matters concurrently with the Federal Government."[185] The Court held that absent an actual conflict with a federal law, state regulation over maritime matters is permissible even though Congress has acted in the same area.[186] In its view, nothing in *Jensen* or *Knickerbocker* prevented Florida from imposing additional liabilities on vessels

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180. *Id.* at 1249 (citations omitted).

181. Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973).

182. *See id.* at 335-36:

> While the Federal Act is concerned only with actual cleanup costs incurred by the Federal Government, the State of Florida is concerned with its own cleanup costs. . . . Moreover, since Congress dealt only with "cleanup" costs, it left the States free to impose "liability" in damages for losses suffered by both the States and by private interests.

183. *See id.* at 329.

184. *Id.* at 331.

185. *Id.* at 337.

186. *Id.* at 341.

plying state waters.

What is most significant about the decision is that the Court paid almost no attention to *Knickerbocker*'s prohibition against delegating the admiralty power to the states. It utilized a traditional statutory preemption analysis,[187] focusing on whether there was a conflict between state and federal interests under *Jensen*, but it did not adequately address *Knickerbocker*, except to say that it was "limited to its facts."

The point to bear in mind, however, is that *Jensen* uniformity is not really the issue. Rather, the question is whether after *Knickerbocker* Congress may allow the states to change the substantive law of admiralty. In other words, the issue is not whether the Florida statute or others like it conflict with the terms of a federal admiralty statute or the general maritime law, which was the primary concern of the court in *Jensen*. Instead the question is whether Congress may abdicate its responsibility to provide for the uniformity of the maritime law by delegating its authority to the states. *Jensen* and *Knickerbocker* turn on two different facets of the same uniformity principle: States may not unilaterally act to disrupt the essential harmony of the maritime law (*Jensen*), but neither may Congress surrender its obligation to provide that uniform body of law (*Knickerbocker*).

In *Jensen*, the Supreme Court refused to permit the application of New York's workmen's compensation statute to longshore workers.[188] The *Jensen* Court held that state law could not be applied where doing so would disturb the essential harmony of the maritime law. This is true even when Congress has itself failed to fashion an appropriate remedy.[189] *Jensen* thus established a "dormant Admiralty Clause," principle with an effect akin to the dormant aspects of the Commerce Clause.[190]

In *Knickerbocker*, on the other hand, the Court was faced with a congressional attempt to circumvent *Jensen*'s holding: Rather than fashioning a statutory remedy for longshoremen's compensation on its own, Congress simply amended the "Saving to Suitors"

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187. *See supra* text accompanying notes 101-05.

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

189. *Id.* at 216.

190. David J. Bederman, *Uniformity, Delegation and the Dormant Admiralty Clause*, 28 J. MAR. L. & COM. 1 (1997) (arguing for a strong "dormant Admiralty Clause"); *see also* E. Merrick Dodd, Jr., *The New Doctrine of the Supremacy of Admiralty over the Common Law*, 21 COLUM. L. REV. 647 (1921) (describing the doctrine of *Jensen, Knickerbocker* etc. as novel, and discussing their effect on the law of the sea).

Clause in the Judiciary Act[191] to provide that common law remedies would include "the rights and remedies under the workmen's compensation laws of any state."[192] Congress intended by this amendment to permit federal courts to apply the remedies created by state workers' compensation laws. These remedies were to be treated as are other common law remedies, the theory being that such remedies are "concurrent" with the remedies available in admiralty. In striking down the amendment, the Supreme Court intended to prevent Congress from delegating power to regulate maritime matters to the states, and thereby limit occasions wherein maritime commerce would be subject to differing liabilities in different states.[193]

Congress responded to this rebuke by amending the Judiciary Act to remove longshore cases from the jurisdiction of the federal courts.[194] The Supreme Court rejected this attempt to circumvent *Jensen* in *State of Washington v. Dawson.*[195] Here, it essentially restated its holding in *Knickerbocker*, and noted that while Congress might enact a general workers' compensation statute by virtue of the powers granted it by the Admiralty Clause, it could not delegate the task to the states.[196]

OPA's preemption clause falls precisely within the confines of the prohibition on delegation found in *Knickerbocker* and *Dawson.* OPA creates a comprehensive federal compensation regime, but

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[191] In the first Judiciary Act, passed in 1789, Congress confirmed the jurisdiction of the common law courts by providing that federal courts shall have exclusive jurisdiction over admiralty claims "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." Judiciary Act of 1789, ch. 20, 1 Stat. 73, 77 (1789) (current version at 28 U.S.C. § 133 (1994)). At the time *Jensen* was decided, the clause was essentially unchanged and granted to suitors "in all cases the right of a common-law remedy where the common law is competent to give it." Judiciary Act of 1911, ch. 231, 36 Stat. 1087 (1911). It is said that the Savings Clause was inserted "from an abundant caution, lest the exclusive terms in which the power is conferred on the District Courts might be deemed to have taken away the concurrent remedy which had before existed." New Jersey Steam Navigation Co. v. Merchants' Bank, 47 U.S. (6 How.) 344, 390 (1848). The exact limits of the Savings Clause has been the subject of extended commentary throughout the years. *See* Jonathan Gutoff, *Admiralty, Article III, and Supreme Court Review of State-Court Decision Making*, 70 TUL. L. REV. 2169 (1996) (discussing the Supreme Court's power to review admiralty decisions made in state courts); David W. Robertson, *Displacement of State Law by Federal Maritime Law*, 26 J. MAR L. & COM. 325 (1995) (arguing for strong uniformity in admiralty law).

[192] Judiciary Act of 1917, ch. 97, 40 Stat. 395 (1917).

[193] Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 164. (1919).

[194] Act of June 10, 1922, ch. 216, 42 Stat. 634 (1922).

[195] 264 U.S. 219 (1924).

[196] *See id.* at 227-28.

still allows states to enact other oil spill legislation.[197] OPA purports to allow states merely the power to supplement the federal compensation regime, in much the same way that common law remedies supplement those given in admiralty.[198] Yet, OPA does much more than that. The scope of OPA's non-preemption clause seems to be without bound, at least with respect to liability and compensation regimes. OPA specifically declares that neither its own provisions nor those of the Limitation of Liability Act prevents any state or political subdivision from imposing any further liability with respect to either the discharge of oil within that state, or any removal activities in connection with such a discharge.[199] OPA thus not only delegates authority over pollution to the states, it also confers the same authority on counties, cities, and towns. OPA does far more than create a problem of inconsistent state and federal legislation; it invites the passage of a myriad of conflicting and burdensome regulations on the part of any municipality so inclined. In this respect at least, OPA's claim to be a comprehensive oil spill regime is rendered a nullity.

Contrary to the Supreme Court's assertions in *Askew*, oil spill legislation cannot be said to be merely concerned with the ship-to-shore effects of a spill. Imposing strict and unlimited liability on vessels responsible for oil pollution impacts on substantive admiralty rights. A vessel which spills oil in a state with an unlimited liability statute will be subject to entirely different burdens than one which is responsible for a discharge in a state without unlimited liability. Even more bizarre is the possibility vessels might be subject to different liability rules depending on the port within a state. Such a result is clearly contrary to the idea that the constitutional admiralty grant was designed to establish "harmonious and uniform rules applicable throughout every part of the Union."[200]

Even after twenty years, *Askew* remains something of a riddle. In the years since the decision, federal courts have struggled to determine how far the states may go in regulating maritime activity

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[197] *See* S. REP. NO. 101-94, at 6 (1990):

> The theory behind the Committee action [urging approval of OPA] is that the Federal statute is designed to provide basic protection for the environment and victims damaged by spills of oil. Any State wishing to impose a greater degree of protection for its own resources and citizens is entitled to do so.

[198] For example, injury to a passenger aboard a vessel might be pursued both at law and in admiralty in the same proceeding.

[199] 33 U.S.C § 2718(a) (1994).

[200] Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 164 (1919).

before they impermissibly interfere with the federal interest in uniformity.[201] This is especially true in the area of marine pollution, because it is difficult to see precisely how a state might produce any meaningful prevention or compensation legislation without affecting maritime conduct on the seaward side of the "twilight zone," that area of the navigable waters where both the states and federal government may have an interest in legislation.[202] Such legislation might run afoul of *Jensen* if it affects a traditional maritime right or remedy, even where it scrupulously avoids prescribing rules of conduct.[203] The problem with *Askew* is that it ultimately seems to decide nothing more than the particular Florida statute at issue in the case was not preempted because it was primarily concerned with compensating private parties for "shoreside injuries by ships on navigable waters":[204]

> [W]e cannot say with certainty at this stage that the Florida Act conflicts with any federal Act. We have only the question of whether the waiver of preemption by Congress . . . concerning "the imposition by a state of any requirement or liability" is valid.
>
> It is valid unless the rule of *Jensen* and *Knickerbocker Ice* is to engulf everything that Congress chose to call "admiralty," preempting state action. *Jensen* and *Knickerbocker Ice* have been confined to their facts, *viz.*, to suits relating to the relationship of vessels, plying the high

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[201] *See In re* Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 628, (1st Cir. 1994) ("Where substantive law is involved, we think that the Supreme Court's past decisions yield no single, comprehensive test as to where harmony is required and when uniformity must be maintained.").

[202] As is well known, until the 1948 passage of the Admiralty Extension Act, 46 U.S.C. § 740, (1994), claims for damage to land-based structures were not cognizable in admiralty, even when the injury was caused by a vessel. *See* Matthew P. Harrington, *After the Flood: Cleaning Up the Test for Admiralty Jurisdiction Over Tort*, 29 U.C. DAVIS L. REV. 1, 5-7 (1995) (discussing admiralty's traditional locus test for tort jurisdiction). The *Askew* Court refused, however, to find that the congressional extension of admiralty jurisdiction was exclusive and thus carried *Jensen*'s uniformity principle shoreward. *See* Askew v. American Waterways Operators, Inc. 411 U.S. 325, 340-44 (1973). The Court therefore recognized the continuing validity of the "twilight zone," that area wherein state regulation is permissible so long as it does not work material prejudice to an already-established federal maritime interest. Davis v. Department of Labor and Industries of Washington, 317 U.S. 249, 252, 256 (1943).

[203] *See* Maryland Department of Natural Resources v. Kellum, 51 F.3d 1220 (4th Cir. 1995) (holding state statute providing for strict liability damage to oyster beds in state waters to be preempted by federal admiralty rule requiring fault).

[204] Askew v. American Waterways Operators, Inc., 411 U.S. at 344.

seas and our navigable waters, and to their crews.[205]

The assertion that state legislation is permissible as long as it is limited to the shoreside effects of a ship-to-shore injury overlooks the reality that almost any maritime casualty, whether it be collision, grounding, or seaman's injury, has shoreside consequences.[206] This is especially true if the legislation in question seeks to impose strict liability for economic or intangible losses. For instance, it is unlikely federal courts would uphold a state statute imposing strict liability for economic losses arising from a collision occurring on navigable waters within a state. On the face of it, such legislation would seem to implicate purely local concerns; yet it would have the effect of abrogating important concepts of fault inherent in the maritime law of collision.[207] *Askew* is wrong to the extent it lends support to the proposition that state legislation over marine pollution is valid as long as it refrains from directly regulating maritime conduct.

Askew's holding is ultimately of little value when considering OPA's non-preemption clause. This is because the preemption clause at issue in *Askew* said nothing about state power to abrogate maritime rights and remedies.[208] State law claims under the WQIA were subject to limitation under the Limitation of Liability Act, in spite of the WQIA's non-preemption language. OPA goes much further than the preemption clause involved in *Askew*, how-

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[205] *Id.* at 343-344.

[206] *See In re* Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 629 (1st Cir. 1994) (noting that little would be left of the exclusive admiralty jurisdiction if some intangible shoreside effect was sufficient to allow state control).

[207] *See* The Pennsylvania, 86 U.S. (19 Wall.) 125 (1873) ("The liability for damages is upon the ship whose fault caused the injury."); *see also* The Clara, 102 U.S. 200 (1880) (finding that the fault for a collision lay with a vessel anchored without a watch on deck); The Sunnyside, 91 U.S. 208 (1875) (finding two vessels equally at fault); The Grace Girdler, 74 U.S. (7 Wall.) 196 (1868) (finding fault for unreasonable adherence to right-of-way rules); The Jumna, 149 F. 171 (2d Cir. 1906) (noting that in the absence of a demonstration of fault on the part of either vessel involved in a collision, it was to be presumed that both were acting lawfully).

[208] While federal claims for cleanup costs under the statutes at issue in *Askew* were not subject to limitation under the Limitation of Liability Act, state and private claims were. *Cf. In re* Lloyd's Leasing, Ltd., 764 F. Supp. 1114 (S.D. Tex. 1990) (holding that owners and charterers were not entitled to limitation for claims made by the federal government under the CWA); *In re* Hokkaido Fisheries Co., Ltd., 506 F. Supp. 631 (D. Alaska 1981) (holding that owners were not entitled to limitation for claims made by the federal government under the CWA); *In re* Harbor Towing, Corp., 335 F. Supp. 1150, (D. Md. 1971) (holding that claims made by Maryland under its own laws were subject to the Limitation of Liability statute).

ever, and provides that state legislation will not be affected by the Limitation of Liability Act.[209] It is at this point, therefore, that Congress seems to have exceeded its authority under the constitutional grant and delegated the power to make substantive admiralty law to the states.

III. OPA'S ASSAULT ON UNIFORMITY

The wisdom of the non-delegation principle is made manifest by the confusion created by OPA's failure to preempt state oil spill legislation. Indeed, the chaos created by the dizzying array of remedies and defenses applicable to post-OPA oil pollution incidents demonstrates the decision not to preempt state action was not only a poor policy choice, but is a perfect example of why the Supreme Court's decision in *Knickerbocker* was correct. Failing to preempt state action has given rise to a situation wherein the uniformity of maritime law is made but an illusion. The law applicable to an oil spill is now almost wholly dependent on the law of the state in which the spill occurs.

After OPA, there are now at least four types of remedies available to injured parties, each with a different statutory or legal basis. Each of these remedies is subject to different limitations on liability. In addition, several defenses remain available to the shipowner, each of which impacts the remedies differently. A shipowner faced with plaintiffs seeking these various remedies might rely on OPA's statutory limit on damages for the OPA claims, have varying defenses available under a state statute, and assert the Limitation of Liability Act against the admiralty and common law claims.

Moreover, as will be seen, the decision not to preempt has also created an entirely new procedural problem, namely the end of the concursus, or joinder of claims into a single proceeding. After OPA, it is unclear whether any mechanism now exists to consolidate claims in one forum so as to achieve an orderly and swift adjudication. In a very real sense, OPA has unnecessarily complicated the substantive and procedural aspects of oil pollution litigation.

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[209] 33 U.S.C. § 2718(a) (1994).

A. The Substantive Problem: Conflicting Remedies and Defenses

1. Sorting Out the Claims

After passage of OPA, a party injured by an oil spill will be entitled to assert claims (1) under the OPA, (2) under any applicable state statute (3) in admiralty, and (4) under the common law.

a. OPA Claims

OPA claims include actions for recovery of removal costs and damages. These must be brought within three years of the date of the spill.[210] Because the scope of covered damages is quite broad, OPA is seen by many as the primary avenue for the recovery for most oil pollution claims. As noted above, it permits injured parties to recover removal costs, property damage, economic loss, and natural resource damages.[211] At the same time, OPA's potential to provide full recovery is limited, at least when the spill is found to be not the result of recklessness, gross negligence, or the violation of a federal operating or safety standard.[212] In such a case, the OPA claims will be subject to the statutory limits. This means in some cases the responsible party's liability, although strict, could be limited to an amount far less than the actual removal costs and damages.[213] If a 1,000 GRT tank barge spills oil over a large area, its liability may be capped at $2 million, even though amounts far in excess of that were spent in cleanup.[214] The amount avail-

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[210] *See* 33 U.S.C. § 2702(b) (1994) (identifying covered injuries); *see also id.* § 2717(f) (creating three year limitation). This assumes that the responsible party has failed to pay after being presented with the claim, and that either the plaintiff has elected not to seek reimbursement from the OSLTF or that the OSLTF has refused to pay.

[211] 33 U.S.C. § 2702(b) (1994); *see also supra* text accompanying note 35.

[212] 33 U.S.C. § 2704(c) (1994); *see also supra* text accompanying notes 25-27.

[213] 33 U.S.C. § 2704(a)(1) (1994).

[214] For example, on January 19, 1996, the barge North Cape grounded off the coast of Rhode Island, spilling approximately 800,000 gallons of oil into Block Island Sound. The *North Cape* had an OPA statutory limitation of $10 million, yet the owners spent $5 million cleaning up the spill. The State of Rhode Island and the United States incurred approximately $3 million in cleanup costs. Owners paid private claimants approximately $3.1 million for property and economic damages, and $2 million was spent on environmental assessment. The full extent of environmental damages have yet to be assessed. Thus costs and damages resulting from the spill have already exceeded the statutory limitation, even before claims for environmental damage are presented. *See, e.g.*, Odin Marine Corp. Thor Towing Corp. & Eklof Marine Corp.'s Response to the Motions of the United States, the State of Rhode Island and Private Third Party Claimants, 96 Civ. 5438 (S.D.N.Y. Oct. 16, 1996).

able to satisfy public and private claims might actually be even lower, since the responsible party is permitted to offset any costs it incurs in cleaning up the spill against its statutory limit.[215] Hope of full compensation from the responsible party under OPA may, therefore, prove to be illusory in many cases. When claims are in excess of the statutory limitation, many plaintiffs may be left to seek compensation either from the OSLTF or in a legal proceeding grounded in some other remedy.

b. Claims Based on State Statute

Almost all the coastal states have enacted some sort of oil pollution legislation.[216] These statutes take a variety of forms, provide for various forms of liability and permit recovery for a variety of different claims. The nonuniformity in state pollution legislation is staggering. Many states have enacted oil pollution compensation statutes providing for strict and unlimited liability for discharges. Some of these statutes are far broader than OPA, in that they provide for a broader range of recoverable costs and damages.[217] Some states provide for unlimited liability, but with types of recoverable damage more limited than under OPA.[218] Others provide for liability limits and recoverable damages that are almost identical to those in OPA.[219] Finally, a few states have statutes that provide for neither strict nor unlimited liability, essentially leaving injured parties to use common law or admiralty remedies.[220]

This variety in state legislation not only subjects a vessel owner to differing liabilities depending on the location of the spill—a proposition that would seem to be at odds with the purposes of the

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[215] *See* 33 U.S.C. § 2704(a) (1995).

[216] *See supra* text accompanying note 54.

[217] *See, e.g.*, The Rhode Island Environmental Injury Compensation Act, R.I. GEN. LAWS § 46-12.5-6 (1996) (providing for strict and unlimited liability for discharges of oil in state waters). Recoverable damages include removal costs, damage to real and personal property, economic losses, natural resource damages, interest and attorney's fees. *See id.*

[218] *See* Massachusetts Oil and Hazardous Materials Prevention Act, MASS. GEN. LAWS ch. 21E, § 5 (West 1983) (providing for strict and unlimited liability but permitting recovery only for removal costs and damages to natural resources and real or personal property); *see also* N.J. STAT. ANN. § 58:10-23.11g (West 1996).

[219] *See* LA. REV. STAT. ANN. § 30:2025(E) (West 1996).

[220] *See, e.g.*, 35 PA. CONS. STAT. § 691.401 (1996) (a water pollution law, permitting the Commonwealth to maintain a nuisance action against a discharger, but providing no specific remedies to private parties).

admiralty grant—it permits different opportunities for recovery to claimants. Injured parties in states with more generous compensation statutes, such as Rhode Island, which provides for strict and unlimited liability for a wide range of damages,[221] may fare better than those in states such as Pennsylvania,[222] where a vessel owner's liability is more limited. Where damages exceed OPA's statutory limits, a vessel owner's liability and a plaintiff's ultimate right to recovery are wholly dependent on the fortuity of an accident occurring in a state with a generous compensation regime.

The interaction between OPA and claims based on state legislation is complicated by this patchwork regime. One need only imagine an incident involving a vessel with an OPA limit of $10 million and cleanup costs and damages in excess of that limit to see the effect. Assuming that neither the vessel nor the OSLTF have paid the claim, recovery of amounts in excess of the OPA limit will be entirely dependent on the state legislation in force. If the state imposes strict and unlimited liability for all costs and damages, a plaintiff might conceivably recover. However, a spill in a state with a less generous recovery regime might not result in recovery in excess of the OPA limits. The situation is even more complicated when one factors in the types of damages that might be at issue. Economic losses in excess of the OPA limit might be recoverable in some states with an unlimited liability regime, but not in others. Still other states might permit recovery for economic losses, but only up to a specified state limit.

It is clear, therefore, that OPA's promised recovery may not only be illusory in some cases, but it may open the claims resolution process to a great deal of confusion and uncertainty. After OPA, vessel owner liability and claimant recovery remain a function of an inconsistent statutory regime.

c. Admiralty Claims

OPA did not abrogate the right to recover in admiralty for oil pollution damages.[223] States and private individuals may, therefore, maintain an action in admiralty in rem[224] and *in per-*

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221. *See supra* text accompanying note 54.

222. *See supra* note 219 and accompanying text.

223. 33 U.S.C. § 2751(e) (1994) (savings provision).

224. *See* The Barnstable, 181 U.S. 464, 467 (1901). A number of early cases considered the question of whether admiralty could give any rights *in rem* or *in personam* for oil pollution damage. The issue was whether such damage could constitute an admiralty tort.

sonam[225] to recover when oil pollution damages or interferes with a property interest.[226]

There was also some question as to whether such torts could give rise to an *in rem* right. Because the existence of a maritime lien is the basis for any action *in rem*, one of the first questions was whether damage to property caused by oil spills could give rise to a lien. In *The Rock Island Bridge*, the Court held:

> There is no doubt . . . that the jurisdiction of the admiralty extends to all cases of tort committed on the high seas, and in this country on navigable waters. For the redress of these torts, the courts of admiralty may proceed *in personam*, and when the cause of the injury is the subject of a maritime lien, may also proceed *in rem*. The latter proceeding is the remedy afforded for the enforcement of liens of that character. A maritime lien, unlike a lien at common law, may, in many cases, exist without possession of the thing, upon which it is asserted, either actual or constructive. . . . [W]hen the lien arises from torts committed at sea, it travels with the thing, wherever that goes, and into whosoever hands it may pass. The only object of the proceeding *in rem*, is to make this right, where it exists, available—to carry it into effect. It subserves no other purpose.

73 U.S. 213, 215 (1867).

Courts quickly determined that oil pollution damage gives rise to tort liens in much the same way a lien would arise for injury to property by conversion. *See* California v. S.S. Bournemouth, 307 F. Supp. 922, 927 (C.D. Cal. 1969) (citing The Escanaba, 96 F. 252 (N.D. Ill. 1899)) (conversion by master of goods aboard vessel); The Atlanta, 82 F. Supp. 218 (S.D. Ga. 1948) (conversion of lighter by ship's crew); The Lydia, 1 F.2d 18 (2d Cir. 1924) (conversion of coal aboard vessel); The Minnetonka, 146 F. 509 (2d Cir. 1906) (theft of passenger's goods by crew); *see also In re* New Jersey Barging Corp., 144 F. Supp. 340, 341 (S.D.N.Y. 1956) ("On the evidence in this case there can be no question as to the negligence of the tankerman . . . and the immediate result was the oil spill. There is no issue, therefore, either in law or fact as to the *in rem* liability.").

[225] *See* Salaky v. Atlas Tank Processing Corp., 120 F. Supp. 225 (E.D.N.Y. 1953) (allowing a cause of action for damage to small boats fouled by oil sludge), *rev'd on other grounds sub nom.* Salaky v. The Atlas Barge No. 3, 208 F.2d 174 (2nd Cir. 1953).

[226] The only real question is the relative standing of public and private plaintiffs to sue. It seems clear at this point that both public and private entities may maintain actions in admiralty for damage to real or personal property. It is an altogether different question where parties seek to recover for injury suffered by the waters themselves. Public entities seem clearly to have a cause of action, grounded in their position as trustee of a public right. *See* Maryland v. Amerada Hess Corp., 350 F. Supp. 1060, 1067 (D. Md. 1972) ("[I]f the State is deemed to be the trustee of the waters, then, as trustee, the State must be empowered to bring suit to protect the corpus of the trust—i.e., the waters—for the beneficiaries of the trust—i.e., the public."); *see also* The Bournemouth, 307 F. Supp. 922 (C.D. Cal. 1968) (holding that the Admiralty Extension Act does not give the federal courts jurisdiction to hear a claim by a state for damage to the water itself). Private parties, on the other hand, lack standing to sue in admiralty unless they can make out some claim akin to private nuisance. This is because admiralty has been traditionally reluctant to recognize a cause of action for injury absent an ownership interest in the damaged property. *See* Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927). A private claim for injury to a public right might be successful if the claimant makes some special commercial use of the resource, as where fishermen sue for damage to their livelihoods caused by the destruction of fishing stocks. This exception is based on the tradi-

Damages recoverable in admiralty for oil pollution are similar to those available in other maritime tort actions. Property damage and cleanup costs are recoverable items of damage, but recovery for economic loss is severely limited by the *Robins Dry Dock* rule. This rule holds that a plaintiff in admiralty cannot recover damages for economic loss in the absence of some injury to person or property.[227] The rule, which is frequently criticized, operates as a limit on proximate causation, barring claims that might be considered too remote to have been foreseeable.[228]

It is clear, therefore, that admiralty recognizes a maritime cause of action in tort for damages caused by oil pollution,[229] and this is true whether the claim involves damage to property, either real or personal, or where the claimant seeks the costs of cleaning up a spill.[230] Nonetheless, it is also important to note that oil spills will frequently give rise to admiralty claims that do not involve damages from pollution. A grounding or collision undoubtedly will give rise to all manner of admiralty claims, which may sound in tort or contract. None of these ancillary claims are cognizable under OPA or any state oil pollution statute. Maritime casualties will create claims from cargo owners for lost cargo.[231] Vessels involved in a collision may have claims for damage.[232] Seamen, passengers, or other maritime workers will have personal injury claims.[233] Charterers might claim for breach of charter party.[234]

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tional protection of fishermen as "favorites of admiralty." Union Oil Co. v. Oppen, 501 F.2d 558, 567 (9th Cir. 1974).

227. *See Robins Dry Dock*, 275 U.S. 303 (1927) (holding that pure economic loss was not recoverable).

228. *See* Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 623 (1st Cir. 1994) (noting that the *Robins Dry Dock* rule applies to all types of "secondary" injury); *cf. In re* Cleveland Tankers, Inc., 791 F. Supp. 669 (E.D. Mich. 1992) (holding that the *Robins Dry Dock* rule is more appropriate than a rule of foreseeability in determining what sort of injuries give rise to liability).

229. *See Ballard Shipping*, 32 F.3d at 626 (holding that claims arising from pollution may sound in maritime tort or at common law); Oppen v. Aetna Ins. Co., 485 F.2d 252, 258 (9th Cir. 1973) (holding that claims for property damage sound in maritime tort); *In re* Lloyd's Leasing, Ltd., 764 F. Supp. 1114, 1141 (S.D. Tex. 1990) (holding that an oil spill resulting from negligent construction of a vessel gives rise to cause of action in maritime tort).

230. *See* Puerto Rico v. S.S. Zoe Colocotroni, 628 F.2d 652 (1st Cir. 1980) (allowing the Commonwealth of Puerto Rico to pursue a claim for loss of value of land).

231. *See In re* Lloyd's Leasing, Ltd., 764 F. Supp. 1114 (S.D. Tex. 1990).

232. *See* Maritrans Operating Partners v. M/V Balsa 37, 64 F.3d 150 (4th Cir. 1995) (describing claims resulting from a collision), *cert. denied*, 116 S. Ct. 775 (1996).

233. *See* Petition of Odin Marine Corp., No. 96-CV-5438 (S.D.N.Y. 1996).

234. *See In re* Lloyd's Leasing, Ltd., 764 F. Supp. at 1114.

Terminal operators will claim for damage from allision or grounding.[235]

Recovery for these injuries or breaches are not provided for either in OPA or state pollution statutes, and thus, claimants are required to maintain actions in admiralty. Claims in admiralty, however, are subject to admiralty defenses and procedures.[236] OPA's preemption of the Limitation of Liability Act was not absolute. It specifically left in place traditional admiralty rights and defenses, where damages unconnected with the pollution itself are concerned.[237] Thus the Limitation of Liability Act survives as a defense to admiralty claims, even though it does not apply to claims brought under OPA's damage provisions.[238] Moreover, it appears that the *Robins Dry Dock* rule may remain in force for the same reason.

d. Common Law Claims

Maritime plaintiffs have long enjoyed the right to bring a claim pursuant to common law in addition to any right of action they might have had in admiralty. This right was enshrined in the first Judiciary Act and has remained a fundamental principle of federal civil procedure ever since. OPA makes specific provision for common law actions by "saving to suitors in all cases all other remedies to which they are otherwise entitled."[239]

While courts were somewhat slow to recognize common law remedies for water pollution, at least three (and possibly four) theories would seem to be available: These include actions for trespass, nuisance, negligence, and strict liability.

While trespass has been recognized by the English courts as a cause of action to recover damages for oil pollution, few, if any, American courts have been faced with similar claims.[240] The primary obstacle to a successful trespass action is the requirement that the injured party show intent on the part of the wrongdoer.[241] Un-

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235. *See In re* Nautilus Motor Tanker Co., 900 F. Supp. 697 (D.N.J. 1995) (allowing a berth operator a claim for pure economic damages from a grounding and resulting oil spill).

236. *See infra* text accompanying notes 262-75.

237. *See* 33 U.S.C. § 2751(e) (1994).

238. *See id.* § 2702.

239. *Id.* § 2751(e)(2).

240. *See* Esso Petroleum Co. v. Southport Corp. [1955] App. Cas. 218 (H.L.) (holding lack of negligence to be a full defense in a trespass action resulting from oil damage to a shoreline).

241. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 13,

less the pollution is intentional, as in the case of a discharge of oily ballast, the chances of showing intent are small.[242]

A nuisance action might be maintained either by the state to abate a public nuisance or by a private citizen to recover damages for a particularized injury.[243]

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at 73-75 (5th ed. 1984).

[242] *See* Thomas R. Post, *A Solution to the Problem of Private Compensation in Oil Discharge Situations*, 28 U. MIAMI L. REV. 524, 527 (1974); Joseph C. Sweeney, *Oil Pollution of the Oceans*, 37 FORDHAM L. REV. 155, 170-71 (1968) (discussing the requirements for intent or negligence under the various formulations of the doctrine of trespass).

[243] A public nuisance action is based on the sovereign's power to act on behalf of the public and is akin to a strict liability action in tort. *See* Pennsylvania v. Barnes & Tucker Co., 353 A.2d 471 (Pa. Commw. Ct. 1976), *aff'd*, 371 A.2d 807 (Pa. 1977) (holding that it was unnecessary for the Commonwealth to demonstrate negligence on the part of a mine owner in order for it to be able to force the abatement of damage resulting from acid runoff). It seeks the abatement of a harmful condition and the restoration of the damaged area. *See* Maryland v. Amerada Hess Corp., 350 F. Supp. 1060, 1068-69 (D. Md. 1972) (holding that Maryland could not be awarded costs of such restoration because of the non-continuing nature of the spill made it not a nuisance). A private action to abate or recover damages for a private nuisance is more complicated, however. A plaintiff must assert that a particular property interest of his own has been damaged, *see In re* New Jersey Barging Corp, 168 F. Supp. 925 (S.D.N.Y. 1958) (allowing beach owners to make claims for property damage), or that a public right has been impaired, causing damage that is particular to him. *See* Burgess v. M/V Tomano, 370 F. Supp. 247, 250 (D. Me. 1973). Specifically, a plaintiff must show an interference in the enjoyment of his or her private property which "is substantial and unreasonable and such as would be offensive and inconvenient to the normal person. . . ." KEETON ET AL., *supra* note 241, § 87, at 620. Unlike a claimant in a public nuisance action, a claimant in private nuisance will be required to show negligence, foreseeability, unlawful conduct, or lack of due care. *See* Roady, *supra* note 10, at 370. One court has summed up the distinction this way: "[A] private nuisance is a civil wrong based on the disturbance of rights in land while a public nuisance is not dependent upon a disturbance of rights in land but upon an interference with the rights of the community at large." Venuto v. Owens-Corning Fiberglas Corp., 99 Cal. Rptr. 350, 355 (Cal. Ct. App. 1971).

Parties who have suffered damage to shoreside property are entitled to recover for the costs of cleanup, restoration, and even "for such annoyance, inconvenience and discomfort" that might be suffered. *See In re* New Jersey Barging Corp, 168 F. Supp. at 937 (allowing claims for bad smells, flies, etc.). In some unusual cases, moreover, recovery is available when the injury is to a public right or property interest. An example of the latter type of private nuisance claim is one brought by fishermen to recover lost income or wages; recovery is permitted because fishermen are said to have an established business making a commercial use of the public right with which the defendant interferes. *See* RESTATEMENT (SECOND) OF TORTS § 821C(1) (1977). A "private individual can recover in tort for invasion of a public right only if he has suffered damage particular to him—that is, damage different in kind, rather than simply in degree, from that sustained by the public generally." Burgess v. M/V Tamano, 370 F. Supp. 247, 250 (D. Me. 1973). In *Venuto v. Owens-Corning Fiberglas Corp*, the California Supreme Court held:

> Where the nuisance alleged is not also a private nuisance as to a private individual he does not have a cause of action on account of a public nuisance

An action in negligence is perhaps the most viable cause of action at common law for damages resulting from oil spills. In order to be successful, the plaintiff will be required to show the vessel owner has some duty with respect to the plaintiff and some act amounting to a breach of that duty resulted in damage to the plaintiff's interests. All the difficulties attendant with proof in claims for land-based torts are magnified in oil spill cases. This is primarily because of the rule that a vessel owner's duty of care is determined by resort to the principles of maritime law.[244]

Finally, one other theory that might support a common law claim for oil pollution is strict liability for ultra-hazardous activities. Admittedly this theory is as yet undeveloped, but at least one court has held that a motor carrier's transportation of large quantities of gasoline is an ultra-hazardous activity.[245] The rationale for the decision was that "[i]n many respects hauling gasoline as freight is no more unusual, but more dangerous, than collecting water. When gasoline is carried as cargo—as distinguished from fuel for the carrier vehicle—it takes on uniquely hazardous characteristics, as does water impounded in large quantities."[246]

> unless he alleges facts showing special injury to himself in person or property of a character different *in kind* from that suffered by the general public. Under this rule the requirement is that the plaintiff's damage be different in kind, rather than in degree, from that shared by the general public.

99 Cal. Rptr. at 355 (emphasis in original) (citations omitted). As a result, courts have been content to recognize the right of fishermen to recover in private nuisance for damage to the fishing stocks, while at the same time limiting the right of pleasure boat owners to recover simply because their rights to navigation have been impaired. The latter situation is not thought to involve a loss different in kind from that suffered by the public in general. *See* Oppen v. Aetna Ins. Co., 485 F.2d 252, 259-60 (9th Cir. 1973).

[244] In *Ballard Shipping Co. v. Beach Shellfish*, the First Circuit commented that:

> Whether a state claim is litigated in a federal court or a state forum, "the extent to which a state law may be used to remedy maritime injuries is constrained by the so-called 'reverse-*Erie*' doctrine, which requires that the substantive remedy afforded by the States conform to governing federal maritime standards."

32 F.3d 623, 626 (1st Cir 1994) (quoting Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 223 (1986)); *see also* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959) (holding that the duty of care owed a guest on a berthed vessel is determined by federal maritime law); Pope & Talbot v. Hawn, 346 U.S. 406 (1953) (holding that the liability rules governing injuries suffered by a carpenter at work on a berthed vessel are those of maritime law).

[245] *See* Siegler v. Kuhlman, 502 P.2d 1181, 1187 (Wash. 1972).

[246] *Id.* at 1184.

2. Applying the Defenses

After OPA, a vessel which discharges oil into navigable waters within a state is subject to a variety of differing obligations. As noted in the previous section, claimants might make out claims under OPA for removal costs and damages up to the statutory limit.[247] Amounts in excess of those recoverable under the federal statute might be recoverable under a state statute. But, because such statutes provide for differing levels of recovery, a vessel owner's liability will differ depending on the statute in force in a particular state.[248] Where both the federal and statutory regimes are inadequate, or where the claim is not cognizable under an oil pollution statute, a party might also make out a claim in admiralty or at common law for damages.[249]

While this scheme appears to provide a broad right of recovery, it also results in some confusion. OPA creates a complex array of liabilities that are met by an equally complex array of defenses. Moreover, even where the vessel lacks a complete defense, it may still limit its liability for damage in various ways, again depending on the cause of action being asserted. Keeping the claims, defenses, and limitations all straight requires the dexterity of a juggler.

a. Defenses to the Statutory Claims

OPA provides several defenses to liability. Under the federal statute, a responsible party may be relieved of liability where it can show that the spill was the result of an act of God, act of war, or the act or omission of a third party.[250] The limited nature of the third party defense,[251] along with the improbability that a party will be able to show that a spill was the result of an act of God or act of war, mean that there is very little possibility of escaping liability under OPA. Nonetheless, while liability may be strict, liability under OPA is not unlimited. A responsible party will still be able to take advantage of the limit on damages provided in the statute.[252]

State statutes also provide defenses to liability, and these are as

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247. *See supra* text accompanying notes 221-22.
248. *See supra* text accompanying notes 221-22.
249. *See supra* text accompanying notes 239-54.
250. *See* 33 U.S.C. § 2703 (1994).
251. *See supra* notes 31-33 and accompanying text.
252. *See supra* text accompanying note 54.

variable as the statutes themselves. Some provide almost no defenses, to the point of requiring a responsible party even to show that the spill was the result of an act of God which could not have been guarded against.[253] Others provide defenses for acts of God, acts of war, negligent or criminal acts of third parties, sabotage, and negligent acts on the part of governments.[254] Some states contain monetary caps on liability, while others impose unlimited liability.

With respect to statutory claims, therefore, different defenses to liability may be asserted, and different limits on liability are imposed. Statutory rights of action are wholly dependent on the location of the spill.

b. Defenses to Admiralty and Common Law Claims

In drafting OPA, Congress was intent on preventing the Limitation of Liability Act from being used to limit recovery, at least where statutory claims are at issue. OPA thus repeals the Limitation of Liability Act with respect to "any additional liability or requirement" imposed by the states.[255] Congress did not, however, undertake a repeal of the Limitation of Liability Act with respect to other claims. Thus, a vessel owner may assert a right to exoneration or limitation under the 1851 Act for claims not based on statute. At the same time, Congress made no provision for the repeal of the *Robins Drydock* rule, except to provide a federal statutory remedy for recovery of economic loss. As a result, both the Limitation of Liability Act and the *Robins Drydock* rule may be applicable to bar claims brought in admiralty or at law.

(i) The Limitation of Liability Act

The Shipowner's Limitation of Liability Act[256] was enacted in 1851, to encourage shipbuilding and the investment of money in the shipping industry.[257] The Act provides that "the liability of the owner of any vessel, whether American or foreign, . . . for any act, matter, or thing, loss or damage, or forfeiture, done, occa-

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253. *See* ALASKA STAT. §§ 46.03.758, .760 (Michie 1996).

254. *See* OR. REV. STAT. § 468B.305 (1995).

255. 33 U.S.C. § 2718(a) (1994).

256. Act of March 3, 1851, ch. 43, 9 Stat. 635 (1851) (codified at 46 U.S.C. §§ 181-89).

257. *See* Flink v. Paladini, 279 U.S. 59, 62 (1929).

sioned or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."[258] It creates a procedure whereby the vessel owner may petition the federal district court for limitation and deposit a sum equal to the value of the vessel and pending freight with the court for the satisfaction of all claims. All proceedings against the owners are stayed pending disposition of the limitation petition.[259] A single forum is then used to determine (1) whether the vessel and its owner are liable at all, (2) whether the owner may in fact limit its liability to the value of the vessel, (3) the amount of the claims, and (4) how the fund should be distributed.

Until the passage of OPA, the Limitation of Liability Act was routinely applied to claims for pollution damages.[260] After OPA, it remains a viable defense to any common law or admiralty claim. This is because OPA's non-preemption clause[261] is evidently intended only to exempt statutory actions for pollution damages. OPA's savings clause, provides that OPA does not affect the general maritime law, other than as is set forth in the preemption clause:

> 2751. Savings provision
>
> . . . .
>
> (e) Admiralty and maritime law.
> Except as otherwise provided in this Act, this Act

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[258] 46 U.S.C app. § 183(a) (1994). The term "owner" is defined broadly to include both those who hold legal title to the vessel as well as demise and bareboat charterers. It does not include time or voyage charterers, however. *See* 46 U.S.C app. § 186 (1994); *see also In re* Amoco Transp. Co., 1979 A.M.C. 1017 (N.D. Ill. 1979); *In re* Barracuda Tanker Corp., 281 F. Supp. 228 (S.D.N.Y. 1968) (holding that a time charterer is probably not an owner for the purposes of the Limitation of Liability Act).

[259] *See* 46 U.S.C. app. § 185 (1994). This means a calculation based on the value of the vessel at the end of the voyage. *See, e.g., In re* Barracuda Tanker Corp., 281 F. Supp. at 232 (finding the value of the vessel after the casualty to be equivalent to one $50 lifeboat).

[260] A number of decisions have held that the Limitation of Liability Act is also inapplicable to damages under other pollution statutes. *See In re* Lloyd's Leasing, Ltd., 764 F. Supp. 1114 (S.D. Tex. 1990) (holding that a shipowner is not entitled to limitation of CWA claims made by the U.S. government); *In re* The Glacier Bay, 741 F. Supp. 800 (D. Alaska 1990) (holding that the Limitation of Liability Act is repealed as to Trans-Alaska pipeline oil by TAPAA), *aff'd*, 944 F.2d 577 (9th Cir. 1991).

[261] *See* 33 U.S.C. § 2718(a).

> does not affect—
> (1) admiralty and maritime law; or
> (2) the jurisdiction of the district courts of the United States with respect to civil actions under admiralty and maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.[262]

The Limitation of Liability Act survives to the same extent that admiralty and common law claims survive OPA, because limitation is a right and a defense granted by the maritime law. The savings clause, when read in conjunction with the preemption clause, reveals that OPA was not intended to abrogate the Limitation of Liability Act except with respect to the liability of a responsible party for claims asserted under OPA or a state statute. Nothing else in OPA indicates a congressional intent to effect a total repeal of the right to limitation.[263]

It is true that OPA contains a number of prohibitions on the use of the Limitation of Liability Act. It prevents limitation as to claims by the United States, and it also prohibits a responsible party from relying on the Limitation of Liability Act as a defense to actions under OPA itself, regardless of the person or entity bringing the claim.[264] OPA also abrogates the Limitation of Liability Act's provisions in cases wherein states have imposed additional or unlimited liability.[265] OPA's repeal of the Limitation of

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[262] 33 U.S.C. § 2751(e) (1994).

[263] *See* William M. Duncan, *The Oil Pollution Act of 1990's Effect on the Shipowners' Limitation of Liability Act*, 5 U.S.F. MAR. L.J. 303, 314 (1993):

> [I]t would be nonsensical for Congress to selectively repeal the Limitation of Liability Act in various provisions if it intended to repeal the Act in its entirety. Furthermore, there is no indication in OPA itself, or its legislative history, to suggest that Congress intended to wholly repeal the Limitation of Liability Act.

[264] OPA provides that "[n]otwithstanding any other provision or rule of law . . . each responsible party . . . is liable for . . . the removal costs and damages . . . that result from such incident." 33 U.S.C. § 2702(a). This interpretation is supported by the language of the legislative history: "Liability under [OPA] is established notwithstanding any other provision or rule of the law. This means that the liability provisions of this Act would govern compensation for removal costs and damages notwithstanding any limitation under existing statutes such as the Act of March 3, 1851 [The Limitation of Liability Act]. . . ." H.R. CONF. REP. NO. 101-63, at 103 (1990), *reprinted in* U.S.C.C.A.N. 779, 781.

[265] 33 U.S.C. § 2718(c) (1994) provides:

> Nothing in this chapter, the Act of March 3, 1851 [The Limitation of Liability

Liability Act is not complete, however. OPA does not affect the right of a responsible party to limit liability where the claim is brought under the general maritime law.[266] Thus, where a claim is brought under a maritime tort theory, a vessel owner should be able to raise the Limitation of Liability Act as a defense. Such cases are most likely to arise in situations where a state has not enacted an unlimited liability statute.[267]

(ii) *Robins Drydock* and Limits on Economic Loss

Admiralty has traditionally prevented plaintiffs from asserting a right to recovery for purely economic losses in the absence of any damage to person or a property interest.[268] This rule, first announced in *Robins Dry Dock & Repair Co. v. Flint*,[269] functions as a rule of proximate cause, foreclosing recovery for damages remote from the incident giving rise to the tort.[270] The *Robins Dry Dock* rule has been used to severely limit claims for purely economic loss on a number of occasions. It has been invoked to prevent seafood restaurants and bait shops from recovering lost profits after a chemical spill closed off fishing grounds in the Mississippi River Gulf outlet.[271] It has also been used to prevent recovery of damages incurred by ships unable to unload cargo because shipping lanes were closed by an oil spill[272] or colli-

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Act] . . . shall in any way affect, or be construed to affect, the authority of the United States or any State . . .

(1) to impose additional liability or additional requirements; or

(2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law. . . .

See also id. § 2718(a) (OPA's non-preemption clause).

266. *See id.* § 2751(e) (OPA's admiralty and maritime law savings provision).

267. *See* Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623 (1st Cir. 1994) (holding that exoneration was available to defeat shellfish dealers' claims for purely economic loss); *In re* Lloyd's Leasing, Ltd., 764 F. Supp. 1114, 1141-42 (S.D. Tex. 1991) (holding that shipowners' lack of knowledge of the unseaworthy condition of a vessel entitled them to limitation); *In re* Harbor Towing Corp., 335 F. Supp. 1150, (D. Md. 1971) (holding that because the owner was not in privity, a challenge to a limitation must fail although tug and barge were negligent in discharging oil into Baltimore harbor).

268. *See* Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 308-309 (1927).

269. *Id.*

270. *See* Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1032 (5th Cir. 1985) ("Denying recovery for pure economic losses is a pragmatic limitation on the doctrine of foreseeability, a limitation we find to be both workable and useful.").

271. *See id.* at 1021. Claims of fishermen were to allowed to proceed, as they enjoy a special status in admiralty. *See id.* at 1027.

272. *See* Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 50, 56-57 (1st Cir. 1985).

sion.[273] Although the rule is admittedly arbitrary in nature, it is motivated by a desire to prevent unbounded or unlimited exposure, and thus to decrease the likelihood that socially beneficial activity will be impeded by unlimited liability. The concern is that "liability for pure financial harm, insofar as it is proved vast, cumulative and inherently unknowable in amount, could create incentives that are perverse."[274]

The *Robins Dry Dock* rule is thus likely to be applied in any admiralty action arising in conjunction with OPA. This is so because OPA arguably only repeals *Robins* as to OPA claims and as to claims brought pursuant to state statutes.[275] OPA does not address *Robins Dry Dock* as it affects common law claims or claims brought in admiralty because, by its own terms, OPA does not affect admiralty and maritime law.[276]

B. The Procedural Problem: Concursus or No?

The difficulties for uniformity created by OPA's preemption clause are magnified when one considers the problem of the traditional right to a "concursus" of claims in an admiralty limitation proceeding. In abrogating the Limitation of Liability Act—whether

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[273] *See In re* Kinsman Transit Co., 388 F.2d 821 (2d Cir. 1968).

[274] Barber Lines A/S v. M/V Donau Maru, 764 F.2d at 55.

[275] *See* 33 U.S.C. § 2702(b)(2)(E); *cf.* Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 630-31 (finding that the passage of OPA tips balance in favor of non-preemption of the Rhode Island statute allowing recovery for pure economic damages). *But cf. In re* Cleveland Tankers, Inc., 791 F. Supp. 669, 678-679 (E.D. Mich. 1992) (holding that claims for pure economic loss are not made cognizable by § 2702(b)(2)(E)). For more information on this issue, see McCurdy, *supra* note 62, at 444.

[276] 33 U.S.C. § 2751(e) (1994) (OPA's savings provision). This seems to be the case notwithstanding several decisions in the Ninth Circuit, which had held that *Robins* was effectively repealed by the Trans-Alaska Pipeline Authorization Act with respect to spills coming within its provisions. In *Slavin v. BP America, Inc.*, 786 F. Supp. 853 (C.D. Cal. 1992), a federal district court in California held that TAPAA repealed *Robins* both with respect to claims for damage caused by Trans-Alaska pipeline oil brought under TAPAA's provisions and with respect to claims under common law. *See also In re* Exxon Valdez, 767 F. Supp. 1509, 1514 (D. Alaska 1991) (holding that *Robins* limits claims for amounts above TAPAA's liability cap); *In re* The Glacier Bay, 746 F. Supp. 1379 (D. Alaska 1990) (holding that "the plain language and purpose" of the TAPAA repealed *Robins*), *aff'd*, 944 F.2d 577 (9th Cir. 1991). The basis of these decisions was TAPAA's use of the phrase "[n]otwithstanding the provisions of any other law. . . ." in 43 U.S.C. § 1653(c)(1). It was held that this phrase indicated an intent to end the applicability of *Robins* and the Limitation of Liability Act to Trans-Alaska Pipeline incidents. *Compare In re* The Glacier Bay, 944 F.2d 577, 581 (9th Cir. 1991) (upholding lower court, but basing decision on "implicit repeal" of the Limitation of Liability Act by TAPAA, rather than "notwithstanding" language) *with* the cases just cited.

completely or partially—Congress neglected to provide a means by which all claims from an oil spill could be resolved in a single forum. Uniformity of the maritime law is, thus, impaired because some claims may be subject to the concursus, while others may not. This increases the possibility a vessel owner will be subject to inconsistent judgments.

1. The Benefits of a Single Forum

Notwithstanding the criticism directed at its substantive provisions,[277] the Limitation of Liability Act has long been relied upon to provide a single forum in which to adjudicate all claims arising from a maritime casualty. Limitation involves a special proceeding, which is initiated by the petitioner and controlled by the Limitation of Liability Act itself and Rule F of the Supplemental Admiralty Rules.[278] Proceedings in limitation are, at least in form, defensive

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[277] The City of Norwich, 118 U.S. 486 (1886) (Matthews, J., in a dissent appearing after the opinion of the Court in The Great Western) (stating that the statute as it has been construed puts a "premium on ... destruction [of property] by taking away from the shipowners a principal motive for regarding either their own or the interests of others").

[278] The limitation petition is filed in admiralty in the district court. *See* FED. R. CIV. P., SUPP. R. FOR ADMIRALTY AND CERTAIN MARITIME CLAIMS, F(9). Venue is proper in any district where the vessel has been attached or arrested or, if there is no attachment or arrest, in any district where the owner has been sued. *See id.* If no suit is yet pending, a petition may be filed in any district where the vessel is present. *See In re* Connecticut Nat'l Bank v. Omni Corp., 687 F. Supp. 111 (S.D.N.Y. 1988) (holding that suit was proper in New York even though the accident occurred in Hawaii). If the vessel is not present in any district (either because it is lost, or in a foreign port), a complaint for limitation is proper in any district. *See In re* Bowoon Sangsa Co. v. Micronesia Indem. Corp., 720 F.2d 595 (9th Cir. 1983) (holding that suit was proper in the District of Guam when the vessel was located in Korea and no suits were pending in the U.S. proper).

A petition for limitation must be filed within six months after the owner has received notice of a claim. *See* 46 U.S.C. app. § 185 (1994). Notice of a claim is usually by service of suit papers, but it may also be asserted by a simple letter. *See In re* Allen N. Spooner & Sons, 148 F. Supp. 181 (S.D.N.Y. 1956), *aff'd*, 253 F.2d 584 (2d Cir. 1958); *see also In re* Okeanos Ocean Research Found., Inc., 704 F. Supp. 412 (S.D.N.Y. 1989) (holding that written notice need not be in any particular form). If a vessel owner receives notice of a claim that by itself does not exceed the value of a vessel, but is aware of other claims that will cause the value to be exceeded, the six month period begins to run with notice of the first claim. *See* Hebert v. Exxon Corp., 674 F. Supp. 1234 (E.D. La. 1987); *see also In re* Big Deal, Inc., 765 F. Supp. 227 (D. Md. 1991). This time bar is absolute as to the federal cause of action and cannot be extended by including the defense of limitation in an answer to a complaint. *See In re* Bayview Charter Boats, Inc., 692 F. Supp. 1480 (E.D.N.Y. 1989). Limitation will be dismissed as to all claimants if it is filed too late with respect to the first claimant. *See In re* United States Lines, 616 F. Supp. 315 (S.D.N.Y. 1985). Limitation may, however, be a viable defense to an action brought in state court regardless of the six month time limit. *See* Langnes v. Greene, 282 U.S. 531 (1931).

in nature and are initiated in response to the threat of claims. The filing of a limitation petition results in a concursus of claims in a single forum. The concursus is designed to bring about the most effective resolution of a multiplicity of claims. By bringing all claims into a single forum, claimants obtain a just and speedy resolution of their claims, and vessel owners are protected against inconsistent judgments.[279]

2. Obtaining a Concursus of Claims After OPA

A number of courts and commentators contend that OPA has effected a comprehensive repeal of the Limitation of Liability Act.[280] As a result, the reasoning goes, there is no basis for per-

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Upon the filing of a petition, a vessel owner will be required to post a bond as security "for the benefit of claimants" in an amount "equal to the amount or value of the owners' interest in the vessel and pending freight." FED. R. CIV. P., SUPP. R. FOR ADMIRALTY AND CERTAIN MARITIME CLAIMS, F(1). The court will then issue an injunction staying all proceedings against the owner in connection with the incident in question. *See* FED. R. CIV. P., SUPP. R. FOR ADMIRALTY AND CERTAIN MARITIME CLAIMS, F(3); *In re* Paradise Holdings, 619 F. Supp. 21 (D. Haw. 1984), *aff'd*, 795 F.2d 756, (9th Cir. 1986). The court will also establish a monition period during which all claimants must file their respective claims. Claims not filed during this period are subject to default. The court does have discretion, however, to set both the initial monition period and to admit late-filed claims to the concursus. *See* FED. R. CIV. P., SUPP. R. FOR ADMIRALTY AND CERTAIN MARITIME CLAIMS, F(4)-(6); American Commercial Lines, Inc. v. United States, 746 F.2d 1351 (8th Cir. 1984), *vacated in part on other grounds*, 781 F.2d 114 (8th Cir. 1985); *In re* Sause Bros. Ocean Towing, 1992 A.M.C. 1869 (D. Or. 1992). All claims are then disposed of in a single proceeding. A claimant may be permitted to continue suit in state court in certain limited situations. *See* Lake Tankers Corp. v. Henn, 354 U.S. 147 (1957) (allowing suit to proceed in state court when the claim was not in admiralty, when it was undisputed that the value of the value of the vessel was greater than the value of the claims).

[279] The Supreme Court has stated:

> In promulgating the rules . . . this Court expressed its deliberate judgment as to the proper mode of proceeding on the part of shipowners for the purpose of having their rights under the act declared and settled by the definitive decree of a competent court, which should be binding on all parties interested, and protect the ship owners [sic] from being harassed by litigation in other tribunals. . . . The questions to be settled by the statutory proceedings being, first, whether the ship or its owners are liable at all . . . and, secondly, if liable, whether the owners are entitled to a limitation of liability, must necessarily be decided by the district court having jurisdiction of the case; and, to render its decision conclusive, it must have entire control of the subject to the exclusion of other courts and jurisdictions. If another court may investigate the same questions at the same time, it may come to a conclusion contrary to that of the district court; and if it does . . . the proceedings in the district court will be thwarted and rendered ineffective to secure the ship owners [sic] the benefit of the statute.

Providence & New York S.S. Co. v. Hill Mfg. Co., 109 U.S. 578, 594-95 (1883).

[280] *See, e.g.*, *In re* Jahre Spray II K/S, 1997 A.M.C. 845 (D.N.J. 1996) (holding that

mitting a concursus of claims. This is the case even where there are non-OPA admiralty claims resulting from an oil spill.[281] The effect of such a holding, however, is the very real potential for multiple, inconsistent judgments being rendered in connection with a single casualty.

Courts faced with this question in recent years have almost uniformly held that OPA does not require that all claims be joined in a single proceeding. The result has been that parties with claims arising from a spill are entitled to bring actions in different forums at different times. In *In re Jahre Spray II K/S*, a federal district court in New Jersey recently dismissed a vessel owner's petition for limitation and lifted its injunction against prosecuting pollution claims in other courts.[282] The court also claimed that it lacked the authority not only to enjoin suits brought under OPA, but to consider any claims brought under federal, state, or common laws that were related to the spill.[283] At the same time, claims for non-pollution damages, which included a claim for damage to a dock and a claim for breach of charter party, were held to be subject to a concursus.[284]

The basis of the court's holding was that OPA was intended to encompass all claims resulting from an oil spill. In the court's view, this meant that the Limitation of Liability Act is inapplicable to any claim for oil pollution damage, regardless of the underlying legal basis of the claim. This view requires an overly broad reading of OPA's preemption clause, since that clause seems to apply only to statutory claims.[285] Under the FWPCA, the Limitation of Liability Act had served as a barrier to state statutory liability.[286]

OPA repeals the Limitation of Liability Act with respect to claims arising from oil spills).

[281] *See id.*

[282] *See id.*

[283] *See id.*

[284] *See id.* The limitation plaintiffs requested dismissal of the petition rather than continuation with only two minor claims. *See id.*

[285] *See* 33 U.S.C. § 2718(a) (1994).

[286] *See* Steuart Transp. Co v. Allied Towing Corp., 596 F.2d. 609 (4th Cir. 1979) (limiting a barge owner's liability for costs of federal cleanup of an oil spill under the FWPCA to twenty-five percent of the cost where there was no willful negligence on the owner's part); *In re* Allied Towing Corp., 478 F. Supp. 398 (E.D. Va. 1979) (limiting liability for oil spill cleanup costs under the FWPCA to costs incurred by the federal government, and excluding costs incurred by the state government); *In re* Oswego Barge Corp., 439 F. Supp. 312 (E.D.N.Y. 1977) (applying the Limitation of Liability Act to a New York statute imposing strict liability); *In re* Harbor Towing Corp., 335 F. Supp. 1150 (D. Md. 1971) (holding that the Limitation of Liability Act applied to an action under a Maryland statute which gave the state a cause of action for the costs of oil spill

Congress, therefore, clearly sought to eliminate that barrier, but there is nothing in the legislative history to demonstrate any intent to abrogate the Limitation of Liability Act with respect to all causes of action. On the contrary, the fact that Congress later sought to preserve traditional admiralty rights in the Savings Clause indicates that it envisioned a partial repeal.[287] Moreover, if, as the court says, OPA truly was intended to encompass all claims resulting from an oil spill, it is hard to see how permitting a concursus of the admiralty claims while rejecting consolidation of pollution damage claims would encourage the rapid and equitable resolution of claims.[288]

If OPA does, in fact, repeal the Limitation of Liability Act, it must also withdraw the procedural right to a concursus of claims as well. The result seems to be, then, that oil spill cases will soon degenerate into a free-for-all, a race to the courthouse, in which multiple claimants will be able to maintain multiple suits against the vessel owner for the same accident. Shipowners will, therefore, be required to defend different actions in different fora, all the while facing the threat of inconsistent judgments.

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cleanup expenses).

[287] *See* 33 U.S.C. § 2751(e) (1994).

[288] One means of getting around the problem is through a very liberal reading of Rule F of the Supplemental Admiralty Rules. This Rule provides that any vessel owner may file a petition for limitation where the right to limitation is given pursuant to statute. FED. R. CIV. P., SUPP. RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS, F(1). The failure of the rule to confine the right to limitation explicitly to proceedings under the Limitation of Liability Act may mean that a vessel owner is permitted to obtain a concursus because OPA does provide a kind of right to limitation, albeit not one confined to the value of the vessel and her freight then pending. *See* 33 U.S.C. § 2704 (1994); 46 U.S.C. app. § 183(a) (1994) ("The liability of the owner . . . shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.").

Adopting such a solution would require taking the position that the Federal Rules of Civil Procedure in themselves confer substantive rights—a concept at odds with the provisions of the Rules Enabling Act—unless the concursus is regarded as a *procedural* right applicable to any federal statute which gives a right to limitation. *See* 28 U.S.C. § 2072(b) (1994) ("Such rules shall not abridge, enlarge, or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."). Such an interpretation would seem to assume that Congress intended to expand the procedural right beyond cases arising under the Limitation of Liability Act. There is very little support in the record for this assumption, however.

IV. CONCLUSION

It is commonly thought that oil spill legislation prior to OPA had two great failings. The first was that none of the legislation provided adequate limits of liability. The second centered on the lack of any statutory remedy available to states or private parties. In many respects, OPA corrected these deficiencies and achieved the goals of real legislative reform. OPA expanded the remedies for oil pollution both by increasing the classes of parties entitled to seek a remedy and by broadening the types of damages that might be recoverable. OPA also attempted a delicate balance, permitting expanded recovery while at the same time avoiding the possibility that responsible vessel operators would be driven out of the market by potentially crushing liability.

Yet, in drafting OPA's non-preemption clause, Congress appears to have been working at cross purposes with itself. Having settled upon a scheme to impose strict, but limited, liability, Congress then undercut the uniformity of the oil pollution regime by permitting the states to impose additional liabilities. It further exacerbated the problem by abrogating the Limitation of Liability Act with respect to those liabilities. The result is an oil pollution statute that is neither comprehensive nor uniform, and quite probably unconstitutional.

Allowing states to supplement the limited liability regime created by OPA works material prejudice to the essential harmony of the federal oil pollution regime. The problem is not that Congress chose to abrogate the Limitation of Liability Act. There seems little doubt that Congress could have done so and still preserved the constitutional requirement of uniformity. Rather, the problem is that having expressed a preference for a regime that imposes strict liability but limits recoverable damages,[289] Congress cannot be permitted to upset that balance by permitting states to enact non-uniform legislation. The result is that vessel owners are now subject to inconsistent statutory liabilities, liability in excess of that provided for in *Robins Dry Dock*, and the possibility of a multiplicity of suits with the threat of inconsistent judgments.

It is important to bear in mind that the issue is not one of preemption. None of the problems discussed above result from a

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[289] *Cf.* United States v. Dixie Carriers, Inc., 627 F.2d 736, 739 (5th Cir. 1980) (discussing Congressional intent in creating a similar liability scheme under the FWPCA).

conflict between state and federal law. Rather, they result from the fact that Congress has unconstitutionally chosen to *delegate* its exclusive power to legislate over maritime affairs. One commentator ably summed up the problem, arguing that "[t]he Framers intended that the Courts and Congress would work together in preserving the intended uniformity of the national maritime law, leaving the states the power to develop those legal areas that did not directly impinge on the national interest."[290] In abdicating its responsibility to provide a uniform national admiralty policy, Congress has created a confusing and contradictory statutory regime. Because it does not preempt supplemental state legislation, OPA is truly a "missed opportunity" to make some good of the "emotional reaction to the *Exxon Valdez* disaster."[291] It is a decision which the courts would do well to reject.

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290. Bederman, *supra* note 190, at 35.

291. Swanson, *supra* note 127, at 407.