

**ROSCOE HOGAN ENVIRONMENTAL LAW ESSAY CONTEST
WINNER**

**THE GULF OIL SPILL: OPA, STATE LAW, AND MARITIME
PREEMPTION**

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INTRODUCTION

On the night of April 20, 2010, an explosion rocked the Deepwater Horizon, an oil drilling rig in the Gulf of Mexico.¹ Within ten days, an oil

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spill had spread across almost 4,000 square miles of ocean.² The massive release of oil from the Macondo reservoir continued unabated for eighty-six days until the well was capped on July 15, 2010.³

The Deepwater Horizon spill is the largest accidental oil spill in history.⁴ Estimates indicate that the amount of oil released may be nearly five million barrels, or about 205 million gallons.⁵ In comparison, the Exxon Valdez spilled only 11 million gallons.⁶ Oil made landfall in all five of the Gulf Coast states: Louisiana, Mississippi, Alabama, Florida, and Texas.⁷

Communities dependent on marine harvesting and tourism have been devastated. Huge portions of the Gulf were closed to fishing by the federal government.⁸ The environmental harm is catastrophic; thousands of species were threatened and the whole ecosystem has suffered a devastating blow.⁹ The true extent of the ecological damage remains relatively uncertain.¹⁰

The legal implications of the oil spill are also vast. The Department of Justice has filed suit against BP and eight other companies, and criminal

1. Campbell Robertson, *Search Continues After Oil Rig Blast*, N.Y. TIMES, April 21, 2010, <http://www.nytimes.com/2010/04/22/us/22rig.html?scp=1&sq=Search%20Continues%20After%20Oil%20Rig%20Blast&st=cse>.

2. Leslie Kaufman & Campbell Robertson, *Oil Spill Threatens Fragile La. Marshes*, N.Y. TIMES, May 2, 2010, www.boston.com/news/science/articles/2010/05/02/oil_spill_threatens_fragile_la_marshes/.

3. *See Gulf of Mexico Oil Spill (2010)*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/o/oil_spills/gulf_of_mexico_2010/index.html?scp=1-spot&sq=bp%20oil%20spill&st=cse (last updated Oct. 17, 2011) (summarizing the spill and its aftermath).

4. *Id.*

5. Henry Fountain, *U.S. Says BP Well is Finally 'Dead'*, N.Y. TIMES, Sept. 19, 2010, <http://www.nytimes.com/2010/09/20/us/20well.html>.

6. *In re Exxon Valdez*, 270 F.3d 1215, 1223 (9th Cir. 2001). Just over three million barrels of oil were spilled into the Bay of Campeche by the Mexican rig Ixtoc I in 1979. *Gulf of Mexico Oil Spill (2010)*, *supra* note 3.

7. *Gulf of Mexico Oil Spill (2010)*, *supra* note 3.

8. CNN Wire Staff, *Feds Close More Gulf Waters to Fishing Due to Oil Spill*, CNN (May 31, 2010), http://articles.cnn.com/2010-05-31/us/oil.spill.fisheries_1_oil-spill-fishing-coasts?_s=PM:US.

9. David Biello, *The BP Spill's Growing Toll on the Sea Life of the Gulf*, YALE ENVIRONMENT 360 (June 9, 2010), <http://e360.yale.edu/content/feature.msp?id=2284>.

10. *See* Leslie Kaufman & Shaila Dewan, *Gulf May Avoid Direst Predictions After Oil Spill*, N.Y. TIMES, Sept. 13, 2010, <http://www.nytimes.com/2010/09/14/science/earth/14spill.html?scp=1&sq=Gulf%20May%20Avoid%20Direst%20Predictions%20After%20Oil%20Spill&st=cse> (reviewing threats to wildlife and noting "scientists caution that much remains unknown" in regards to oil that remains on the sea floor and in underwater plumes).

investigations are ongoing.¹¹ Wrongful death suits are being filed on behalf of the eleven men who were killed during the explosion and its aftermath.¹² State and local governments affected by the disaster have also initiated suits.¹³ Even securities, racketeering, and animal cruelty litigation has begun.¹⁴

Over three hundred law suits have already been consolidated under Federal Judge Carl Barbier in New Orleans.¹⁵ Similar to the Exxon Valdez case,¹⁶ the multi-district litigation will be bifurcated.¹⁷ An initial trial to determine fault and assign percentages of liability to defendants was scheduled to begin February 27, 2012.¹⁸ Damage trials are unlikely to be held until 2013.¹⁹ If history is a good marker, appellate litigation could potentially last decades.²⁰

This research paper focuses on the bulk of the claimants and potential civil liability. This group includes those affected economically by the spill, such as shrimpers, fisherman, seafood dealers, restaurants, hotel owners, other business owners, and individuals who assert claims.

11. John Schwartz, *U.S. Sues Companies for Spill Damages*, N.Y. TIMES, Dec. 15, 2010, www.nytimes.com/2010/12/16/us/16suit.html?scp=4&sq=gulf%20oil%20spill,%20doj,%20criminal%20&st=cse (alleging violations of federal safety regulations).

12. Tresa Baldas, *Third Wrongful-Death Suit Filed Over Oil Rig's Lost Workers*, NAT'L L. J., (May 04, 2010), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202457668697&src=EMC-Email&et=editorial&bu=National%20Law%20Journal&pt=NLJ.com-%20Daily%20Headlines&cn=20100505NLJ&kw=Third%20wrongful-death%20suit%20filed%20over%20oil%20rig%27s%20lost%20workers&hbxlogin=1>.

13. Amanda Bronstad, *Plaintiffs Lawyers Say Oil Spill Fund Unlikely to Deter Litigation*, AM. LAWYER MAG. (Aug. 30, 2010), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202471227241>.

14. Ashby Jones, *Big Gulf Spill Litigation Gets Sent to the Big Easy*, WALL ST. J. LAW BLOG (Aug. 10, 2010, 2:14 PM), <http://blogs.wsj.com/law/2010/08/10/big-gulf-spill-litigation-gets-sent-to-the-big-easy/>; Anna S. Persky, *Animal Protection Attorneys Are Pushing the Law to Treat Animals More Like Humans*, A.B.A. J. (Sept. 17, 2010), http://www.abajournal.com/news/article/animal_protection_attorneys_are_pushing_the_law_to_treat_animals_more_like_humans/.

15. Dionne Searcey, *Judge in New Orleans to Hear Oil-Spill Cases*, WALL ST. J. LAW (Aug. 11, 2010), http://online.wsj.com/article/SB10001424052748704164904575421483433277348.html?mod=WSJ_hps_MIDDLEForthNews. The multi-district litigation has been consolidated in the Eastern District of Louisiana. *Id.*

16. *See In re Exxon Valdez*, 270 F.3d 1215, 1225 (9th Cir. 2001) (chronicling four phases of trial and post-trial litigation).

17. *Judge Postpones Trial in Gulf Oil Spill Cases*, BUSINESS WEEK (Oct. 7, 2010), <http://www.businessweek.com/ap/financialnews/D9IMRH7O0.htm>.

18. *Id.*

19. *Id.*

20. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 476 (2008) (noting spill occurred in 1989).

Part I, the Background, first outlines the potential claims available to these plaintiffs. Part I.A examines federal claims under the Oil Pollution Act of 1990 (OPA) and explains the OPA savings clauses. The research also explores federal maritime claims and an array of statutory and common law claims arising under state law. Part I.B discusses preemption, displacement, maritime preemption, and related caselaw.

In the Analysis, Part II.A determines that OPA preserves state law, in accord with most authorities on the subject. Part II.B demonstrates that OPA clearly does not displace general maritime law, contrary to two district court decisions premised on faulty reasoning. An issue, which has not been addressed by courts or academics, is whether maritime law might preempt state law independently from OPA. Part II.C argues that OPA's savings clause is limited to statutory preemption analysis and does not affect maritime preemption.

The maritime preemption standard created by the Supreme Court in *Southern Pacific Co. v. Jensen* is rooted in the Admiralty Clause of the Constitution and developed over the years to promote the federal interest in maritime uniformity.²¹ The doctrine has not been applied clearly in the past. As one federal judge stated: “[d]iscerning the law in this area is far from easy; one might tack a sailboat into a fog bank with more confidence.”²² Nevertheless, this essay seeks to illuminate a path through the murky doctrine towards a fair and efficient outcome.

After applying the standard to the unique facts and legal dilemma of the Gulf spill, this essay concludes that preemption of state law is warranted because the federal interest overwhelms state interests in the balancing test developed under *Jensen's* third prong. The spill originated in federal waters. It resulted from an activity heavily regulated by federal law and agencies. Its affects were not confined to a single state but were spread across an entire region. There is also a federal interest in the uniform recovery for citizens in Gulf states. The state interests are minimal because the rights and remedies available under state law are generally duplicative of the federal scheme provided by OPA and maritime negligence. However, maritime courts may use their inherent rule-making power to incorporate aspects of state law into the litigation to alleviate the harshness of preemption and pay respect to the historic police power of states. This dual analysis balances the state's historic police power and the federal interest in uniformity in

21. See *infra* Part I.B.2.

22. *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 624 (1st Cir. 1994).

maritime law. Its application creates results that are fair to the litigants and efficient for federal courts.

During the process of publishing the present article, the district court released an order addressing preemption and displacement, among a multitude of other issues.²³ Similar to the conclusion drawn here, the district court held that OPA did not displace maritime claims and punitive damages under maritime law.²⁴ Also arriving at a similar conclusion to this article, the district court found that state law was preempted by federal maritime law despite the OPA savings clause.²⁵ While the conclusions are generally similar, the substance, focus, scope, and depth of the two analyses vary significantly.²⁶ This article should provide an effective supplement to the analysis performed by the district court as the parties decide which issues to eventually raise on appeal.

I. BACKGROUND

A. Potential Claims

1. OPA Claims.

Congress enacted the Oil Pollution Act of 1990 (OPA) in the wake of the 1989 Exxon Valdez spill.²⁷ OPA establishes that a responsible party²⁸ is strictly liable for removal costs²⁹ and damages caused by the discharge of

23. *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179, 2011 WL 3805746 (E.D. La. Aug. 26, 2011).

24. *See id.* at *10–15 (“Thus, OPA does not displace general maritime law claims for those Plaintiffs who would have been able to bring such claims prior to OPA’s enactment. These Plaintiffs assert plausible claims for punitive damages against Responsible and non-Responsible parties.”).

25. *See id.* at *5–10 (dismissing all common law and statutory claims arising under state law and noting that “[a]lthough the Supreme Court [in *Locke*] observed that the savings clause in OPA preserved state statutes relative to liability, it did not declare a rule so broad as to allow state liability statutes to apply to oil spills outside of state waters”).

26. For example, the district court examined the role of the Outer Continental Shelf Lands Act, admiralty jurisdiction, and vessel status (all key issues in determining the applicable law) in much greater detail than the current paper. *Id.* at *2–5. This article, however, explored the maritime preemption in greater depth, particularly the *Jensen* doctrine and the court’s maritime rule-making authority. *See infra* Part I.B.2 and Part I.I.C. While the authorities relied upon by the respective analyses overlap to some extent, there is also considerable variance.

27. S. REP. NO. 101-94, at 2–4 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 723–25.

28. A “responsible party” includes owners and operators of offshore facilities. 33 U.S.C. § 2701(32) (2006).

29. Removal costs include all costs incurred by the federal government and individual states. 33 U.S.C. § 2702.

oil.³⁰ Private parties, as well as federal and local government agencies, may recover.³¹ Private plaintiffs may recover loss of subsistence use of natural resources,³² damages to real or personal property,³³ and even pure economic damages.³⁴ By allowing claimants to recover pure economic losses without physical damage to property or personal injury, Congress effectively eliminated one of the greatest historical barriers of recovery in maritime pollution and tort cases.³⁵

OPA's strict liability for offshore facilities is unlimited in regards to removal costs, but is capped at \$75 million for the other damage provisions.³⁶ Liability is unlimited, however, if the incident was caused by gross negligence, willful misconduct, violation of a federal safety regulation, or if the responsible party fails to report a spill or cooperate with government officials.³⁷ If the discharge resulted from an act of God, act of war, or an act or omission of a third party, then the party has a viable defense.³⁸

30. See § 2702(a) (“[E]ach responsible party for a vessel or facility from which oil is discharged . . . into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) of this section that result from the incident.”).

31. See § 2702(b) (“any claimant”); § 2702(b)(2)(D) (providing for recovery of lost taxes and other revenues by the federal, state, and local governments); § 2702(b)(2)(a) (providing recovery for loss of natural resources by various government entities).

32. See § 2702(b)(2)(c) (providing recovery for any claimant who uses those resources without regard to the ownership or management of the resources).

33. See § 2702(b)(2)(b) (providing for recovery of actual damages or economic damages resulting from injury of real or personal property by any claimant).

34. See § 2702(b)(2)(e) (allowing recovery for lost profits and future earnings by any claimant).

35. See *infra* Part I.A.3. (discussing *Robins Dry Dock* rule); H.R. CONF. REP. NO. 101-653, at 3 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 781 (The Act will govern notwithstanding “existing requirements that physical damage to the proprietary interest of the claimant be shown.”). The limit of pure economic recovery under OPA is an interesting issue not addressed by this paper. One possible solution is borrowing limitations from traditional tort doctrine: duty, proximate causation, foreseeability, and temporal and geographic remoteness. See, e.g., *Benefiel v. Exxon*, 959 F.2d 805, 808 (9th Cir. 1992) (holding that Californians who claimed that their gasoline cost more as a result of the Exxon Valdez spill were barred from recovery because they lacked proximate causation despite an Alaska statute which created strict liability for pure economic harm resulting from hazardous substance spills).

36. *Id.* at § 2704(a)(3).

37. *Id.* at § 2704(c).

38. *Id.* at § 2703(a). Third parties do not include “an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party.” *Id.*

2. OPA Savings Clauses.

Title I of the statute, governing oil spill liability and compensation, is peppered with savings clauses.³⁹ Congress provides for strict liability “[n]otwithstanding any other provision or rule of law,” in the central liability provision of the statute.⁴⁰ The most extensive savings provision, Section 2718, preserves state law:

Nothing in this 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 requirements 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; or (2) affect, or be construed to affect or modify in any way the obligations or liabilities of any person under . . . State law, including common law.⁴¹

OPA’s legislative history reinforces the broad language of the savings provisions.⁴² Specifically, the Senate Report stated: “[t]he theory behind the [savings clause] 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.”⁴³

Maritime law is also preserved from displacement by OPA; the “Act does not affect admiralty or maritime law,” or jurisdiction of such claims.⁴⁴ The House Report further clarifies that OPA does not affect or supersede admiralty and maritime law, and that Congress wishes “to promote uniformity regarding these laws.”⁴⁵

39. Title I is codified at 33 U.S.C. §§ 2701–20.

40. 33 U.S.C. § 2702(a).

41. *Id.* at § 2718(a).

42. See H.R. CONF. REP. NO. 101-653, at 21-22 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 799-800; S. REP. NO. 101-94, at 6-7 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 727-29.

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

44. 33 U.S.C. § 2751(e).

45. H.R. CONF. REP. NO. 101-653, at 57-58 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 799–800.

3. Maritime Claims.

Maritime tort clearly recognizes an action for damages caused by oil pollution.⁴⁶ The primary claim available is negligence, comprised of its usual elements: duty, breach, causation, and damages.⁴⁷ The burden of proof is a preponderance of the evidence standard.⁴⁸ Punitive damages are available in cases of recklessness or greater fault.⁴⁹ However, the punitive-to-compensatory damages ratio may not exceed 1:1, at least in cases not involving intentional, malicious, profit-motivated, or surreptitious conduct.⁵⁰ Under the common law maritime rule announced in *Robins Dry Dock*, economic damages cannot be recovered without physical damage to a plaintiff's property.⁵¹ If negligence diminishes aquatic life, however, commercial fishermen, as "favorites of the admiralty," may still recover pure economic damages.⁵²

Strict products liability has been recognized in maritime law.⁵³ These claims could be relevant given the prominent role of the blow-out preventer in causing the spill.⁵⁴ A federal nuisance claim might be applicable, but

46. See, e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. at 475–76, 478 (2008). Because the Deepwater Horizon rig is not a traditional vessel, a maritime jurisdictional question may arise which is outside the scope of this paper. The test for admiralty tort jurisdiction requires that the incident occur on navigable waters, have a potentially disruptive impact on maritime commerce, and bear a substantial relationship to traditional maritime activity. See generally THOMAS J. SCHOENBAUM, *ADMIRALTY & MARITIME LAW* § 3–6 (4th ed. 2010). The Gulf oil spill satisfies the locality aspect because it originated in the U.S. exclusive economic zone. There was clearly potential to disrupt maritime commerce as well. The maritime relationship requirement will depend upon the rig being classified as a vessel. *Id.* at § 3–6. Generally, mobile rigs are considered vessels and rigs permanently attached to the ocean floor are not. *Id.* However, the caselaw is divided. Compare *Sohyde Drilling and Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1138 (5th Cir. 1981) (holding extraction of gas by a mobile drilling barge in inland waters was not traditional maritime activity) with *Houston Oil & Minerals Corp. v. American Intern. Tool Co.*, 827 F.2d 1049, 1054 (5th Cir. 1987) (“On a practical level, *Sohyde* requires the application of potentially inconsistent rules of law to different claims arising from a single incident. For example, in the likely scenario of a blowout on a movable rig . . . causing both personal injury and property damage, maritime law would apply to the latter while state law would govern the former.”). For the purpose of this research, the incident will be deemed to be governed by maritime law given that the rig was mobile and not permanently attached to the sea floor. If courts resolve the issue otherwise, most of the analysis here will be irrelevant.

47. See, e.g., *Sekco Energy v. M/V Chouest*, No. 92-0420, 1993 WL 322942 (E.D. La. 1993).

48. *In re Exxon Valdez*, 270 F.3d 1215, 1231 (9th Cir. 2001).

49. *Id.* at 1226 n.14.

50. See *Exxon Shipping Co. v. Baker*, 554 U.S. at 513.

51. See *Robins Dry Dock & Repair v. Flint*, 275 U.S. 303, 309 (1927); see also *Louisiana v. M/V Testbank*, 752 F.2d 1019, 1021–28 (5th Cir. 1985) (examining history and rationale of the rule).

52. *Union Oil Co. v. Oppen*, 501 F.2d 558, 567, 570–71 (9th Cir. 1974).

53. See generally Thomas J. Schoenbaum, *Admiralty & Maritime Law* § 3–11 (4th ed. 2010).

54. See *Gulf of Mexico Oil Spill (2010)*, *supra* note 3 (discussing role of blow-out preventer).

there is doubt that nuisance claims exist in maritime law.⁵⁵ Other maritime actions, such as wrongful death and intentional torts, exist but are irrelevant to the current analysis.⁵⁶ In the Analysis, this research only considers the preemptive effect of maritime negligence claims.

4. State Law Claims.

While delving into the intricacies of each of the Gulf Coast states' common law and statutes is impossible here, a general overview is helpful. Common law claims include negligence, nuisance, strict products liability, and strict liability for abnormally dangerous substances.⁵⁷

The negligence claims require a showing of the familiar elements, usually by a preponderance of the evidence. Similar to maritime claims, pure economic damages are not recoverable absent personal injury or property damage,⁵⁸ and punitive damages can be awarded only upon showing recklessness or greater fault.⁵⁹ Unlike maritime claims, most states require clear and convincing evidence for punitive claims.⁶⁰ Maximums for punitive damages vary. Florida and Alabama have a maximum ratio of 3:1

55. See *Testbank*, 752 F.2d at 1030 n.13. There is also doubt that private parties can assert federal nuisance claims. See *Connecticut v. Am. Elec. Power. Co.*, 582 F.3d 309, 358–68 (2009) (adopting rule allowing suits by non-state parties who suffer a harm different from the public).

56. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 409 (1970) (recognizing maritime wrongful death claim); *Sekco Energy Inc. v. M/V Margaret Chouest*, 820 F. Supp. 1008, 1010, 1011–13 (1993) (denying maritime intentional tort claims on other grounds).

57. Matthew P. Harrington, *Necessary and Proper; But Still Unconstitutional*, 48 CASE W. RES. L. REV. 1, 58 (1997). Trespass is irrelevant to the Gulf spill cases because there was no intent. *Id.*

58. See, e.g., *Cargill, Inc. v. Offshore Logistics, Inc.*, 615 F.2d 212, 213–14 (5th Cir. 1980) (holding that Louisiana law bars recovery for negligent interference with contractual relations).

59. See, e.g., ALA.CODE § 6-11-20 (LexisNexis 2005) (prohibiting punitive damages in civil actions unless defendant acted recklessly); MISS. CODE ANN. § 11-1-65 (Lexis Supp. 2010) (same). *But see* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (West 2008) (allowing punitive award for gross negligence).

60. Compare ALA.CODE § 6-11-20 (LexisNexis 2005) (requiring clear and convincing evidence for punitive damage awards); MISS. CODE ANN. § 11-1-65 (Lexis Supp. 2010) (same); TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (West) (same) with *In re Exxon Valdez*, 270 F.3d 1215, 1232 (9th Cir. 2001).

and Texas is 2:1.⁶¹ Mississippi caps punitive awards at \$20 million.⁶² Louisiana does not allow punitive damages for oil pollution.⁶³

Most states have adopted the Restatement's definition of public nuisance: an "unreasonable interference with a right common to the general public."⁶⁴ Private nuisance, in contrast, requires substantial unreasonable interference with private use and enjoyment of land.⁶⁵ Strict liability claims may be available if oil is determined to be an abnormally dangerous substance under state law.⁶⁶ Courts are reluctant to classify oil in this manner.⁶⁷

Additionally, each Gulf Coast state has enacted legislation governing liability for oil spills, or water pollution generally.⁶⁸ Generally, these statutes create strict liability and a private right of action.⁶⁹ The rights and defenses under the Florida statute, for example, are quite similar to OPA.⁷⁰ Liability caps vary.⁷¹

61. ALA.CODE § 6-11-21 (LexisNexis 2005); FLA. STAT. ANN. § 768.73 (allowing 4:1 ratio if decision-maker knew of financially-motivated, dangerous conduct); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (West 2008).

62. See MISS. CODE ANN. § 11-1-65 (Lexis Supp. 2010) (increasing caps based on net worth of defendant).

63. See LA. REV. STAT. ANN. § 30:2491 (2000) (not providing punitive damages); *Ross v. Conoco, Inc.*, 828 So. 2d 546, 555 (La. 2002) (holding punitive damages are not allowed unless expressly authorized by statute).

64. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 351–52 & n.28 (2009). To recover damages, one must have suffered damage different in kind from the general public. RESTATEMENT (SECOND) OF TORTS § 821B cmt. i. (1979).

65. RESTATEMENT (SECOND) OF TORTS § 821B cmt. h, 821D (1979).

66. RESTATEMENT (SECOND) OF TORTS § 520 (1979) (supplying factor test).

67. See *Ozark Indus. v. Stubbs Transports, Inc.*, 351 F. Supp. 351, 356 (W.D. Ark.1972) (negligence required); *Collins v. Liquid Transporters*, 262 S.W.2d 382, 383 (Ky. 1953) (same). *But see Siegler v. Kuhlman*, 502 P.2d 1181, 1187 (Wash. 1972).

68. See ALA.CODE §§ 22-22-1 to 14 (LexisNexis 2006) (governing water pollution); FLA. STAT. ANN. § 376.011-031 (West 2010) (governing water pollution); LA. REV. STAT. ANN. §§30.2451–2500 (2000) (governing oil pollution); MISS. CODE ANN. §§ 49-17-1 to -89 (2010) (governing water pollution); TEX. CIV. WATER CODE ANN. §§ 26.001–562 (West 2008), TEX. CIV. NAT. RES. ANN. §§ 40.001–304 (West 2011) (governing water and oil pollution, respectively).

69. See, e.g., FLA. STAT. ANN. § 376.205 (West 2010) (creating private right to action for discharge of pollutants, including oil as defined by § 376.031).

70. See FLA. STAT. ANN. § 376.12 (West 2010) (allowing state to recover removal costs and damage to natural resources, capping liability at \$150 million for facilities, but creating an exception for gross negligence, willful misconduct, violation of a regulation, or lack of cooperation with government during cleanup). Defenses include acts of war, acts of god, and third party causation, also similar to OPA. *Id.*

71. See, e.g., *id.* (capping liability at \$150 million for facilities with exceptions); TEX. CIV. NAT. RES. ANN. § 40.203 (West 2011) (limiting liability at \$350 million for facilities, but no cap if unauthorized discharge of oil results from gross negligence, willful misconduct or violation of federal or state safety, construction, or operating regulation).

B. Statutory Preemption, Displacement, and Maritime Preemption

1. Statutory Preemption and Displacement.

The Supremacy Clause proclaims that federal law is the supreme law of the land.⁷² In the bulk of cases, preemption doctrine evaluates whether a federal statute preempts state common law or a state statute.⁷³ However, federal common law and regulations may also preempt state law.⁷⁴ There are generally four types of preemption: express, field, implied, and conflict.⁷⁵ In all preemption and displacement case law, congressional intent is the “ultimate touchstone.”⁷⁶ Many federal statutes include savings clauses which announce legislative intent to avoid preemption of related state claims.

Because OPA’s savings clause expressly preserves state law, extensive review of preemption doctrine is unnecessary. However, the mere presence of a savings clause is not dispositive.⁷⁷ Courts must evaluate the text of the provision, its location within the statutory framework, and its relationship to the federal regulatory scheme, and the state law being challenged.⁷⁸ The Supreme Court has stated that it will “decline to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law.”⁷⁹

Displacement of federal common law by federal statute involves a similar but distinct analysis to preemption. Though courts have frequently confused the doctrines by using the term preemption when discussing

72. U.S. Const. art. VI, cl. 2.

73. *Hillsborough Cnty. v. Automated Med. Lab.* 471 U.S. 707, 713 (1985).

74. *See, e.g., Illinois v. Milwaukee (Milwaukee I)*, 406 U.S. 91, 107 & n.9 (1972) (holding that federal common law preempted state common law); *Hillsborough Cnty. v. Automated Med. Lab.* 471 U.S. 707, 713 (1985) (noting that “state laws can be preempted by federal regulations”).

75. *See Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987).

76. *Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009).

77. *See Sandra B. Zellmer, Saving Savings Clauses From Judicial Preemption*, at *2,*6, *42 (August 29, 2007), available at http://www.google.com/url?sa=t&rc=tj&q=zellmer%2C%20sandra%20b.%2C%20saving%20savings%20clauses%20from%20judicial%20preemption&source=web&cd=2&ved=0CCMQFjAB&url=http%3A%2F%2Fworks.bepress.com%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1003%26context%3Dsandi_zellmer&ei=nyyvTtf2GsLk0QGhw8ixAQ&usg=AFQjCNFfljJyslBIIKaL69MXErVd1AYvzA&sig2=qtfxREMMuEAMXzfWG5bbzA&cad=rja <http://ssrn.com/abstract=1010625> (finding that Supreme Court has increasingly construed savings clauses narrowly and been more willing to preserve state common law tort claims than state regulatory programs, though Court is “wildly unpredictable”).

78. *See United States v. Locke*, 529 U.S. 89, 105–07 (2000) (interpreting OPA’s savings clause).

79. *Id.* at 106–07.

displacement,⁸⁰ the Supreme Court has emphasized that “the appropriate analysis . . . is not the same.”⁸¹ Displacement is more straightforward than preemption because it only involves “an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law.”⁸² The historic presence of state police powers, competing state and federal interests, and the presence of a savings provision preserving state law are all irrelevant.⁸³

There is a preliminary assumption that “it is for Congress, not federal courts, to articulate” federal law.⁸⁴ Whether the federal statute is “comprehensive” in character is “quite relevant.”⁸⁵ Federal courts may fill a gap in a federal regulatory scheme with common law but may not do so if it would essentially create a different scheme or have a “frustrating effect” on the federal scheme.⁸⁶ Displacement of federal maritime common law is governed by the same principles.⁸⁷

2. Maritime Preemption and Case Law

Under the Admiralty Clause, judicial power extends to all cases of admiralty and maritime jurisdiction.⁸⁸ Though not explicit in the clause, Congress has implied authority to legislate in the area.⁸⁹ In early maritime law, the interest of uniformity was held to be “unquestionable.”⁹⁰ Later

80. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 371–75 & n.37 (2009) (distinguishing displacement standard).

81. *City of Milwaukee v. Illinois & Michigan (Milwaukee II)*, 451 U.S. 304, 316 (1981).

82. *Id.* at 315 n.8.

83. *See id.* at 316–17 (stating that such concerns are “not implicated”).

84. *Id.* at 317.

85. *Id.* at 319 n.14. If Congress has occupied a field of law through a comprehensive regulatory program supervised by an administrative agency, displacement is suggested. *Id.* at 317–19.

86. *Id.* at 324 n.18; *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489 (2008).

87. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 31–37 (1990) (holding that loss of society and future earnings are not recoverable under a maritime wrongful death action because those damage provisions are not recoverable under the applicable federal statutes, the Jones Act and the Death on the High Seas Act) (“Congress has spoken directly to the question of recoverable damages on the high seas, and . . . the courts are not free to supplement Congress’ answer so thoroughly that the Act becomes meaningless.”); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) (refusing to provide damages for loss of society under federal maritime common law when Congress had not provided such a remedy in the Death on the High Seas Act).

88. U.S. CONST. art. VI, cl. 2.

89. *See The Lottawanna*, 88 U.S. 558, 577 (1874) (holding that Congress has undoubted power to legislate maritime law).

90. *See id.* at 575 (Constitution did not intend “to place the rules and limits of maritime law under the disposal and regulation of the several States” as that would defeat the uniformity interest.).

cases, however, recognized that the uniformity interest is not absolute.⁹¹ Preemption of state law by maritime law is governed by the three-prong test established in *Southern Pacific Co. v. Jensen*.⁹² Under *Jensen*, state law may affect maritime affairs “to some extent,” but is invalid if it: (1) “contravenes the essential purpose expressed by an act of Congress,” (2) “works material prejudice to the characteristic features of the general maritime law,” or (3) “interferes with the proper harmony and uniformity” of maritime law in its interstate and international relations.⁹³

The first prong is a question of statutory preemption. Under the second prong, a characteristic feature of maritime law is a federal rule that “originated in admiralty” or “has exclusive application there.”⁹⁴ Under the third prong, the Supreme Court has adopted a balancing test that weighs state and federal interests in the matter.⁹⁵

In the field of state water pollution control laws, the pertinent case is undoubtedly *Askew v. American Waterway Operators*.⁹⁶ In that case, the Supreme Court confronted a constitutional challenge to Florida’s Oil Spill Prevention and Pollution Control Act.⁹⁷ The Florida statute imposed strict liability for any damage incurred by the state or private plaintiffs as a result of an oil spill in Florida waters from a drilling facility or vessel.⁹⁸ At that time, the federal statute governing water pollution was the Water Quality Improvement Act of 1970 (WQIA), which subjected owners of vessels and facilities without fault to limited liability for cleanup costs incurred by the federal government as a result of oil spills.⁹⁹ Liability for federal removal

91. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994).

92. *See generally* *S. Pac. Co. v. Jensen*, 244 U.S. 205, 251 (1917) (holding that a maritime worker could not constitutionally receive an award under New York’s worker compensation statute because the remedy in admiralty was exclusive). Following the decision, Congress expressly allowed states to provide such a remedy but the Court again held that this was an impermissible intrusion upon the admiralty. *See Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920) (holding that Congress’s legislative authority over maritime affairs is “non-delegable”).

93. *Jensen*, 244 U.S. at 216.

94. *See Am. Dredging Co.*, 510 U.S. at 450 (1994) (holding state law on forum non conveniens was not preempted by maritime law after reaffirming and applying *Jensen* test).

95. *Kossick v. United Fruit Co.*, 365 U.S. 731, 739 (1961).

96. *See Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325 (1973) (holding that WQIA and maritime law did not preempt the Florida Oil Pollution statute in a challenge to its facial validity).

97. *Id.* at 327 (“[A]ction was brought . . . to enjoin application of the Florida Oil Spill Prevention and Pollution Control Act.”); *see also* Steven R. Swanson, *Federalism, the Admiralty, and Oil Spills*, 27 J. OF MAR. L. & COM. 379, 389–93 (July 1996) (explaining the preemption issue in *Askew*).

98. *Askew*, 411 U.S. at 327.

99. *Id.* at 328. Liability was limited at \$14 million for vessel owners and \$8 million for owners of facilities. *Id.*

costs was unlimited in the case of willful negligence or willful misconduct.¹⁰⁰ It also authorized the federal government to promulgate regulations requiring ships and facilities to maintain equipment for the prevention of oil spills.¹⁰¹

The Court explained that statutory preemption of the Florida Statute was unwarranted.¹⁰² The WQIA savings clause clearly allowed state regulation and the legislative history supported this finding.¹⁰³ Though WQIA did provide a “pervasive system of federal control,” the Court held there was no conflict with the Florida provisions allowing recovery of property damage because WQIA only concerned removal costs.¹⁰⁴ As to removal costs, there was no conflict because WQIA only covered federal costs and the Florida statute only covered state costs.¹⁰⁵ The Court declined to address whether Florida could recoup costs above the federal cap.¹⁰⁶

In the absence of federal statutory preemption, the Court then addressed the question of whether maritime law preempted the Florida statute under *Jensen*.¹⁰⁷ The Court determined that the Florida statute did not interfere with a characteristic feature of maritime law because, historically, damages to shore-side interests were not cognizable in admiralty.¹⁰⁸ While the Admiralty Extension Act did extend admiralty jurisdiction to include sea-to-shore injuries, the Court declined “to move the *Jensen* line of cases shoreward to oust state law from any situations involving shore side injuries by ships on navigable waters.”¹⁰⁹ The Court emphasized the state interest in its traditional police powers over pollution within its borders.¹¹⁰ Justice Douglas characterized oil spills as “an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and the lives of coastal people are greatly dependent.”¹¹¹

100. *Id.* at 330 (citing 33 U.S.C. § 1161).

101. *Id.* at 328.

102. *See id.* at 328 (performing statutory preemption analysis).

103. *Id.* at 329 (quoting 33 U.S.C. 1161(o)).

104. *Id.* at 330–31.

105. *See id.* at 335–36 (finding “no collision” between the two statutes). In support, the Court noted that WQIA contemplated federal cooperation with state and local agencies in response to spills under a national contingency plan. *Id.* at 331–32 (citing 33 U.S.C. § 1161(c)(2)).

106. *See id.* at 332 (noting that it would be “premature”).

107. *Id.* at 337.

108. *Id.* at 340.

109. *See id.* at 340–41, 343–44 (referring to the area of law governing sea-to-shore pollution where both federal and state regulation is permissible as the “twilight zone”).

110. *Id.* at 329, 340, 343.

111. *Id.* at 328–29.

While the case can be read to give great deference to state pollution laws in matters of maritime preemption, it can also be read narrowly as allowing WQIA's savings clause to survive a challenge to only its facial validity without addressing any actual conflicts that might result from its application.¹¹² Courts have reached divergent conclusions in applying *Askew*.¹¹³

During the Exxon Valdez litigation, maritime preemption arguments resurfaced. An Alaska statute imposed strict liability for discharges of hazardous substances and included pure economic damages.¹¹⁴ However, economic damages without physical injury to person or property are barred in maritime tort actions under the *Robins Dry Dock* rule.¹¹⁵ The Ninth Circuit, however, determined that the rule "neither 'originated in the admiralty' nor 'had exclusive application in admiralty.'"¹¹⁶ The maritime rule is generally applied in land-based contexts and was traced back to the traditional tort rule, which refuses recovery for negligent interference with contractual rights.¹¹⁷

After concluding *Jensen's* second prong did not warrant preemption, the court balanced state and federal interests to determine if application of the state law would interfere with maritime uniformity under the third prong.¹¹⁸ The court found that Alaska had a strong interest in regulating oil pollution and providing for recovery of damages for injury caused by oil spills.¹¹⁹ The federal interest in limiting liability in maritime commerce and providing a uniform maritime rule was minimized because two federal statutes governing oil pollution allowed recovery for pure economic harm.¹²⁰ While OPA did not apply retroactively to the case,¹²¹ the Ninth Circuit believed it offered "compelling evidence that Congress does not view either expansion of liability to cover purely economic losses or

112. *See id.* at 343–44 (“[W]e cannot say with certainty at this stage that the Florida Act conflicts with any federal Act. We have only the question whether the waiver of pre-emption by Congress in [Section] 1161(o)(2) concerning the imposition by a State of ‘any requirement or liability’ is valid.”); *see also* Swanson, *supra* note 97, at 393–94 (interpreting *Askew*).

113. Swanson, *supra* note 97, at 393–94 (categorizing state interpretations).

114. *In re Exxon Valdez*, 270 F.3d 1215, 1250 (2001).

115. *Id.* at 1250–51.

116. *Id.* at 1251.

117. *Id.*; *see also* Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 627–28 (1994) (noting that of the four cases cited in the *Robins* decision, only two involved maritime law).

118. *Id.* at 1251–52.

119. *See id.* at 1252 (citing *Askew*).

120. *See id.* (referring to OPA and the Trans-Alaska Pipeline Authorization Act).

121. *See* Pub. L. No. 101-380 § 1020 (providing that OPA “shall apply to an incident occurring after the date of the enactment of this Act [August 18, 1990]”).

enactment of comparable state oil pollution regimes as an excessive burden on maritime commerce.”¹²² In accord with the Ninth Circuit, the Alaska Supreme Court also held that damages for pure economic harm were not preempted by the maritime rule.¹²³ Addressing the same issue, the First Circuit and various district courts have reached the same conclusion.¹²⁴

3. Post-OPA Case Law

Since OPA was enacted, several courts have addressed preemption and displacement issues related to oil spills, but the results do not clearly establish how the statute interacts with maritime and state law.

In *Sekco Energy Inc. v. M/V Margaret Chouest*, a seismic cable towed by vessels struck an oil drilling platform on the outer continental shelf.¹²⁵ Though the incident caused no physical damage to the platform, oil did spill from the cable after it was ripped open by barnacles.¹²⁶ Government officials ordered the platform to halt operations during an investigation.¹²⁷ After suffering economic losses following this period, the platform owners sued the vessel owners, asserting maritime tort claims, nuisance claims under state and federal law, and OPA claims.¹²⁸

The District Court allowed the OPA claim for lost profits under Section 2702(b)(2)(E).¹²⁹ The court did not perform any analysis to determine if OPA displaced the federal maritime claims or federal nuisance claims. The court did determine that federal maritime law preempted the state law

122. *In re Exxon Valdez*, 270 F.3d at 1252 (quoting *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 630–31 (1994) (noting that both statutes contained savings clauses).

123. *Kodiak Island Borough v. Exxon Corp.*, 991 P.2d 757, 769 (Alaska 1999) (allowing municipalities to recover monetary value of services diverted to massive oil response operation).

124. *See Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 630–31 (1994) (holding that shellfish dealers were allowed to recover pure economic damages resulting from oil spill under Rhode Island statute, which was not preempted by *Robins Dry Dock* rule of maritime law); *Slaven v. BP Am., Inc.*, 786 F. Supp. 853, 864–65 (C.D. Cal. 1992) (holding that federal uniformity interest in *Robins Dry Dock* rule was outweighed by state interest in regulating pollution within its borders and providing remedies for shoreside injuries). *But see Louisiana v. M/V Testbank*, 752 F.2d 1019, 1032 (1985) (“While our maritime decisions are informed by . . . developments in the state courts . . . federal interest in protecting maritime commerce is often best served by the establishment of uniform rules of conduct.”).

125. *Sekco Energy Inc. v. M/V Margaret Chouest*, 820 F. Supp. 1008, 1010 (1993).

126. *Id.* at 1010.

127. *Id.*

128. *Id.* at 1010–15. The plaintiffs also asserted a Federal Water Pollution Control Act claim but the court dismissed the claim because the statute clearly does not create a private right of action. *Id.* at 1014.

129. *Id.* at 1014–15.

nuisance claim, but its reasoning was sparse.¹³⁰ It stated only that the facts were that of a classic maritime case and that state law did not apply because maritime law applied “of its own force.”¹³¹ The court did not consider the effect of OPA’s savings clause or the *Jensen* doctrine.

In *South Port Marine, LLC v. Gulf Oil Ltd.*, a gasoline spill severely damaged a marina’s floating docks, causing property damage as well as lost profits and other economic losses.¹³² The First Circuit addressed whether OPA displaced maritime law.¹³³ The plaintiff desired a maritime claim because punitive damages would be available, while OPA does not provide for punitive damages.¹³⁴ Relying heavily on *Miles v. Apex Marine Corp.*,¹³⁵ the court held that Congress intended OPA to be the exclusive federal law governing oil spills and refused to supplement the available OPA remedies with a general maritime claim.¹³⁶ It reasoned that OPA set forth a “comprehensive federal scheme for oil pollution liability” with a similarly “comprehensive list of recoverable damages” which did not include punitive damages.¹³⁷ The court mentioned, but failed to adequately address, the OPA provision; it specifically states, ““this Act does not affect . . . admiralty and maritime law.””¹³⁸ It should be noted that the

130. *Sekco Energy Inc. v. M/V Margaret Chouest*, 820 F. Supp. 1008, 1013 (1993).

131. *Id.* at 1013. The court initially determined that state law of the adjacent state applied in accord with the Outer Continental Shelf Lands Act. *Id.* Its scanty analysis of maritime preemption was guided by *Rodrigue v. Aetna Casualty and Sur. Co.*, 395 U.S. 352 (1969) and its progeny. *See id.* This doctrine has traditionally only applied to contract and personal injury actions. The *Rodrigue* case law is inconsistent and lacks standards which adequately consider the federal and state policy implications created by the Gulf oil spill. *Rodrigue* has never been applied to oil spills before *Sekco Energy*. The *Jensen* analysis, however, has been used to address maritime preemption in oil spill cases and provides a means to weigh the relevant policy issues. *See infra* Part I.B.2 and *supra* Part II.C. The *Sekco Energy* court, therefore, allowed an OPA claim and a maritime negligence claim after the limited *Rodrigue* analysis. *Id.* at 1012–13, 1015. A maritime claim for intentional tort was dismissed because it lacked an adequate factual basis. *Id.* at 1013. A maritime claim for private nuisance was dismissed because the court found no authority recognizing such a claim in maritime law, or alternatively because the plaintiff had not pleaded facts establishing intent. *Id.* The court also rejected a federal maritime claim for public nuisance. *See id.* at 1014 (finding no authority recognizing such a cause of action and noting that the Fifth Circuit had already declined to create such a claim).

132. *South Port Marine, LLC v. Gulf Oil Ltd.*, 234 F.3d 58, 61 (1st Cir. 2000).

133. *Id.* at 64–65.

134. *Id.* at 64.

135. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 37 (1990) (holding that loss of society and future earnings are not recoverable under a maritime wrongful death action because those damage provisions are not available under the applicable federal statutes: the Jones Act and Death on the High Seas Act).

136. *Id.*; *see also* *Clausen v. M/V New Carissa*, 171 F. Supp. 2d 1127, 1133 (relying heavily on *South Port*, the district court determined that OPA precluded an award of punitive damages under general maritime law).

137. *South Port*, 234 F.3d at 65.

138. *Id.* at 65 (quoting 33 U.S.C. § 2751(e)).

statutes at issue in *Miles* do not include any similar provisions preserving maritime law.¹³⁹

The Supreme Court addressed the preemptive force of OPA in *United States v. Locke*.¹⁴⁰ Plaintiffs, a trade association of tanker owners, sought declaratory and injunctive relief against the enforcement of state regulations governing the design, equipment, reporting, and operation of tankers.¹⁴¹ They argued that the state law impermissibly invaded an area long governed by federal law and dependent upon national uniformity.¹⁴² The Court generally agreed, holding that state regulations on watch procedures, training, English language skills, and casualty reporting are preempted and implying that the other requirements would be preempted on remand.¹⁴³

Title IV of OPA governs oil spill prevention and amended a number of other federal statutes that regulate tanker design, construction, equipment, traffic, operating, training, reporting, and language requirements.¹⁴⁴ These new statutory provisions expanded an already “comprehensive federal regulatory scheme governing oil tankers.”¹⁴⁵ The Court noted that federal interest in regulating interstate navigation “has been manifest since the beginning of our Republic” and was one of the reasons for adopting the Constitution.¹⁴⁶

Addressing the OPA savings clauses, the Court emphasized that the provisions were placed in Title I of OPA, which governs oil pollution

139. See Jones Act, 46 U.S.C.A. § 30104; Death on the High Seas Act, 46 U.S.C.A. § 30302. The latter specifically preserves state law, but makes no mention of preserving maritime common law, unlike OPA. See 46 U.S.C.A. § 30308(a) (“This chapter does not affect the law of a State regulating the right to recover for death.”).

140. *United States v. Locke*, 529 U.S. 89, 89 (2000).

141. *Id.* at 97.

142. *Id.*

143. See *id.* at 116–17.

144. See *Intertanko v. Locke*, 148 F.3d 1053, 1059 (9th Cir. 1998) (noting that OPA amended the Ports and Waterways Safety Act, Tank Vessel Act, and Port and Tanker Safety Act), *rev'd on other grounds sub nom.* *United States v. Locke*, 529 U.S. 89 (2000). For example, OPA imposed random drug and alcohol testing, limited consecutive working hours for crews, and required tankers to be equipped with double hulls. *Id.* at 1061–62. See also *United States v. Locke*, 529 U.S. 89, 105–06 (2000) (“In its titles following Title I, OPA addresses matters including licensing and certificates of registry, 104 Stat. 509; duties of senior licensed officers to relieve the master, *id.*, at 511; manning standards for foreign vessels, *id.*, at 513; reporting of marine casualties, *ibid.*; minimum standards for plating thickness, *id.*, at 515; tank vessel manning requirements, *id.*, at 517; and tank vessel construction standards, *id.*, at 517–518, among other extensive regulations.”).

145. *United States v. Locke*, 529 U.S. 89, 94 (2000).

146. *Id.* at 99 (citing THE FEDERALIST NO. 12 (Alexander Hamilton), THE FEDERALIST NO. 44 (James Madison), & THE FEDERALIST NO. 64 (John Jay)).

liability and compensation.¹⁴⁷ In addition to the location of the clauses within the statute, the court found that the text also referred only to liability provisions.¹⁴⁸ Believing that Congress did not intend to disrupt national uniformity of maritime commerce, the Court limited the savings clauses to Title I.¹⁴⁹ Legislative history, which specifically preserved the holding of *Ray v. Atlantic Richfield Co.*, supported this determination.¹⁵⁰ The Court, in *Ray*, held that state laws regulating design, construction, maintenance, operation, equipment, and personnel qualifications of tanker vessels were preempted by the Ports and Waterways Safety Act,¹⁵¹ one of the statutes amended by OPA.

The application of the OPA savings clause to matters of oil spill liability was not at issue in the litigation,¹⁵² but *Locke*'s dicta implies that state laws imposing liability for oil spills should be preserved. Citing *Askew*,¹⁵³ the Court mentioned that limiting the savings clauses to Title I of OPA would respect the "established federal-state balance in matters of maritime commerce."¹⁵⁴ Without definitively ruling on the subject, the Court stated:

Placement of the saving clauses in Title I of OPA *suggests* that Congress intended to preserve state laws of a scope similar to the matters contained in Title I of OPA . . . The evident purpose of the saving clauses is to preserve state laws which, rather than imposing substantive regulation of a vessel's primary conduct, establish liability rules and financial requirements relating to oil spills. . . . The clauses

147. *See id.* at 104–06 (“The saving clauses are found in Title I of OPA, captioned Oil Pollution Liability and Compensation and creating a liability scheme for oil pollution. In contrast to the Washington rules at issue here, Title I does not regulate vessel operation, design, or manning.”).

148. *See id.* at 105 (“Our conclusion is fortified by Congress’ decision to limit the saving clauses by the same key words it used in declaring the scope of Title I of OPA. Title I of OPA permits recovery of damages involving vessels ‘from which oil is discharged, or which pos[e] the substantial threat of a discharge of oil.’ 33 U.S.C. § 2702(a). The saving clauses, in parallel manner, permit States to impose liability or requirements ‘relating to the discharge, or substantial threat of a discharge, of oil.’”).

149. *See id.* at 106 (“The clauses may preserve a State’s ability to enact laws of a scope similar to Title I, but do not extend to subjects addressed in the other titles of the Act or other acts.”).

150. *See id.* at 107 (citing H.R. Conf. Rep. No. 101-653, p. 122 (1990)).

151. *Id.* at 110–11. *Ray* also “preserved state authority to regulate the peculiarities of local waters if there was no conflict with federal regulatory determinations.” *Id.* at 110. The Court in *Locke* reaffirmed *Ray* by adopting the “same approach.” *Id.* at 11.

152. *See id.* at 106 (noting that the role of state law in oil spill liability is “unchallenged here”).

153. *Id.* at 106 (citing *Askew*, 441 U.S. at 325). *Askew* held that WQIA and maritime law did not preempt the Florida Oil Pollution statute in a challenge to its facial validity. *See supra* Part I.B.2.

154. *Locke*, 529 U.S. at 106.

may preserve a State's ability to enact laws of a scope similar to Title I.¹⁵⁵

While this language is strongly suggestive, application of the savings clauses to an actual scenario of facts and state oil spill liability law has only been performed by lower courts.¹⁵⁶

In *Williams v. Potomac Electric Power Co.*, an oil pipeline burst over a marsh in Maryland.¹⁵⁷ Oil leaked into a river and washed ashore on land owned by numerous plaintiffs, who asserted negligence, trespass, strict liability, and nuisance claims under state law.¹⁵⁸ Without performing conflict or field preemption analysis, the District Court quoted the same passages from *Locke* referred to above and held that OPA did not preempt the common law claims.¹⁵⁹ It stated that *Locke* had “put to rest” the matter and “foreclosed” any preemption argument.¹⁶⁰ As there were no maritime claims involved, no preemption analysis under *Jensen* was performed.

In *Dostie Development, Inc. v. Artic Peace Shipping Co.*, oil spilled from a tanker into a Florida river and washed onto the plaintiff's land.¹⁶¹ The landowner asserted federal OPA claims and state law claims for negligence.¹⁶² The defendant argued that the negligence claims were preempted by OPA.¹⁶³ The district court considered the plain language of the OPA savings clause and its persuasive legislative history.¹⁶⁴ The court held the preemption argument was without merit and allowed the state negligence claim to proceed.¹⁶⁵ No maritime claims were involved so *Jensen* analysis was unnecessary.

155. *Id.* at 105–06 (emphasis added).

156. See Steven R. Swanson, *Federalism, the Admiralty, and Oil Spills*, 27 J. MAR. L. & COM. 379, 393 (1996) (“No Supreme Court decision since *Askew* has broadened its holding.”).

157. *Williams v. Potomac Elec. Power Co.*, 115 F. Supp. 2d 561, 562 (2000).

158. *Id.* at 563.

159. *Id.* at 564–65 (quoting *United States v. Locke*, 120 S. Ct. 1135, 1145–47 (2000)).

160. *Id.*

161. *Dostie Development, Inc. v. Arctic Peace Shipping Co.*, No. 95-808-CIV-J-MMP, 1996 WL 866119, at *1 (M.D. Fla. Aug. 14, 1996).

162. *Id.* The plaintiff also asserted a claim under the Florida statute creating strict liability for damages caused by pollution, but the defendant did not argue that this claim was preempted by OPA. *Id.* at *1–2.

163. *Id.* at *3.

164. *Id.* at *3 (quoting 33 U.S.C. § 2718(a) and S. Rep. No. 94, 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.A.A.N. 728).

165. *Id.* at *3.

In *National Shipping Co. of Saudi Arabia v. Moran*, the Fourth Circuit confronted a more complex situation.¹⁶⁶ The case involved a collision between a tugboat and a cargo vessel and the resulting oil spill.¹⁶⁷ Under OPA, the “responsible party” is the vessel which actually discharges oil and is liable for all removal costs and damages.¹⁶⁸ However, the responsible party can reassign liability to a third party if that party was the sole cause of the spill.¹⁶⁹ The U.S. Coast Guard initially designated the cargo vessel as the responsible party.¹⁷⁰ Its owners paid about \$870,000 to remove oil, \$300,000 to the U.S. navy for costs incurred, and \$106,806 to settle claims of those whose property was damaged by the spill.¹⁷¹ This totals \$1,276,806 in liability.

The district court determined that the tugboat’s negligence was the sole cause of the accident.¹⁷² The cargo vessel’s owners had claims under OPA and state law.¹⁷³ The district court granted relief under OPA, but capped damages at \$500,000,¹⁷⁴ which is the OPA cap for non-tanker vessels absent gross negligence, willful misconduct, or violation of federal regulation.¹⁷⁵ The district court did not allow the cargo vessel owners to circumvent the cap through its state law claims and the Fourth Circuit affirmed.¹⁷⁶

The court reasoned that the OPA savings clause only protects the rights of parties to “bring additional claims based on liability which accrues under state law.”¹⁷⁷ State law, however, was never imposed to force the cargo vessel owners to clean up the spill or to compensate private parties.¹⁷⁸ Because the liability derived solely from OPA, the court held that the plaintiffs could not recover from the tugboat owners beyond the \$500,000

166. *Nat’l Shipping Co. of Saudi Arabia v. Moran*, Nos. 96-1741, 96-1824, 122 F.3d 1062 (Table) (4th Cir. Sept. 9, 1997).

167. *Id.* at *1.

168. *Id.* at *2 (citing 33 U.S.C. § 2701–02).

169. *Id.* at *2 (citing 33 U.S.C. § 2702(d)).

170. *Id.* at *1.

171. *Id.*

172. *Id.*

173. *Id.* A Virginia Water Control Law claim was dismissed before trial and about \$20,000 was awarded under general maritime law for lost fuel and damage to the hull. *Id.* These claims did not factor into the court’s preemption analysis.

174. *Id.*

175. *Id.* at *2–3 (citing 33 U.S.C. 2704). Though it was argued that the tugboat violated a federal safety regulation, the court determined there was no factual basis for this exception to OPA’s limited liability scheme. *Id.* at *3.

176. *Id.* at *2–4.

177. *Id.* at *4.

178. *Id.*

OPA cap.¹⁷⁹ In defiance of common sense (and probably legislative intent), the non-negligent party incurred the most of the liability.

In summary, the First Circuit and a district court determined that OPA displaces maritime law despite the provision explicitly preserving it.¹⁸⁰ The Supreme Court's dicta in *Locke* seems to indicate that state laws imposing oil spill liability are preserved by the OPA savings clause.¹⁸¹ Two district courts reached similar conclusions in cases actually involving oil spills.¹⁸² The Fourth Circuit has construed the savings clause very narrowly in the context of contribution for removal costs.¹⁸³ Another district court confronted with OPA, maritime, and state claims basically avoided the effect of the savings clause altogether by deciding the claims under other grounds.¹⁸⁴ This is the loose patchwork of case law that existed prior to the Gulf oil spill.

II. ANALYSIS

A. Statutory Preemption

Under this line of analysis,¹⁸⁵ it is clear that state laws creating liability for oil pollution are not preempted. Section 2718 of OPA explicitly preserves the ability of states to enact laws providing additional liability or requirements with respect to oil discharges and removal.¹⁸⁶ It further provides that nothing in the Act shall affect (or be construed or interpreted to affect or modify in any way) the obligations or liabilities of state law, "including common law."¹⁸⁷ Thus, both state statutory and common law are within the scope of the savings provision. Non-preemption of state law is reiterated throughout the OPA's title on liability.¹⁸⁸

While OPA is comprehensive and directly addresses the question of oil spill liability, the presence of savings clauses in Title I negates express

179. *Id.*

180. *See supra* notes 132–39 and accompanying text.

181. *See supra* notes 140–56 and accompanying text.

182. *See supra* notes 157–64 and accompanying text.

183. *See supra* notes 165–78 and accompanying text.

184. *Sekco Energy Inc. v. M/V Margaret Chouest*, 820 F. Supp. 1008, 1013 (1993).

185. *See supra* Part I.B.1.

186. 33 U.S.C. § 2718(a).

187. *Id.*

188. *See, e.g.*, § 2702(a) ("Notwithstanding any other provision or rule of law"); § 2718(c) ("Nothing in this Act . . . shall in any way affect, or be construed to affect, the authority . . . of any State or political subdivision.").

preemption and any inference of implied or field preemption.¹⁸⁹ Conflict preemption also seems to be out of the question because OPA itself contemplates “additional liability or requirements” under state law.¹⁹⁰

Unlike the Clean Water Act savings clause at issue in *Ouellette*,¹⁹¹ the OPA savings clause is not generic. Actually, preemption was the most discussed issue by the Senate Committee, which endorsed the view that Section 2718 “does not embrace any preemption of State oil spill liability laws,” including additional requirements or penalties.¹⁹² Finally, the Supreme Court strongly suggested in *Locke* that the OPA savings clause preserves all state laws which establish liability rules and financial requirements.¹⁹³ Simply stated, no state law governing oil spill liability is preempted by OPA.

Some commentators argue that the OPA savings clause is an unconstitutional intrusion upon admiralty and maritime law.¹⁹⁴ They argue that Congress cannot delegate such authority to the states because varying and inconsistent liability regimes for oil pollution under state law would lead to a lack of uniformity impermissible under the Constitution’s Admiralty clause.¹⁹⁵

The Supreme Court has effectively laid these arguments to rest. In *Askew*, the Court held that the non-delegation principle is not applicable to areas historically governed by state police powers.¹⁹⁶ Specifically, it held that oil pollution is one of these areas and upheld a Florida statute imposing

189. See *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (“Although Congress intended to dominate the field of pollution regulation, the saving clause negates the inference that Congress ‘left no room’ for state causes of action.”).

190. § 2718(a).

191. See *Ouellette*, 479 U.S. at 492–94 & n.14 (refusing to allow a generic savings clause to disrupt a federal regulatory scheme and also preempting the nuisance law of a state which was merely affected by interstate water pollution but not the source of the pollution).

192. S. REP. NO. 101-94, at 17–18 (1989). The House Report adopts the same view. See H.R. CONF. REP. NO. 101-653, at 21–22 (1990) (discussing OPA’s relationship to other law).

193. *United States v. Locke*, 529 U.S. 89, 106 (2000).

194. Matthew P. Harrington, *Necessary and Proper, But Still Unconstitutional*, 48 CASE W. RES. L. REV. 1, 2 (1997); Steven R. Swanson, *Federalism, the Admiralty, and Oil Spills*, 27 J. OF MAR. L. & COM. 379, 380 (July 1996) (“This overlapping jurisdiction runs contrary to the constitutional grant of admiralty powers to the national authorities.”). Others have criticized the clause but not considered it unconstitutional. See, e.g., Daniel Kopec & Philip Peterson, *Crude Legislation and Compensation Under the Oil Pollution Act of 1990*, RUTGERS L. J. 597, 626 (1992) (concluding that OPA’s lack of national uniformity creates a domino effect where inequities lead to an inefficient oil cleanup response).

195. See Harrington, *supra* note 193, at 2, 20 (relying on *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920), which held that Congress cannot delegate its admiralty power).

196. See *Askew v. Am. Waterways Operators*, 411 U.S. 325, 328–29, 343–44 (“[WQIA savings clause] is valid unless the rule of *Jensen* and *Knickerbocker Ice* is to engulf everything that Congress chose to call ‘admiralty,’ preempting state action.”).

strict liability for oil pollution.¹⁹⁷ The cases relied upon by the commentators were expressly limited to their facts.¹⁹⁸ In 2000, the Court reaffirmed *Askew* in *Locke*.¹⁹⁹ It explained that upholding state oil spill liability laws would respect, not upset, the established federal-state balance in matters of maritime commerce.²⁰⁰

B. Displacement

The First Circuit and a district court in Oregon have held that OPA displaces federal maritime law.²⁰¹ This essay takes the opposite view. Section 2751(e) of OPA addresses admiralty and maritime law.²⁰² It explicitly states that the “Act does not affect-- (1) admiralty and maritime law; or (2) [admiralty and maritime jurisdiction].”²⁰³ Neither the First Circuit, nor the district court adequately addressed this provision.

The First Circuit relied heavily on *Miles v. Apex Marine Corp.*,²⁰⁴ in determining that Congress intended OPA to be the exclusive federal law governing oil spills.²⁰⁵ However, the two statutes at issue in *Miles* do not include any similar provisions preserving maritime law.²⁰⁶

In *Milwaukee II*, the Supreme Court held that the Federal Water Pollution Control Act displaced federal common law nuisance suits for interstate water pollution.²⁰⁷ Though the FWPCA did contain a savings clause preserving “common law,” it did not explicitly address federal

197. *Id.* at 327.

198. *See id.* at 343–44 (“*Jensen* and *Knickerbocker Ice* have been confined to their facts, viz., to suits relating to the relationship of vessels, plying the high seas and our navigable waters, and to their crews.”).

199. *United States v. Locke*, 529 U.S. 89, 105–06 (2000) (interpreting the OPA savings clause).

200. *Id.* at 106.

201. *South Port Marine, LLC v. Gulf Oil Ltd.*, 234 F.3d 58, 65 (1st Cir. 2000); *Clausen v. M/V New Carissa*, 171 F. Supp. 2d 1127, 1133 (relying heavily on *South Port*).

202. 33 U.S.C. § 2751(e).

203. *Id.*

204. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 37 (1990) (holding that loss of society and future earnings are not recoverable under a maritime wrongful death action because those damage provisions are not available under the applicable federal statutes: the Jones Act and Death on the High Seas Act).

205. *South Port*, 234 F.3d at 65–66; *see also Clausen*, 171 F. Supp. at 1133 (relying heavily on *South Port*, the district court determined that OPA precluded an award of punitive damages under general maritime law).

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

207. *City of Milwaukee v. Illinois & Michigan (Milwaukee II)*, 451 U.S. 304, 317 (1981). The Court later extended this holding to pollution of coastal waters. *See Middlesex Cty. Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 22 (1981) (“The regulatory scheme of the MPRSA is no less comprehensive, with respect to ocean dumping, than are analogous provisions of the FWPCA.”).

common law.²⁰⁸ The Court believed it was generic and referred only to “the more routine state common law.”²⁰⁹

The same cannot be said about Section 2751(e) of OPA. Its preservation of admiralty and maritime law is clear and unambiguous. The legislative history also contradicts any displacement argument. The House Report clarifies that OPA does not affect or supersede admiralty and maritime law.²¹⁰ Maritime law should not be displaced by OPA. To hold otherwise would defy Congressional intent.

C. Maritime Preemption

OPA’s savings clause does not affect maritime preemption. In Section 2751, Congress expressly indicated that OPA does not affect maritime law.²¹¹ As maritime preemption is a subset of maritime law, OPA cannot affect maritime preemption. In Section 2718, OPA only dictates that “Nothing *in this Act*” shall affect state law.²¹² The clause, however, does not speak to, let alone prevent, preemption of state law by maritime law. After reading Sections 2718 and 2751 together, courts should not foreclose upon maritime preemption solely because Section 2718 preserves state law from preemption by OPA. To do so would give unintended breadth to Section 2718,²¹³ especially when OPA’s legislative history indicates that Congress intended to maintain and “promote uniformity regarding [maritime] laws.”²¹⁴

To examine the possibility of maritime preemption, it is necessary to turn to the third prong of the maritime preemption test established in *Jensen*. There, the Supreme Court held that application of a state law cannot interfere with the proper harmony of maritime law in its international or interstate relations.²¹⁵ Courts must weigh federal and state interests in the

208. *See Milwaukee II*, 451 U.S. at 328 (providing the text of Section 510 and 505(e) of the FPWCA).

209. *See id.* at 329 (interpreting Section 510 and 505(e) of the FPWCA).

210. H.R. CONF. REP. NO. 101-653, at 57-58 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 799-800.

211. 33 U.S.C. § 2751(e) (“[T]his Act does not affect-- (1) admiralty and maritime law;”).

212. § 2718(a),(c) (emphasis added).

213. “[W]ords of a statute should be interpreted consistent with their neighbors to avoid giving unintended breadth to an Act of Congress.” *United States v. Locke*, 529 U.S. 89, 105 (2000).

214. H.R. CONF. REP. NO. 101-653, at 57-58 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 799-800.

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

matter.²¹⁶ Generally, the federal interest is maritime uniformity and the state interest is the exercise of its historic police powers.

Askew, the primary case governing maritime preemption of state oil spill laws only confronted a challenge to the facial validity of a state oil spill statute.²¹⁷ It certainly did not consider the implications of an oil spill originating in federal water and reaching the shores of multiple states. Neither did *Locke*.²¹⁸ The matter of the Gulf oil spill is certainly unique factually. After an extensive search, no cases were found involving an oil spill that originated in federal waters *and* affected multiple states. The Exxon Valdez oil spill, like most other oil spill cases, originated in one state's territorial waters and only affected that one state.²¹⁹

Also worth noting, the federal statute only allowed the federal government to recover removal costs at the time of *Askew*.²²⁰ Unlike OPA, it did not specifically permit recovery by state and local governments and did not create a private right of action with extensive damage provisions.²²¹ Legal regimes have changed and the factual scenario is unprecedented. The courts must perform a novel analysis of federal and state interests involved in the Gulf oil spill.

There is a federal interest in providing citizens from different states with equal rights and remedies. If the varying law of each of the five Gulf Coast states is deemed to apply, residents of some states might be entitled to greater rights and recovery than claimants in other states. For example, state statutes have different liability limits and punitive-to-compensatory damage ratio maximums.²²² Louisiana residents might be denied punitive damages altogether, while residents of other states recover punitive damages up to three times the amount of their compensatory damages.²²³ Recovery should be uniform for those suffering similar harms. Divergent rights and recovery based on state citizenship simply "interferes with the proper harmony and uniformity of that law in its . . . interstate relations."²²⁴

216. *Kossick v. United Fruit Co.*, 365 U.S. 731, 739 (1961).

217. *See supra* notes 96–113 and accompanying text.

218. *See supra* notes 140–56 and accompanying text.

219. Robert P. Thibault, *Are Today's International Model Operating Agreements Looking Far Enough Into Tomorrow?—Operator Liability for Major Spill or Blowout Incidents*, 3 ROCKY MTN. MIN. L. INST. 21B-1, 21B-6 (2011) ("The Exxon Valdez spill only dealt with one state, while the Gulf spill involves several Gulf States.").

220. *Askew*, 411 U.S. at 330.

221. *See supra* Part I.A.1.

222. *See supra* Part I.A.4.

223. *See supra* notes 61–63 and accompanying text.

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

Additionally, the spill originated in the exclusive economic zone of the United States,²²⁵ outside of the borders of state territorial waters. There is a significant federal interest in regulating conduct which takes place in federal waters. Locality has always played a great role in admiralty tort jurisdiction.²²⁶ Further, the Secretary of the Interior has been granted federal statutory authority to oversee oil and gas extraction on the outer continental shelf.²²⁷ The Bureau of Ocean Energy Management, Regulation, and Enforcement, a federal agency, grants federal leases, issues federal permits, and administers a complex and comprehensive federal regulatory scheme governing oil exploration and drilling.²²⁸ The well-established federal presence in the regulation of oil extraction activities on the outer continental shelf and the extensive federal response to this particular spill are significant evidence of the federal interest in the matter.

There is also a federal interest in resolving the multi-district litigation efficiently and compensating plaintiffs in a timely manner. Application of the varying law of each of the five states in the multi-district litigation could cause significant constraints and delays. A typical claimant might have three common law claims and one statutory claim under state law.²²⁹ Multiplied by five states, there are probably at least twenty types of claims just from civil litigants with economic losses. Varying elements, burdens of proof, defenses, jury instructions, and damage awards for each type of claim could easily overwhelm the litigation process.

The fact that the spill originated in federal waters does not lessen the terrible impact it has had on the lives of Gulf Coast residents and businesses. The oil entered state waters; each state still has a strong interest in compensating their residents and imposing liability to deter future spills which effect their waters and shores.

However, the interest of the states in applying their own law is greatly minimized because the state law claims being asserted are generally duplicative of federal claims. In fact, the state law claims would not provide any type of remedy beyond what is already available to plaintiffs under the

225. Robertson, *supra* note 1.

226. See THOMAS J. SCHOENBAUM, *ADMIRALTY & MARITIME LAW* § 1-3 (4th ed. 2010) (explaining prominent role of locality in admiralty tort jurisdiction, both historically and in modern caselaw).

227. Outer Continental Shelf Lands Act, 43 U.S.C. § 1334 (1986). The liability portions of this statute were repealed and replaced by OPA § 2004 (repealing 43 U.S.C. §§ 1811 to 1824).

228. See Bureau of Ocean Energy Management, Regulation and Enforcement: Frequently Asked Questions, available at <http://www.boemre.gov/ooc/newweb/frequentlyaskedquestions/frequentlyaskedquestions.htm>. The agency was formerly known as the Minerals Management Service.

229. See *supra* Part I.A.4.

federal scheme of maritime negligence and OPA. Between maritime negligence claims and OPA, claimants have access to punitive awards for reckless conduct, compensatory damages for property damage, and pure economic recovery.²³⁰ The latter two are available under OPA without having to show fault.²³¹

Negligence claims under state law generally mirror negligence claims under maritime law.²³² The elements are the same and the same types of damages will be available: compensatory property damages, punitive awards, and economic losses.²³³ Property damage is a prerequisite to recovery of economic damages under both state and maritime negligence.²³⁴ Maritime claims actually provide a more, plaintiff-friendly burden of proof for punitive awards than under state law.²³⁵

While maritime punitive awards were capped at 1:1 in the Exxon Valdez litigation, the same may not be true in this litigation. The Supreme Court only established the 1:1 ratio for cases without exceptional conduct, such as dangerous behavior driven by financial gain.²³⁶ An initial report found that the defendants in the Gulf spill case took numerous actions which “saved time and money when less risky alternatives were available.”²³⁷ Even if there was no exceptional conduct justifying a ratio greater than 1:1, maritime courts have broad power to draw from state law and adopt a ratio that more closely resembles the Gulf state ratios.

The constitutional grant of judicial power in admiralty allows courts to continue the development of general maritime law.²³⁸ As Justice Marshall stated: “the law, admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise.”²³⁹ When new situations arise that are not directly governed by precedent, federal courts may fashion

230. *See supra* Part I.A.1 and Part I.A.3.

231. *See supra* Part I.A.1.

232. *Compare* Part I.A.3 with Part I.A.4.

233. *Compare* Part I.A.3 with Part I.A.4. One minor difference is that Texas allows punitive damages under a showing of gross negligence, not recklessness as in maritime law. However, the other Gulf states all require recklessness. This minor divergence between rights under state and maritime law is isolated and does not significantly increase the interests of the states in applying their own law. The Texas rule should be preempted.

234. *Compare* Part I.A.3 with Part I.A.4.

235. *Compare* Part I.A.3 with Part I.A.4 (preponderance of the evidence standard in maritime cases is more plaintiff-friendly than clear and convincing standards under state law).

236. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 509–15 (2008).

237. John M. Broder, *Blunders Abounded Before Gulf Spill, Panel Says*, N.Y. TIMES, Jan. 5, 2011, <http://www.nytimes.com/2011/01/06/science/earth/06spill.html>.

238. *The St. Lawrence*, 66 U.S. (1 Black) 522, 526–27 (1862).

239. *Am. Ins. Co. & Ocean Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 545 (1828).

a rule by a variety of methods.²⁴⁰ Federal courts may, and often do, “borrow” state law and apply it as the federal admiralty rule.²⁴¹ For example, the Supreme Court looked to state law when it originally formulated the 1:1 punitive-to-compensatory damage ratio for maritime law.²⁴²

It has already been noted that the Gulf oil spill is without precedent. The ability to borrow state law to create a uniform rule could prove to be the ultimate tool in handling the Gulf oil spill litigation, working in conjunction with maritime preemption of state law to promote the federal interest in maritime uniformity while minimizing any intrusion of the admiralty into areas traditionally governed by state police powers.

For example, punitive-to-compensatory ratios in the Gulf states range from a 4:1 maximum ratio to not recoverable at all.²⁴³ Borrowing from the state rules, a federal judge could adopt a more representative and average ratio, perhaps at 3:1 or 2:1. The newly crafted maritime rule would preempt the varying state law rules without substantially reducing the remedies available to claimants located in states with higher ratios. The federal interest in uniformity would be promoted while respecting historical state police powers in regulating pollution.

The state statutes providing strict liability and state common law claims for strict liability would be duplicative of OPA. It is unlikely that liability will be capped under OPA because a finding of gross negligence or violation of a federal regulation seems almost inevitable. Transocean, for example, did not perform an inspection of the blowout preventer as required by federal regulation.²⁴⁴ However, in the event that liability was deemed to be capped under OPA, but uncapped under a state law, the state interest in applying its own law would greatly increase and maritime preemption of state law would probably be unjustifiable.

The only type of state claim remaining would be nuisance claims. If seeking damages under nuisance, then this would be duplicative of remedies available by OPA, which provides a better fault standard for claimants anyway. To the extent that parties were seeking some form of injunctive relief available under a state nuisance claim and no similar right

240. THOMAS J. SCHOENBAUM, *ADMIRALTY & MARITIME LAW* § 2-1 (4th ed. 2010).

241. *Id.*

242. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 509-513 (2008) (comparing state damage statutory provisions). The Court emphasized “the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law [of] maritime.” *Id.* at 508 n.21.

243. *See supra* Part I.A.4.

244. 30 C.F.R. § 250.516; David Barstow, et. al., *Deepwater Horizon's Final Hours*, N.Y. TIMES, Dec. 25, 2010, <http://www.nytimes.com/2010/12/26/us/26spill.html?pagewanted=all>.

or remedy was available under federal nuisance claims, preemption of the state law would be ill-advised.

Because the state law claims are generally duplicative of claims under the federal scheme of maritime negligence and OPA, the interest of the states in applying their own law is minimal. The Supreme Court has noted that when similar claims exist under both state and federal common law, the federal claims govern.²⁴⁵ Additionally, the federal interest in such a catastrophic oil spill is great because the spill originating in federal waters was caused by activities regulated by federal law and agencies. Further, the spill has contaminated many coastal states while most spills in previous caselaw have been limited to a single state. The spill has affected a whole region, if not the whole nation. The overwhelming nature of the federal interest cannot be denied and, therefore, outweighs the state interests at issue. Federal maritime law should, therefore, preempt state law under the third prong of *Jensen*.

To the extent that state laws offer more generous substantive rights or procedural advantages, courts can seek to incorporate these benefits into general maritime law under the courts broad maritime rule-making authority after comparing the federal rule to the rules of each of the Gulf states. This rule-making power can be wielded to balance the federal interest in maritime uniformity with the state interest in preserving historical police powers.

Finally, this essay does not address a distinct factual scenario in which oil pollution originates within one state's borders or territorial waters but affects other states. The federal interest in such cases is reduced to some extent because of the locality. The federal interest in uniform recovery and efficiency is still present. The state in which the pollution originated has an even greater interest because of the locality.

In such scenarios, two options are available. The court could hold that maritime law does not preempt either of the states' laws because the federal interest is diminished. Alternatively, maritime law would only preempt the law of the affected state because its interest is lesser based on locality. The

245. *City of Milwaukee v. Illinois & Michigan (Milwaukee II)*, 451 U.S. 304, 314 n.7 (1981) ("In this regard we note the inconsistency in Illinois' argument and the decision of the District Court that both federal and state nuisance law apply to this case."); *Illinois v. Milwaukee (Milwaukee I)*, 406 U.S. 91, 108 n.9 (1972) ("Federal common law and not the varying common law of the individual States is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain.").

latter alternative is analogous to the Court's reasoning in *Ouellette*²⁴⁶ and, for that reason, this essay advocates that interpretation. Ultimately, it is not necessary to address that factual scenario during the Gulf Coast litigation. In cases involving oil pollution originating within one state's waters and only affecting the same state, there is no interference with interstate relations and state law should be applied. That state's police power interest clearly outweighs any federal interest in the matter.

In summary, OPA's savings clause should not be construed to affect maritime preemption. The text and legislative history support this line of reasoning. The two cases, which have held otherwise, are based on faulty reasoning.

In factual situations involving multistate oil pollution originating in federal waters, maritime law should preempt state laws governing oil spill liability. To offset any of the harshness of this holding, courts can incorporate some state law into the case under the maritime rule-making authority, which permits borrowing rules from state law in novel situations. This construction of the law honors both the historic police powers of the states and the maritime interest in uniformity required by the Constitution.

CONCLUSION

Research demonstrates that OPA's savings clause is limited to OPA itself and does not affect maritime law or maritime preemption. This analysis is primarily textual in nature.²⁴⁷ However, its application properly balances constitutional interests in historic police powers and uniformity in maritime law. General maritime law should preempt the state law of each of the five Gulf Coast states because most rights and remedies under state law are already available to claimants under federal maritime law and OPA. In some instances, the state laws may provide greater rights or remedies than maritime law, such as the punitive-to-compensatory maximum damage ratios. To address these situations, federal courts may use their maritime rule-making authority to adopt a standard which reflects the state law practices but is applied uniformly throughout the multi-district litigation.

The courts could limit this holding to the Gulf spill, or to factual scenarios in which oil pollution originates in federal waters and affects

246. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 493–97 (1987) (holding nuisance law of a state affected by interstate pollution was preempted by the Clean Water Act's regulatory scheme and that nuisance law of source states where pollution originated was not preempted).

247. *See supra* Parts II.A and II.B (focusing on text of OPA's saving clauses).

multiple states. In these cases, state law interferes with the proper harmony of maritime law in interstate relations under the third prong of *Jensen*. Under this novel yet common sense argument, duplicative state laws would be preempted in order to achieve a fair and efficient resolution to the litigation, which acknowledges the overwhelming federal interest and need for uniform recovery. The harshness of preemption would be alleviated and the historic police powers of the states would be preserved through maritime rule-making authority.