THE OIL POLLUTION ACT'S PROVISIONS ON DAMAGES FOR ECONOMIC LOSS

David W. Robertson*

* W. Page Keeton Chair in Tort Law and University Distinguished Teaching Professor, University of Texas at Austin. The sole purpose of mentioning my academic affiliation is to identify me. The views expressed here are mine, not those of my university or law school. The analysis presented here has a deep basis in decades of academic study, reflection, and scholarship, but it also reflects work I have recently become engaged in as a consulting expert for the Plaintiffs' Steering Committee in *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179 (E.D. La.) [hereinafter "Oil Spill Litigation"]. For current developments on the Oil Spill Litigation, with links to all relevant filings and orders listed in reverse chronological order, see http://www.laed.uscourts.gov/OilSpill/OilSpill.htm.

I. INTRODUCTION: THE KEY STATUTORY PROVISIONS

When the supertanker *Exxon Valdez* ran aground and ripped itself open in Alaska's coastal waters in March 1989, spilling an estimated eleven million gallons of crude oil,[1] Congress had been trying for more than a decade to enact comprehensive marine oil spill legislation.[2] The previously unimagined scale and scope of the Valdez tragedy jolted Congress into a more productive mode,[3] and the Oil Pollution Act of 1990 ("OPA") was enacted and signed into law on August 18, 1990.[4]

In their deliberations on the bills that eventually coalesced to become OPA, members of Congress expressed deep dissatisfaction with virtually everything about this country's lack of preparedness for disasters like Valdez. One major theme in this outpouring of official grief and anger was the view that the thousands upon thousands of individuals, communities, and businesses whose lives and livelihoods were destroyed, disrupted, or damaged should have had

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[1] *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 476–78 (2008).

[2] JOHN C.P. GOLDBERG, LIABILITY FOR ECONOMIC LOSS IN CONNECTION WITH THE DEEPWATER HORIZON SPILL 7 (Nov. 22, 2010), http://www.gulfcoastclaimsfacility.com/Goldberg.Memorandum.of.Law.2010.pdf; *infra* Appendix.

[3] *See* GOLDBERG, *supra* note 2, at 6. The *Exxon Valdez* spill was "only the world's fifty-seventh largest." Raffi Khatchadourian, *The Gulf War*, THE NEW YORKER, Mar. 14, 2011, at 39 *available at* http://www.newyorker.com/reporting/2011/03/14/110314fa_fact_khatchadourian?printable. But in this country the Valdez spill had a unique political impact because it was so "ecologically devastating" and it was the United States' first huge one. *Id*. Famous larger spills include the thirty-seven million gallons of Kuwaiti crude oil released when the *Torrey Canyon* went aground off Cornwall in 1967 and the estimated 120-million-gallon spill caused by the semi-submersible drilling rig *Sedco 135-F* in the Bay of Campeche, Mexico, in June 1979. *Id.*; *see* Ixtoc I Oil Spill, http://en.wikipedia.org/wiki/Ixtoc_I_oil_spill (last visited June 3, 2011); *see also* Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140, 1142 (5th Cir. 1985) (referring to the Ixtoc I spill as "the world's largest"). Oil from the Ixtoc spill reached Texas beaches, but the national political impact of the incident was negligible.

Some analysts have noted that the 1989–90 Congress was jolted not just by the *Exxon Valdez* spill but by several other spills occurring not long after Valdez, including "the *World Prodigy* oil spill off the coast of Rhode Island in June 1989; the *American Trader* oil spill along the coast of California in February 1990; and the *Mega Borg* explosion, fire, and oil spill in the Gulf of Mexico in June 1990." Lawrence I. Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the First Decade*, 24 TUL. MAR. L.J. 481, 482 (2000).

[4] Act of Aug. 18, 1990, Pub. L. No. 101–380, 104 Stat. 484. Title I of the Act, captioned Oil Pollution Liability and Compensation (§§ 1001–1020), is codified at 33 U.S.C. §§ 2701–2730 (2011). Because most practitioners and lower-court judges seem to find the Title 33 counterparts more easily accessible than the provisions of the Act itself, this Article cites to OPA by using the Title 33 section numbers.

(but often were denied) adequate, fair, and speedy compensation.[5] Congress believed that such relief should be guaranteed for the victims of all future spills.

OPA addresses these concerns by imposing strict (no-fault) liability on the party or parties responsible for an oil spill.[6] This strict liability is limited (but only slightly) by a narrowly crafted set of affirmative defenses.[7] An oil polluter held strictly liable under OPA is potentially protected by a cap on the damages owed,[8] but a claimant can break the cap by showing that the responsible party's gross negligence, willful misconduct, or violation of a federal safety statute or regulation "proximately caused" the spill.[9] Victims who are not fully compensated by a responsible party may claim against a federally administered Oil Spill Liability Trust Fund.[10]

OPA makes polluters (and, when polluters can't or won't pay, the Fund) responsible for removal costs and for a "wide range" of damages.[11] The OPA provisions with which this Article is centrally concerned are those specifying the types of damages available. The immediately relevant statutory provisions are set forth just below. The central focus of this Article is the meaning of the language in italics (supplied).

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[5] *See infra* note 58.

[6] 33 U.S.C. § 2702 (2011).

[7] 33 U.S.C. § 2703 (2011).

[8] 33 U.S.C. § 2704(a) (2011).

[9] 33 U.S.C. § 2704(c) (2011). In the Oil Spill Litigation, *supra* note *, the principal defendant has waived the damages caps. Statement of BP Exploration & Production Inc. Re Applicability of Limit of Liability Under Oil Pollution Act of 1990, *In re*: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, 2010 WL 4151003, at *1 (E.D. La. Oct. 18, 2010).

[10] 33 U.S.C. §§ 2701(11), 2712(a)(4) (2011). The Fund, which is funded primarily by a tax on oil imports, cannot pay more that $1 billion for any single incident. 26 U.S.C. § 9509(c)(2)(A) (2011). It is administered by the Coast Guard under regulations published in Part 136 of Title 33 of the Code of Federal Regulations.

[11] S. REP. NO. 101–94, at 12 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 734.

33 U.S.C. § 2702. Elements of liability

(a) In general

Notwithstanding any other provision or rule of law, and subject to the provisions of this Act, 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 specified in subsection (b) of this section *that result from such incident*.

(b) Covered removal costs and damages

(1) Removal costs

* * *

(2) Damages

The damages referred to in subsection (a) of this section are the following:

(A) Natural resources

Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, and Indian tribe trustee, or a foreign trustee.

(B) Real or personal property

Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property.

(C) Subsistence use

Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources.

(D) Revenues

Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by the Government of the United States, or a political subdivision thereof.

(E) Profits and earning capacity

> Damages equal to the loss of profits or impairment of earning capacity *due to the injury, destruction, or loss of real property, personal property, or natural resources,* which shall be recoverable by any claimant.
>
> (F) Public services
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> Damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil, which shall be recoverable by a State, or a political subdivision of a State.

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II. THE MACONDO (*DEEPWATER HORIZON*) OIL SPILL

Disagreement about the meaning of the above-emphasized language of Sections 2702(a) and 2702(b)(2)(E) is presently at the heart of the litigation[12] stemming from the monstrous Macondo[13] oil well spill into the Gulf of Mexico on April 20, 2010, when the *Deepwater Horizon* drilling rig exploded, burned, and capsized, killing eleven workers, injuring many other workers, and causing oil and gas to begin spewing into the Gulf from the wellhead almost a mile (5,000 feet) below the ocean surface.[14] The flow of oil into the Gulf was not staunched until July 15, 2010. By then, an estimated 200 million gallons of oil (perhaps twenty times as much as the Valdez spill) had entered the Gulf.

The Macondo well is located forty-three miles off the coast of Louisiana and about ninety-eight miles from the coasts of Mississippi and Alabama. Hundreds of thousands of individuals and businesses in those states, as well as in Florida, Texas, and other states, have sustained economic harm and are seeking recompense. Some of these victims—those who

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[12] *See supra* note *.

[13] "Macondo" was the name that one of the operating companies, presumably BP, gave to the exploratory well. This was also the name of a fictional town in Gabriel Garcia Marquez's novel ONE HUNDRED YEARS OF SOLITUDE. In the novel, the village of Macondo, grown into a city, is eventually wiped off the map by a gigantic windstorm.

[14] The information in this section of this Article is taken from the pleadings on file in the Oil Spill Litigation, *supra* note *.

owned or leased real or personal property affected by the spill—can invoke subsection B of Section 2702(b)(2). For most of them, though, the crucial provision is Section 2702(b)(2)(E).[15]

III. THE PRECISE QUESTION TREATED IN THIS ARTICLE

The central question addressed by this Article is the correct interpretation of 33 U.S.C. § 2702(b)(2)(E) (quoted above in Part I). For analyzing this question, the proper starting place is the combined language of subsections 2702(a) and (b)(2)(E). Paraphrased and combined, these provisions look like this:

> Subsection (a): A party responsible for an oil spill or a substantial threat of an oil spill owes certain categories of damages that "result from" the spill or threat.
>
> Subsection (b)(2)(E): Among those categories of recoverable damages are "loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources."

For ease of presentation, it will sometimes be useful to refer to the "loss of profits" and "impairment of earning capacity" covered by subsection (b)(2)(E) as "pure economic loss."[16] In simplified form, the question addressed in this Article is: What must a pure economic loss victim show in order to establish that his damages "result[ed] from" a spill (or threat) and were "due to the injury, destruction, or loss of [property] or natural resources?"

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[15] To recover damages under subsection (B) of Section 2702(b)(2), an owner or lessor must trace its damages to "injury to" or "destruction of" its own (leased or owned) property. Under subsection (E), that same claimant (like claimants who did not own or lease any involved property) can recover on showing that the claimant sustained lost profits or impaired earning capacity "due to the injury, destruction, or loss" of natural resources or of anyone's property. *See In re* Taira Lynn Marine Ltd., 444 F.3d 371, 382 (5th Cir. 2006) (indicating that property owners could invoke both subsections (B) and (E)); *In re* Settoon Towing L.L.C., 2009 WL 4730969 at *3–4 (E.D. La. Dec. 4, 2009) (holding that when a spill temporarily prevented the owner of an undamaged offshore platform from using it, the owner had a cause of action under subsection (E)); Sekco Energy, Inc. v. M/V Margaret Chouest, 820 F. Supp. 1008, 1015 (E.D. La. 1993) (same).

[16] Economic losses caused by physical damage to the plaintiff's real or personal property are routinely regarded as recoverable and non-problematic. (Such damages are addressed by OPA in 33 U.S.C. § 2702(b)(2)(B).) The term "pure economic loss" refers to economic losses that do not stem from physical injury to the plaintiff's person or tangible property. DAVID W. ROBERTSON, WILLIAM POWERS, JR. DAVID A. ANDERSON & OLIN GUY WELLBORN III, CASES AND MATERIALS ON TORTS 251 (4th ed. 2011).

IV. THE GULF COAST CLAIMS FACILITY, THE GOLDBERG PAPER, AND THE COMMERCIAL-USE-RIGHT THEORY

The meaning of 33 U.S.C. § 2702(b)(2)(E) was recently addressed at some length by Harvard Law School Professor John C. P. Goldberg.[17] The circumstances leading to the production of Professor Goldberg's paper are sketched below.[18]

The operator of the Macondo site was BP Exploration and Production, Inc., a subsidiary of BP, PLC. Transocean, Ltd. owned the *Deepwater Horizon*. The Coast Guard has designated BP and Transocean as "responsible parties" under OPA.[19] As a "responsible party," BP was required by 33 U.S.C. § 2714(b) to set up and advertise a claims procedure.[20] In recognition of that obligation—and by some accounts in response to the blandishments of President Obama[21]—BP set up the Gulf Coast Claims Facility (GCCF) and put a famous and well-credentialed attorney/mediator, Kenneth Feinberg, in charge of it.[22]

The purpose of the GCCF is to settle claims for economic and other losses made against BP. The Facility initially presented itself to the public as "neutral,"[23] but the federal district

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[17] *See* GOLDBERG, *supra* note 2.

[18] Much of the information in the two paragraphs just below is taken from the pleadings on file in the Oil Spill Litigation, *supra* note *.

[19] 33 U.S.C. § 2701(32) defines "responsible party" as the vessel or facility from which the spill or threatened spill emanated. Section 2714(a) requires the President (acting through the Coast Guard), upon learning of a spill or threatened spill, to designate and "immediately notify" the party or parties deemed responsible. Transocean takes the position that it is responsible only for the oil that leaked from the rig (by some accounts about 700,000 gallons of fuel) and not for the millions of barrels of oil that spewed from the underwater well.

[20] 33 U.S.C. § 2714(b)(1) provides that unless the designated responsible party denies the designation, the responsible party "shall advertise the designation and the procedures by which claims may be presented." Section 2714(b)(2) provides that the advertisement "shall state that a claimant may present a claim for interim, short-term damages representing less than the full amount of damages to which the claimant ultimately may be entitled and that payment of such a claim shall not preclude recovery for damages not reflected in the paid or settled partial claim."

[21] *See, e.g.*, GOLDBERG, *supra* note 2, at 4.

[22] The Goldberg paper seems to go out of its way to emphasize that setting up the fund was voluntary on BP's part and that the GCCF and Mr. Feinberg are neutral and independent of BP. *See Id.* at 4–6. None of that appears to be true. OPA required BP to set up a settlement procedure and to pay interim claims without insisting on full releases. *See supra* note 20. And the federal judge in charge of the Oil Spill Litigation has ordered the GCCF and Feinberg to cease and desist from claiming independence and neutrality. *See* Oil Spill Litigation, Order and Reasons, *infra* note 24.

[23] *See, e.g.*, *Gulf Coast Claims Facility Protocol for Interim and Final Claims*, Nov. 22, 2010, at 2, *available at* http://www.afj.org/connect-with-the-issues/the-corporate-court/crude_justice/gccf-protocol-for-interim-

judge in charge of the Oil Spill Litigation subsequently issued an order directing BP, Feinberg, and the GCCF to "[r]efrain from referring to the GCCF, Ken Feinberg, or [Feinberg's law firm] as 'neutral' or completely 'independent' from BP."[24] The court's order further stated: "It should be clearly disclosed in all communications, whether written or oral, that said parties are acting for and on behalf of BP in fulfilling its statutory obligations as the 'responsible party' under the Oil Pollution Act of 1990."[25]

Mr. Feinberg has a $20 billion settlement fund to work with. This fund is "intended to make whole both private enterprises (for lost earnings) and the states and the federal government (for cleanup costs)."[26] The GCCF is also trying to use the fund to settle personal injury and death claims.[27] Given the tragic physical and emotional consequences of the *Deepwater Horizon* explosion and the apparent magnitude of the Macondo spill's physical, emotional, and economic effects, $20 billion is probably not enough money. According to the *New York Times*, Feinberg—in quest of legal principles that might justify the exclusion of economic loss claimants from areas of the country remote from the spill and its physical effects—turned to Professor Goldberg for assistance. Here is the *Times* account:

> Working outside of the court system, Mr. Feinberg isn't necessarily constrained by [OPA], or state or federal tort law. But to figure out what, if anything, these claimants should be paid, he needs a sense of what would become of them if they slogged through the dockets.
>
> So Mr. Feinberg has quietly hired one of the country's foremost scholars on torts—he declined to provide a name [we now know it is Professor Goldberg]—to write a memorandum about the validity and value of [economic loss] claims.

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and-final-claims-2010.pdf (stating that "[t]he GCCF is administered by Kenneth R. Feinberg, ('the Claims Administrator'), a neutral fund administrator") (hereinafter "Protocol").

[24] *See* Order and Reasons at 13-14, *In re*: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179 (E.D. La. Feb. 2, 2011), *available at* http://www.laed.uscourts.gov/OilSpill/Orders/222011OrderonRecDoc912.pdf.

[25] *Id.* at 14.

[26] David Segal, *Should BP's Money Go Where Oil Didn't?*, N.Y. TIMES, Oct. 23, 2010, at 1 *available at* http://www.nytimes.com/2010/10/24/business/24claim.html.

[27] *See Protocol*, *supra* note 23, at 1.

> The memo is due soon, and Mr. Feinberg has no idea what it will say. But it won't serve as a blueprint, he says. It will serve as leverage. If the memo states, for instance, that certain [economic loss] claims are stinkers, Mr. Feinberg could say to claimants, "You'll get nothing in court, but I'll give you 20 cents or 30 cents on the dollar."[28]

About a month after the *Times* article appeared, Professor Goldberg transmitted his report to Mr. Feinberg, who made it publicly available.[29] The report does indeed say that some economic loss claims—in fact, a great many of them—are stinkers. In a succinct, clear Executive Summary at the beginning of the paper, Goldberg writes (emphasis supplied):

> Under OPA, a person may obtain compensation for economic loss from a party responsible for a spill if she can prove that her loss is "due to" harm to property or resources that "result[s] from" the spill, irrespective of whether she owns that property or those resources. *This statutory language is best understood to allow recovery only by those economic loss claimants who can prove that they have suffered economic loss because a spill has damaged, destroyed, or otherwise rendered physically unavailable to them property or resources that they have a right to put to commercial use.* Thus, if a spill were to deprive commercial fishermen of expected profits by killing fish they ordinarily would catch and sell, or by causing authorities to bar the fishermen from accessing those fish for a period of time, the fishermen would be entitled to recover. By contrast, operators of beach resorts in areas physically unaffected by a spill, but that nonetheless suffer economic loss because of a general downturn in tourism resulting from the spill, are among those who are not entitled to recovery under OPA.[30]

It will be useful to call the above-emphasized proposal the *commercial-use-right requirement.*

In the body of his paper, Goldberg demonstrates that the commercial-use-right requirement would be an extraordinarily potent exclusionary tool. Part VI below borrows elements of that demonstration as a way of emphasizing the narrow coverage Section 2702(b)(2)(E) would have in Professor Goldberg's world, and to demonstrate that Congress probably had broader aims for the provision.

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[28] Segal, *supra* note 26, at 4.
[29] *See* GOLDBERG, *supra* note 2.
[30] *Id.* at 3.

V. A MIDDLE-OF-THE-ROAD INTERPRETATION OF OPA'S ECONOMIC LOSS PROVISIONS [31]

At the end of the day, the intended meaning of 33 U.S.C. § 2702(b)(2)(E) is tolerably apparent.[32] But it may not be apparent at first blush. An informed reading of the statute requires some understanding of the jurisprudential background and some grasp of the legislative history.

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[31] *See infra* note 56 (arguing that the subtitle's "mid-road" characterization is justified).

[32] This Article's claim that the relevant OPA provisions express a clear meaning entails an underlying assumption that the statute was carefully drafted. This assumption rests on generally comfortable ground—Congress worked intensively on the statute for many months, the legislative history is copious, and nobody in Congress could have doubted the critical importance of the legislation.

But the assumption of clear draftsmanship is not entirely free from doubt. Two irritating anomalies are apparent in some of the statute's key language. First, Section 2701(5)–defining the term *damages* as used throughout the statute—states that the term "means damages specified in section 2702(b) . . . and includes the cost of assessing these damages." Section 2702(b)(2)(A)—providing for the recovery by governmental trustees of damages for injury to natural resources—repeats that these damages "includ[e] the reasonable costs of assessing the damage." But the ensuing subsections of § 2702(b)(2)—subsections (B) through (F)—use the term *damages* without saying anything about damage-assessment costs. So, is the subsection (A) language about assessment costs a redundancy? Or does that language imply that no assessment costs are allowed by the ensuing subsections (B) through (F)? The correct answer is probably redundancy, but Congress should have tried harder to avoid creating this puzzle.

Second, subsection (A) of Section 2702(b)(2) provides for recovery by governmental trustees of damages for "injury to, destruction of, loss of, or *loss of use* of, natural resources" (emphasis supplied), whereas subsection (D) (providing for recovery by governmental entities of damages for lost revenues and taxes) and subsection (E) (the core economic loss provision that is the central focus of this Article) use a formulation—"injury, destruction, or loss of real property, personal property, or natural resources"—that omits the loss-of-use phrase. Does the inclusion of "loss of use" in subsection (A) and the omission of "loss of use" in subsections (D) and (E) mean that a loss of use of natural resources is not compensable under (D) and (E)? It certainly could mean that. *See* Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation and internal quotation marks omitted).

Applying the *Russello* canon to the disparity between subsections (A) (on the one hand) and (D) and (E) (on the other) would yield strange results. Subsection 2702(a) imposes liability for the "damages specified in subsection (b) . . . that result from" "the substantial threat of a discharge of oil," yet if we treat the omission of "loss of use" from (D) and (E) as purposive, those subsections might often, perhaps generally, deny recovery in threatened discharge cases. Moreover, the *Russello* canon would also raise difficulties with the application of subsection (C) of section 2702(b)(2) in threat cases. Subsection (C) allows the recovery of "damages for loss of subsistence use of natural resources" but seemingly only when "natural resources . . . have been injured, destroyed, or lost." Here too, reading subsection (A) to cover a broader range of situations than the ensuing subsections produces a potential anomaly in threat cases.

Professor Goldberg argues persuasively that the subsection (E) term "loss" should be read to include loss of use. *See* GOLDBERG, *supra* note 2, at 19–20 n.40 (arguing that fishermen who cannot fish because of a threat-caused embargo have suffered a loss of natural resources within the meaning of subsection (E)). I agree with Goldberg on this point—and I think we need to accept the same argument on behalf of subsistence fishermen who invoke subsection (C)—but we have to realize that here again (as with the damages-assessment puzzle) reaching the desired resolution requires treating a portion of Section 2702(b)(2)(A) as redundant.

A. Deep Background: Admiralty Jurisdiction and Federal Maritime Law

Article III, Section 2 of the Constitution brings "all cases of admiralty and maritime jurisdiction" under the authority of the federal courts and Congress, and it subjects these cases to federal-law governance.[33] In general, the following simplified statement of the matter holds true: Admiralty cases are governed by federal maritime law.[34] The *Exxon Valdez* litigation was an admiralty (and thus federal maritime) case, and so is the Macondo Oil Spill Litigation.

Federal maritime law includes two tortfeasor-friendly doctrines that can provide great comfort to a marine oil-pollution defendant. The first is the right of a shipowner to limit its liability to the value of the vessel (measured after the accident) if the shipowner can show that the damages sought by the accident victims came about "without the privity or knowledge of the [ship]owner."[35] The second—variously referred to as the *Robins Dry Dock* rule or the *Testbank* rule[36]—often prevents economic-loss victims from recovering damages unless they can show that they owned or leased property that was physically damaged in the accident that caused their economic losses.[37]

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[33] *See generally* DAVID W. ROBERTSON, ADMIRALTY AND FEDERALISM (Found. Press 1970).

[34] Federal maritime law emanates from the federal courts and from Congress. *See* Panama R. Co. v. Johnson, 264 U.S. 375, 387 (1924) (explaining that the constitutional grant of "admiralty and maritime jurisdiction" to the federal judicial power enables both the federal courts and Congress to provide admiralty and maritime governance and stating that "there is no room for doubt that the power of Congress extends to the entire subject and permits of the exercise of a wide discretion.") Court-made federal maritime law is often called "general maritime law"; it is "federal common law." Exxon Shipping Co. v. Baker, 554 U.S. 471, 483 (2008). In modern times, congressional authority over the admiralty and maritime field has become preeminent. *See* Miles v. Apex Marine Corp., 498 U.S. 19, 36 (1990) (stating that "[m]aritime tort law is now dominated by federal statute").

[35] 46 U.S.C. § 30505(b) (2011).

[36] *See* Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1020–21 (5th Cir. 1985) (en banc) (citing Robins Dry Dock v. Flint, 275 U.S. 303, 308–09 (1927), for the proposition that "physical damage to a proprietary interest [is] a prerequisite to recovery for economic loss in cases of unintentional maritime tort").

[37] *Testbank* could be read to establish a more defendant-friendly rule that would require an economic-loss plaintiff to show that the damages sought were caused by (rather than merely being accompanied by) physical damage to the plaintiff's person or property. Subsequent Fifth Circuit decisions indicate that the less demanding (accompanied by) requirement stated in the text is the correct reading. *See In re* Taira Lynn Marine Ltd., 444 F.3d 371, 376 (5th Cir. 2006) (stating that *Testbank* barred claims "for economic losses unaccompanied by damage to a proprietary interest"); Lloyd's Leasing Ltd. v. Conoco, 868 F.2d 1447, 1450–51 (5th Cir. 1989) (separate opinion by Judge Higginbotham, the author of the en banc opinion in *Testbank*, eschewing the causal-connection-requirement

For cases falling within its scope, OPA nullifies both the shipowners' limited-liability doctrine and the *Robins/Testbank* doctrine. 33 U.S.C. § 2702(a) states that the strict liability it imposes on oil polluters is "[n]otwithstanding any other provision or rule of law," and the August 1, 1990, Conference Report explaining the bill that was enacted into law and signed by President George H. W. Bush on August 18 states (emphasis supplied):

> Liability under this Act is established notwithstanding any other provision or rule of law. This means that the liability provisions of this Act would govern compensation for removal costs and damages *notwithstanding* any limitations under existing statutes such as the act of March 3, 1851 (46 U.S.C. 183),[38] or under *existing requirements that physical damage to the proprietary interest of the claimant be shown.*[39]

Moreover, Section 2702(b)(2)(E) provides that economic loss damages "shall be recoverable by any claimant," and the Conference Report explains (emphasis supplied):

> Subsection (b)(2)(E) provides that any claimant may recover for loss of profits or impairment of earning capacity resulting from injury to property or natural resources. The claimant *need not be the owner of the damaged property or resources to recover for lost profits or income*.[40]

This much really seems undebatable: Congress wanted to make sure that marine oil polluters could not use these two major maritime-law defensive doctrines as a shield against OPA liability.[41]

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interpretation of *Testbank*). Judge Higginbotham's opinion in *Lloyd's Leasing* is analyzed in David W. Robertson, *An American Perspective on Negligence Law*, *in* MARKESINIS AND DEAKIN'S TORT LAW 283, 300–02 (6th ed. 2008).

[38] This is the Shipowners' Limited Liability Act, presently codified at 46 U.S.C. § 30505 (2011).

[39] H.R. REP. NO. 101–653, at 103 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 781 (Conf. Rep.).

[40] *Id.*

[41] This footnote belabors the obvious—that the *Robins/Testbank* rule is expunged from OPA cases. It does so because the major thrust of Professor Goldberg's proposed interpretation of 33 U.S.C. §§ 2702(a) and (b)(2)(E)—his commercial-use-right requirement, treated *supra* at note 30 and *infra* in Parts VI-C and VII—is to preserve as much of the *Robins/Testbank* jurisprudence as possible.

Cases holding or stating that OPA nullifies the *Robins/Testbank* rule include *In re* Taira Lynn Marine Ltd., 444 F.3d 371, 382 (5th Cir. 2006); *In re* Exxon Valdez, 270 F.3d 1215, 1252–53 (9th Cir. 2001); Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 631 (1st Cir. 1994); Dunham-Price Group, L.L.C. v. Citgo Petroleum Corp., 2010 WL 1285446 at *2 (W.D. La. Mar. 31, 2010); *In re* Settoon Towing L.L.C., 2009 WL 4730969 at *4 (E.D. La. Dec. 4, 2009); *In re* Nautilus Motor Tanker Co., 900 F. Supp. 697, 702 (D. N.J. 1995); Sekco Energy, Inc. v. M/V Margaret Chouest, 820 F. Supp. 1008, 1014–15 (E.D. La. 1993); Kodiak Island Borough v. Exxon Corp., 991 P.2d 757, 768–69 (Alaska 1999). In *FGDI, L.L.C. v. M/V Lorelay*, an OPA defendant conceded that it owed damages to

B. The Facially Apparent Meaning of Section 2702(b)(2)(E): A Factual Causation Interpretation

As we saw in Part III above, 33 U.S.C. §§ 2702(a) and 2702(b)(2)(E) have to be read together. Taken together, they say that an economic loss victim who invokes subsection (b)(2)(E) must show that his damages "result[ed] from" the spill and were "due to" the injury, destruction, or loss of tangible[42] property or natural resources.

The statutory terms "result from" (subsection 2702(a)) and "due to" (subsection 2702(b)(2)(E)) are not specialized legal terms; they are English-language synonyms for the term "caused by."[43] As we will see in Part VII below, Professor Goldberg's entire proposal rests on an asserted major difference between the meanings of the OPA terms "result from" and "due to." But the asserted difference is imaginary; it is Goldberg's own creation, a deliberate and purposive illusion. The thrust and direction of Professor Goldberg's creativity are fully treated in Part VII. For the present, it should suffice to note that the House Conference Report summarizes Section 2702(b)(2)(E)—Goldberg's pivotal "due to" provision—as follows

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a claimant who could not have qualified for recovery under the *Robins/Testbank* regime. 193 Fed. App'x 853, 2006 WL 2351835 at *1 (11th Cir. 2006).

The commentators agree that OPA ousts the *Robins/Testbank* rule. *See* Steven R. Swanson, *OPA 90 + 10: The Oil Pollution Act of 1990 After Ten Years*, 32 J. MAR. L. & COM. 135, 150–52 (2001); Lawrence I. Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the First Decade*, 24 TUL. MAR. L.J. 481, 531–32 (2000); Keith B. LeTourneau & Wesley T. Welmaker, *The Oil Pollution Act of 1990: Federal Judicial Interpretation Through the End of the Millennium*, 12 U.S.F. MAR. L.J. 147, 200–02 (2000); Francis J. Gonynor, *Six Years Before the Mast: The Evolution of the Oil Pollution Act of 1990*, 9 U.S.F. MAR. L.J. 105, 126–27 (1996); Cynthia M. Wilkinson, L. Pittman, & Rebecca F. Dye, *Slick Work: An Analysis of the Oil Pollution Act of 1990*, 12 J. ENERGY, NAT. RESOURCES & ENVTL. L. 181, 264 (1992); Gregg L. McMurdy, Comment, *An Overview of OPA 1990 and Its Relationship to Other Laws*, 5 U.S.F. MAR. L.J. 423, 427–30 (1993); Cameron H. Totten, Note, *Recovery for Economic Loss Under Robins Dry Dock and the Oil Pollution Act of 1990*, 18 TUL. MAR. L.J. 167, 171–73 (1993); Daniel Kopec & H. Philip Peterson, Note, *Crude Legislation: Liability and Compensation Under the Oil Pollution Act of 1990*, 23 RUTGERS L.J. 597, 623–24 (1992).

[42] *Sekco* suggests that "[f]uture earnings derived from drilling on the Outer Continental Shelf [might] constitute property" within the meaning of subsection E. 820 F. Supp. at 1015. However, it is hard to imagine administering the statute without the tangibility criterion.

[43] *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 403 (1981) (defining "due to" as "caused by"), 510 (in a list of synonyms for "follow," stating that "*result* refers to an event that is discernibly caused by a prior event or events"), 1109 (defining the verb "result" as "to occur or exist as a consequence of a particular cause," and referring to the list of synonyms for "follow"), 1109 (defining "resultant" as "issuing or following as a consequence or result"). *See also* Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2350 (2009) (determining the meaning of the statutory term "because of" by referring to an ordinary dictionary and to considerations of "ordinary meaning" and "common talk").

(emphasis supplied): "Subsection (b)(2)(E) provides that any claimant may recover for loss of profits or impairment of earning capacity *resulting from* [the statutory term is "due to"] injury to property or natural resources."[44] The significance of the House Conference Report's phrasing of subsection (E) is huge: The Report expresses subsection (E)'s "due to" requirement by using the term "resulting from." Here we have an authoritative indication by Congress that the Section 2702(b)(2)(E) term "due to" has the same meaning as the Section 2702(a) term "result from." This by itself substantially refutes the Goldberg proposal.

Plainly enough, in the statute as in the English language, "result from" and "due to" are synonyms for "caused by."[45] In the English language, the term "caused by" normally refers to factual causation,[46] not to what Professor Goldberg calls "proximate cause."[47] It seems plain that the combination of Sections 2702(a) and 2702(b)(2)(E) requires an economic-loss claimant to establish that the defendant's spill was a factual cause of injury, destruction, or loss of tangible property or natural resources that in turn was a factual cause of the claimant's damages—nothing more and nothing less. Because the prevailing, default test for factual causation in Anglo-American tort law is the but-for test,[48] we can be fairly precise about the evident meaning of Sections 2702(a) and 2702(b)(2)(E) for an economic-loss claimant: The claimant is required to

[44] H.R. REP. NO. 101–653, at 103.

[45] 33 U.S.C. § 2702 uses the causation-related terms "result from" (subsection a), "resulting from" (subsection b(2)(B)), "due to" (subsections b(2)(D) and b(2)(E)), and "caused by" (subsection b(2)(F)). I can find nothing in the statute's text, jurisprudential background, or legislative history that even hints that different meanings were intended. Arguably Congress would have done better to strive for uniform use of the everyday term "caused by" in lieu of the synonyms. *Cf. supra* note 32 (questioning other aspects of the draftsmanship that went into OPA).

[46] *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 214 (1981) (defining the noun "cause" to mean "that which produces an effect, result, or consequence" and the verb "cause" to mean "make happen").

[47] GOLDBERG, *supra* note 2, at 20 & n.41.

[48] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 and cmt. b (2010). *See also Gross*, 129 S. Ct. at 2350 (stating that "in common talk, the phrase 'based on' indicates a but-for causal relationship and thus a necessary logical condition, and . . . the statutory phrase 'based on' has the same meaning as the phrase 'because of'") (citation and internal quotation marks omitted).

show that if the spill had not brought about the injury, destruction, or loss of tangible property or natural resources, the damages complained of probably would not have been sustained.[49]

VI. CONTRASTING THE FACTUAL CAUSATION INTERPRETATION WITH THE GOLDBERG USE-RIGHT INTERPRETATION: GOLDBERG'S "UNIVERSE OF POTENTIAL PURE ECONOMIC LOSS CLAIMANTS"

For illustrating the possible ranges of meaning of the "due to" language in Section 2702(b)(2)(E), Professor Goldberg has provided an admirable tool. Positing a large Gulf of Mexico oil spill—something on the order of the BP-Macondo spill, a spill with widespread effects including a great deal of physical damage to natural resources and property—Goldberg presents a realistically imagined sixteen-item sketch of a "Universe of Potential Pure Economic Loss Claimants."[50] With two modifications, this sketch is reproduced below.[51] Note that the sketch moves from cases that seem intuitively to entail direct and immediate causation in the direction of (intuitively) increasingly remote causation. Note also that we are assuming that all these claimants can prove what they allege. As Professor Goldberg astutely observes, "[T]here is no particular reason to think that claimants more closely connected to the spill in time and space will, as a class, be in a better position to offer [sufficient evidence to support their allegations respecting damages and factual causation], or that claimants [further] removed from the spill will be less well-positioned to offer such evidence."[52]

Professor Goldberg's "Universe of Potential Pure Economic Loss Claimants," augmented by the addition of claimant #2, is the following:

> 1. *C* is a commercial fisherman who relies for his business on fisheries in the Gulf of Mexico. *C* claims that oil from a spill for which Oil Co. is responsible has polluted the

[49] Some imprecision is brought into the factual causation inquiry by the uncertain meaning of the statutory term "loss," which OPA does not define. As we saw *supra* note 32, Professor Goldberg makes a plausible argument that Section 2702(b)(2)(E)'s term "loss" can sometimes mean loss of use. *See* GOLDBERG, *supra* note 2, at 19–20 n.40.

[50] *Id.* at 12–14.

[51] The modifications are adding the numbers and inserting hypothetical claimant #2.

[52] GOLDBERG, *supra* note 2, at 15.

waters in which he fishes, and that he has been and will be unable to fish for a period of time, resulting in lost profits.

2. *CH* is a man who makes his living supplying bait, tackle, other necessary supplies, maintenance, and repairs to the vessels of *C* and other fishermen like *C*. (In older maritime terminology, people like *CH* were sometimes referred to as "ships' chandlers."[53]) *CH* claims that when the Oil Co. spill prevented *C* and the others from fishing, *CH*'s business dried up.

3. *H* owns and operates a beachfront hotel in the Gulf area. Oil from the Oil Co. spill has not reached the beachfront that is owned by *H* and reserved for use by guests at *H*'s hotel. However, oil has been found in the immediate vicinity of *H*'s hotel, including in waters that *H*'s guests frequently use, and neighboring beaches that *H*'s guests routinely visit. *H* claims to have suffered a loss of business because tourists, in light of the effects of the spill on the immediate area in which his hotel is situated, have decided to vacation elsewhere.

4. *E* is an employee at *H*'s hotel. Because the hotel has lost business, its managers have reduced staff hours by 25%, as a result of which *E* has suffered and will suffer a 25% reduction in his wages for a certain period.

5. *B* owns a barge that is used to haul equipment and supplies up and down a small navigable river that runs to the Gulf. Oil from the spill reaches the river, threatening migratory birds that live there. Authorities close the river to boat traffic for three weeks to permit clean-up. *B* is unable to operate his barge during this time and seeks recovery of profits he would have made.

6. *R* operates a dockside restaurant located in a Gulf seaport. Its regular customers are dockworkers, fishermen, and others whose jobs are connected with maritime commerce. *R* claims that, because of the spill, the restaurant has lost profits because many of the restaurant's regular customers have not been frequenting it.

7. *A* is a real estate agent whose listings are made up primarily of beachfront properties in an area of the Gulf that has been contaminated by the spill. She claims that the market for property sales and rentals has collapsed because of the spill, depriving her of commissions she otherwise would have made.

8. *W* is a woodworker who owns a small furniture store located three miles inland in a town that relies on beach tourism as a major source of revenue. *W* claims that, because some of the town's beaches have been polluted by the spill, orders for his furniture are down and that he has lost profits as a result.

9. *O* owns a beachfront inn located on the Gulf. No oil from the spill has come within 100 miles of the waters or the stretch of coastline on which the inn sits, and, at that

[53] *See, e.g.*, Puget Sound Stevedoring Co. v. Tax Comm'n, 302 U.S. 90, 94 (1937) (referring to the furnisher of loading/unloading services to a vessel as "similar . . . to . . . a ship's chandler").

location, the spill has had no other discernible adverse physical effects (such as noxious odors). However, given prevailing currents and winds, government officials and scientists have concluded that oil might reach those waters and beaches within a month. *O* claims to have suffered cancelled reservations and lost profits because of the credible threat of oil pollution to the water and beaches adjacent to the inn.

10. *F* owns and operates a fireworks store that is situated along the main interstate highway that leads to a set of Gulf beaches, 150 miles north of those beaches. *F* relies on tourists traveling to and from the beaches for much of his business. *F* claims to have lost profits because of reduced tourist traffic resulting from the Oil Co. spill.

11. *T* runs a tour boat that takes passengers along scenic Gulf shoreline. No oil from the spill has come, or threatened to come, within 400 miles of the area in which *T*'s tours take place. *T* claims that, because of popular misimpressions about the scope of the spill, the spill has depressed tourism in the entire Gulf region, in turn causing *T* to lose business and profits.

12. *D* owns an amusement park in a land-locked portion of central Florida. Many of *D*'s patrons are families that combine a trip to *D*'s park with a beach vacation on Florida's Atlantic Coast, which was never at risk of suffering pollution because of the spill. *D* claims that consumer unease about traveling to Florida because of the spill has caused *D* to suffer lost profits.

13. *N* owns and operates a resort in Nevada. Each year for the past decade, an association of Gulf-area fishermen has held its annual meeting at *N*'s facility. *N* claims that the spill's economic effects have caused the association to cancel its plans to hold their convention at *N*'s facility, in turn causing *N* lost profits.

14. *M*, a company incorporated and operated in Hartford, Connecticut, imports snorkeling equipment manufactured in China. *M* claims that, because of the spill, snorkeling equipment sales are down, resulting in lost profits.

15. *S* runs a seafood restaurant in Phoenix, Arizona. Although the seafood it serves is not from the Gulf, *S* claims that it has lost profits because of general consumer fears about contaminated seafood caused by the spill.

16. *G* owns a gas station in Boise, Idaho that sells Oil Co.-brand gasoline. Although *G* owns and operates the station as an independent franchise, his station becomes the target of a boycott by a local environmental group demanding greater corporate accountability. *G* claims lost income resulting from the boycott.

17. *L* runs a catering company based in New York City, which is also the location of Oil Co.'s U.S. headquarters. *L* claims that a substantial portion of her profits had previously come from catering events at Oil Co. headquarters, but that she has lost revenues because Oil Co. has substantially cut back on catered events in the aftermath of the spill.

Among the significant features of the foregoing "Universe" is its remarkable verisimilitude. None of the hypothesized claimants are difficult to imagine, and none makes a silly or far-fetched argument. Assuming they can prove what they allege, all the claimants have suffered economic losses as a result of the spill. And Professor Goldberg demonstrates that Congress conceivably could have made all of these claimants eligible: If OPA had been enacted as it stands except without the "due to" clause in Section 2702(b)(2)(E), "it would entail liability for all lost profits and impaired earning capacity resulting from a discharge."[54] Moreover, Goldberg points out a theoretically possible interpretation of the "due to" clause that would also probably bestow eligibility on the entire "Universe": If "due to" were to "be read to set a threshold for economic loss liability that treats the fact of *any* harm to *any* property or natural resources as a trigger for the recovery of economic losses by any claimant,"[55] then here again all of the claimants in Goldberg's "Universe" would seem to be eligible for recovery.

But neither Professor Goldberg nor I think that the entire "Universe" is eligible.[56] The subsections below indicate the exclusionary effects of the factual causation interpretation of Section 2702(b)(2)(E) and of the Goldberg use-right proposal.

A. Claims Probably Defeated by Section 2702(b)(2)(E)'s Factual Causation Requirement

The factual causation interpretation that seems to emerge naturally from the statute's language—a but-for connection between spill-produced "injury, destruction, or loss" of property or natural resources and the claimed-for economic losses—probably entitles the defendant Oil Co. to a matter-of-law ruling against claimants 16 (the boycotted Boise gas station) and 17 (the

[54] GOLDBERG, *supra* note 2, at 17.

[55] *Id.* at 18 (Goldberg's emphasis).

[56] The factual causation interpretation of Section 2702(b)(2)(E) excludes a number of classes of claimants who would be entitled to recover under either of Professor Goldberg's two imaginary statutes (one without the "due to" language and one with "due to" defined to mean "accompanied by"). On the other hand, the factual causation interpretation includes a number of classes of claimants who would be excluded by Professor Goldberg's proposed use-right requirement. Hence, it is accurate to call the factual causation interpretation a middle-of-the-road viewpoint.

New York caterer). It seems unlikely that the existence of "injury, destruction, or loss" of resources or property played any causal role in producing these damages. Both the boycott and the catering cut-back would probably have occurred as a result of the reputational effects of the spill, regardless of whether the spill had actually produced any "injury, destruction, or loss" of anything physical.

Claimants 11 through 15—geographically-remote tour boat operator, notional Disney World, Nevada resort, Connecticut snorkel seller, Arizona restaurant—are also likely losers under the factual causation interpretation of Section 2702(b)(2)(E). The factual causation question in each case would be whether the lost customers would have stayed away if somehow the massive ugly spill had not yet been shown to have caused the "injury, destruction, or loss" of anything physical. In some of these cases the claimant might conceivably reach the trier of fact with the assertion that the spill's reputation would not alone have sufficed to turn away the customers. But these all look more like skittish-customer situations, in which the customer behavior constituting the economic losses came about by reason of the spill's ugly reputation without regard to its actual ugly effects.

B. Claims That Should Succeed Under the Factual Causation Interpretation

Cases 1 through 10 all involve claimants with highly plausible assertions that the losses in question would not have occurred if the spill had caused no "injury, destruction, or loss" of natural resources or property. Many of these claimants ought to be entitled to a matter-of-law ruling to that effect. For example, the barge operator in case #5 would probably not have been prevented from using the waterway if the spill had not polluted the river to the extent necessary to threaten bird life.

C. Claims Defeated by the Goldberg Interpretation

Professor Goldberg says that his commercial-use-right doctrine would clearly validate only claims 1, 3, and 4 (fishermen with polluted fishing grounds, beachfront hotel surrounded by oil, and the hotel's employee).[57] Claimant 5 (the barge operator), Goldberg says, has a fairly good argument but also some problems:

> *B* [the barge owner] is not among those specifically mentioned in legislative history as entitled to recover.[58] Moreover, one could argue that access to navigable waters is a right enjoyed generally by the public rather than the particular right of persons whose

[57] *See* GOLDBERG, *supra* note 2, at 40. It is not clear how the hotel has a use-right, much less the hotel employee. Professor Goldberg merely asserts that they do, providing no explanation.

[58] Here Professor Goldberg is taking an overly narrow view of the legislative history. OPA's legislative history is shot through with general statements indicative of congressional intent to authorize recovery of "a broad class of damages." 135 CONG. REC. E842, (daily ed. Mar. 16, 1989) (statement of Rep. Jones). *See also* S. REP. NO. 101–94, *supra* note 11, at 12 ("These provisions are intended to provide compensation for a wide range of injuries and are not so narrowly focused as to prevent victims of an oil spill from receiving reasonable compensation."); 135 CONG. REC. H7893 (daily ed. Nov. 1, 1989) (statement of Rep. Quillen) ("full, fair, and swift compensation for everyone injured by oilspills"; "residents of States will be fully compensated for all economic damages"); 135 CONG. REC. H7955 (daily ed. Nov. 2, 1989) (statement of Rep. Jones) ("an unlimited amount of recovery from the Federal fund for all those who are injured by an oilspill"); 135 CONG. REC. H7959 (daily ed. Nov. 2, 1989) (statement of Rep. Tauzin) ("ensure that all victims are fully compensated"); 135 CONG. REC. H7964 (daily ed. Nov. 2, 1989) (statement of Rep. Hammerschmidt) ("ensure that all justified claims for compensation are satisfied"); 135 CONG. REC. H7969 (daily ed. Nov. 2, 1989) (statement of Rep. Dyson) ("assurances that damages arising from spills will be completely compensated"); 135 CONG. REC. H8140 (daily ed. Nov. 8, 1989) (statement of Rep. Shumway) ("fund is designed to fully compensate all victims"); 136 CONG. REC. H336 (daily ed. Feb. 7, 1990) (statement of Rep. Carper) ("ensure that those people or those businesses that are damaged by these spills are fairly and adequately compensated"); 136 CONG. REC. S7752 (daily ed. June 12, 1990) (statement of Sen. Mitchell) ("ensure the fullest possible compensation of oil spill victims"); 136 CONG. REC. H6260 (daily ed. Aug. 1, 1990) (Joint Explanatory Statement of the Committee of Conference) (polluters are "jointly, severally, and strictly liable for removal costs and for a wide range of damages").

Classes of claimants specifically mentioned as entitled to protection included not only fishermen and beachfront hotel owners but also fish "processing plant employees" and "those who work at the companies depending on the fisheries" 135 CONG. REC. E1237 (daily ed. Apr. 13, 1989) (statement of Rep. Miller); "an employee at a coastal motel" 135 CONG. REC. H7898 (daily ed. Nov. 1, 1989) (statement of Rep. Jones); "restaurant operators" 135 CONG. REC. H8263 (daily ed. Nov. 9, 1989) (statement of Rep. Studds); "fishermen and others whose livelihood depended on the once-pristine waters" 135 CONG. REC. H8271(daily ed. Nov. 9, 1989) (statement of Rep. Slaughter); "local communities and private citizens that have to live with the oil fouled waters" 135 CONG. REC. H7968 (daily ed. Nov. 2, 1989) (statement of Rep. Dyson); "poor people in Alaska who have lost their jobs, their livelihood, their homes, and the beautiful area in which they live" 135 CONG. REC. S9863 (daily ed. Aug. 3, 1989) (statement of Sen. Metzenbaum); "those who depend on clean waters and coastlines for their livelihood" 135 CONG. REC. S9921 (daily ed. Aug. 3, 1989) (statement of Sen. Biden); "shell fishermen and related businesses" 136 CONG. REC. E2109 (daily ed. June 21, 1990) (statement of Rep. Schneider); "shell fishermen and dealers and processors, . . . beach concessionaires, and so forth" 136 CONG. REC. E2109 (daily ed. June 21, 1990) (statement of Rep. Schneider); and "*bait and tackle store owners*." 136 CONG. REC. E2109 (emphasis supplied). The concluding reference to "bait and tackle store owners" presumably includes the ships' chandler that Professor Goldberg's proposal would preclude from economic loss recovery under OPA. *See infra* Part VI-D.

> businesses happen to require use of navigable waters.[59] That fact . . . could distinguish B's claim from that of, for example, commercial fishermen who possess a license to catch and sell fish.[60]

As for the rest on his list, Goldberg thinks his commercial-use-right requirement would probably exclude claimants 6 through 8 (although "it could conceivably be appropriate to interpret OPA generously to permit these claims"[61]) and would certainly exclude claimants 9 through 17.

D. Goldberg Neglects the Ships' Chandler

Professor Goldberg's paper does not deal with claimant # 2, *CH*, the ships' chandler whose pre-spill livelihood came from servicing and supplying fishing boats. The logic of Goldberg's commercial-use-right requirement would exclude this man; it is hard to see how the chandler could plausibly argue that in earning his living in good times he established (in Goldberg's terms) "a right to put [the ocean or its fish] to commercial use."[62] (Moreover, if somehow *CH* could establish that he had a commercial-use-right in the ocean or the fish, then probably so could *CH*'s employees and suppliers, whereupon the exclusion power of the user-right tool would be lost.) Yet, the legislative history suggests that Congress pretty clearly wanted to include *CH* (see, e.g., the reference to bait and tackle stores in note 58), and intuitively *CH* seems almost as close to being in the most obviously deserving class of claimants as the fishermen themselves. Perhaps this is why Professor Goldberg's imagined "Universe" did not include him: By all rights *CH* ought to prevail but Goldberg's commercial-use-right tool will not allow it—and if it did, it would lose most of its exclusionary power.

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[59] Here Professor Goldberg seems to be suggesting, without directly saying so, that Congress may have wanted to import limitations from the jurisprudence of public nuisance into the OPA remedy. *See, e.g.*, Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOL. L.Q. 755 (2001); William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966). Reviewing the legislative history of OPA leaves the strong impression that Congress could hardly have had any such intention. *See, e.g.*, *supra* note 58. Nor does Professor Goldberg point to any statutory language that would support bringing limitations from the common law of public nuisance into OPA.

[60] GOLDBERG, *supra* note 2, at 40.

[61] *Id.* at 42.

[62] *Id.* at 3.

VII. ANALYSIS AND EVALUATION OF PROFESSOR GOLDBERG'S USE-RIGHT PROPOSAL

The Goldberg paper purports to find support for the commercial-use-right requirement in OPA's language, [63] courts' treatment of analogous statutes,[64] "the common law regimes from which OPA departs, [OPA's] legislative history, judicial decisions interpreting OPA, and policy considerations."[65] We have already seen that the crucial statutory language claim is highly dubious,[66] and we will return to this matter in Part VII-G below. First, we need to evaluate Professor Goldberg's other putative sources.

A. The Courts' Treatment of Statutes That Are Broadly Analogous to OPA

Professor Goldberg repeatedly proclaims that his use-right proposal does not entail reading anything into OPA that Congress did not put there.[67] But he seems to give away a big part of that game by urging in support of his reading of OPA that it is "commonplace" for courts to read proximate-cause limits into statutory cause-in-fact language.[68]

The data Goldberg offers in support of his "commonplace" assertion cannot bear the weight. He first treats two cases that arose under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[69] Neither case imposed a proximate cause or use-right limit of the sort that Professor Goldberg contends for in his paper. The relevant CERCLA provision in both cases was 42 U.S.C. § 9607(a)(4)(C), which provides in pertinent part for the recovery of "damages for injury to, destruction of, or loss of natural resources . . . resulting from [the] release [of oil or a hazardous substance]." The U.S. Department of the Interior issued a

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[63] *See infra* Part VII-G.
[64] *See infra* Part VII-A.
[65] GOLDBERG, *supra* note 2, at 25.
[66] *See supra* Part V-B.
[67] *See infra* Part VII-G.
[68] GOLDBERG, *supra* note 2, at 20.
[69] Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601–9675 (2002). For Goldberg's treatment of the two CERCLA cases, see GOLDBERG, *supra* note 2, at 21 & nn.44–45.

regulation interpreting that provision to exclude recovery for harm to "biological resources" when the claimed harm consisted of "biological responses that are caused predominately by other environmental factors such as disturbance, nutrition, trauma, or weather. The biological response must be a commonly documented response resulting from exposure to oil or hazardous substances."[70] In *Ohio v. U.S. Dep't of Interior*, the court upheld the validity of the regulation, noting that the regulation did not address "the causal link between the defendant's acts and the substance release" but only "the causal link between the substance release and the biological injuries alleged to have resulted from it."[71]

United States v. Montrose Chemical Corp. was a cryptic decision ordering CERCLA plaintiffs to replead and stating that "plaintiffs must show that a defendant's release of a hazardous substance was the sole or substantially contributing cause of each alleged injury to natural resources."[72] The *Montrose* court did not cite the regulation but was apparently paraphrasing it. In *In re National Gypsum*, the court refused to follow the *Montrose* dictum because the *Montrose* court "cited no authority for that proposition."[73]

There is no analysis of any sort in *Montrose*. In *Ohio v. Dep't of Interior*, the court discussed CERCLA's language and particular legislative history at length before concluding that the regulation was valid.[74] OPA's language[75] and legislative history are dramatically different from CERCLA's.[76] Moreover, while there are no federal regulations treating OPA's economic

[70] 43 C.F.R. § 11.62(f)(2)(i) (1986).
[71] 880 F.2d 432, 471 n.54 (D.C. Cir. 1989).
[72] 1991 WL 183147 at *1 (C.D. Cal. Mar. 29, 1991).
[73] 1992 WL 426464 at *5 (Bankr. N.D. Tex. June 24, 1992).
[74] *See* 880 F.2d at 469–72.
[75] OPA explicitly displaces the *Robins/Testbank* rule; CERCLA does not. *See supra* note 41.
[76] Indeed, the legislative histories are *opposites* in an important sense. An early version of a bill culminating in CERCLA included a provision that tort law's normal "cause in fact or proximate cause" requirements would *not* apply in CERCLA cases; Congress took that out of the bill. 880 F.2d at 471. An early version of a bill culminating in OPA provided that economic loss plaintiffs *would* have to prove "proximate cause;" Congress took that out of the bill. *See infra* Part VII-D.

loss provisions, the Commerce Department (National Oceanic and Atmospheric Administration, NOAA) has issued regulations on the damages for harm to natural resources made available by OPA, 33 U.S.C. § 2702(b)(2)(A), and these are markedly more liberal than the Interior Department's CERCLA regulations.[77] In addition, the language of the regulation at stake in *Ohio v. Dep't of Interior*—as well as the language from the court's opinion quoted two paragraphs above—may suggest that the primary issue the court was focused on was factual, not proximate, causation.[78]

Professor Goldberg's other data ostensibly supporting his claim that courts routinely read statutory cause-in-fact language to include proximate cause limitations are four cases decided under the Trans-Alaska Pipeline Authorization Act (TAPAA).[79] The relevant TAPAA provision

[77] The Commerce Department (NOAA) regulations on OPA-provided damages for harm to natural resources are at 15 C.F.R. §§ 990.10–990.66. Section 990.10 declares that OPA's purpose "is to make the environment and public whole for injuries to natural resources and services." Section 990.13 establishes a rebuttable presumption that damages assessments made by governmental trustees—these are the only proper plaintiffs in cases seeking damages under 33 U.S.C. § 2702(b)(2)(A)—are correct. Section 990.14(a)(1) calls for "full restoration." Section 990.20(a) supersedes the CERCLA regulations in relevant part. Section 990.25 says that claims for damages to natural resources can be settled only if the settlement is adequate "to restore, replace, rehabilitate, or acquire the equivalent of the injured natural resources and services." Section 990.27 gives the trustees wide latitude on assessment procedures. Section 990.30 defines *injury* to mean "an observable or measurable adverse change in a natural resource or impairment of a natural resource service. Injury may occur directly or indirectly to a natural resource and/or service." Section 990.51 gives the trustees wide latitude in determining and assessing the existence and extent of injury to resources. Section 990.53(c)(2) calls for full compensation for the interim loss of natural resources and services pending recovery.

NOAA interprets its regulations to "authorize[] recovery of what are known as nonuse or 'passive' losses, the value individuals place upon the existence of natural resources, even if they never plan to make active use of them. In the case of the National Seashore, for example, people who have never used the beach may nevertheless value its existence. To assess this value, researchers employ a survey technique known as 'contingent valuation,' in which they create a hypothetical market and ask people—survey respondents—how much they would pay to preserve or protect a given resource." Gen. Elec. Co. v. U.S. Dep't of Commerce, 128 F.3d 767, 772 (D.C. Cir. 1997). The *General Electric* court held that the availability of "passive value" damages was a valid interpretation of OPA.

[78] *Cf.* E. Tex. Theatres, Inc. v. Rutledge, 453 S.W.2d 466, 467 (Tex. 1970) (labeling the question whether defendant's conduct was responsible for plaintiff's being struck by a thrown whiskey bottle an issue of "proximate cause" and the question whether the impact with the bottle produced plaintiff's chronic headaches a "causal connection" issue).

[79] Trans-Alaska Pipeline Authorization Act of 1973, 43 U.S.C. §§ 1651–1656 (2000). The four relevant TAPAA cases are treated in GOLDBERG, *supra* note 2, at 21–22 & nn.47, 48, 50. In his note 49, Goldberg cites an irrelevant case, *Heppner v. Alyeska Pipeline Serv. Co.*, 665 F.2d 868 (9th Cir. 1981), which involved a pipeline construction accident, a car wreck, and a TAPAA provision having nothing to do with oil spills.

in these cases was 43 U.S.C. § 1653(c)(1)—this provision was repealed as part of the OPA-enacting legislation[80]—which stated:

> Notwithstanding the provisions of any other law, if oil that has been transported through the trans-Alaska pipeline is loaded on a vessel at the terminal facilities of the pipeline, the owner and operator of the vessel (jointly and severally) and the Trans-Alaska Pipeline Liability Fund . . . shall be strictly liable without regard to fault in accordance with the provisions of this subsection for all damages, including clean-up costs, sustained by any person or entity, public or private, including residents of Canada, as the result of discharges of oil from such vessel.

The court in *In re Glacier Bay* stated that "the plain language of Section 1653(c) is that all provable damages sustained by any person as a result of a TAPS[81] oil spill are compensable and are not limited by established maritime law."[82] The court then held that the claims of fish tenders, fish spotters, fish processors, and other shoreside businesses were valid under the TAPAA provision. The *Glacier Bay* case thus is antithetical to Professor Goldberg's claim that proximate cause limitations have routinely been read into TAPAA. (Moreover, in upholding the claims of fish processors and shoreside businesses, the case speaks fairly loudly against any use-right limit). Professor Goldberg states that the Ninth Circuit "subsequently rejected" *Glacier Bay*, but that's wrong; the Ninth Circuit case he cites did not even mention *Glacier Bay*, and the KeyCite citator shows no negative history on *Glacier Bay*.[83]

Professor Goldberg can find a bit of support in the other three TAPAA cases, but not much. The district court in *In re Exxon Valdez* said in a footnote that the TAPAA "Congress did not abrogate all notions of proximate cause,"[84] but whatever such "notions" the court thought applicable were lenient enough to lead the court to conclude that a dealer in refrigeration units

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[80] *See* Oil Pollution Act of 1990, Pub. L. No. 101–380, § 8102(a)(1), 104 Stat. 484, 485 (1990).

[81] This is an acronym for Trans-Alaska Pipeline System. *See In re* Glacier Bay, 746 F. Supp. 1379, 1382 n.1 (D. Alaska 1990).

[82] *Id.* at 1386.

[83] Three negative entries turn up on the WestLaw KeyCite citator, but all involved an irrelevant point of federal civil procedure.

[84] *In re* Exxon Valdez, 1993 WL 787392 at *3 n.15 (D. Alaska Dec. 23, 1993).

and a taxidermist had TAPAA claims that should not be dismissed. The district court in *Slaven v. BP America, Inc.* cited no authority and provided no reasoning for its statement that, while "TAPAA does not have an express proximate cause requirement[,] [i]t is beyond dispute that . . . the common law requirement of proximate cause is implicitly incorporated."[85] The *Slaven* court did not seem to use "the common law requirement of proximate cause" against any TAPAA claimant, and in fact it explicitly held that "the bright-line rule of *Robins* is not a necessary component of the proximate cause concept."[86] Here, as with *Glacier Bay*, the court seemed averse to Goldberg's proposed use-right requirement. In *Benefiel v. Exxon Corp.*,[87] the Ninth Circuit thought that the efforts of California consumers to tie gasoline price increases (imposed by California refineries) to the Exxon Valdez spill in Alaska were ridiculous; the court claimed support in TAPAA's legislative history for the availability of a proximate-cause-based "remote and derivative" analysis to throw the gasoline-price claims out.[88]

Summing up the TAPAA cases: They do not seem to help Professor Goldberg very much because several of them imply resistance to a use-right limitation, and none used any kind of proximate cause limitation to defeat any even half-way credible claimant. More importantly, they show that TAPAA and OPA are very different with respect to both their relevant language and their legislative histories. TAPAA included no two-step factual causation requirement of the sort that Congress built into OPA,[89] perhaps thereby inclining the courts to look outside the statute for needed controls. In addition, TAPAA's legislative history respecting its effect on the *Robins/Testbank* rule was equivocal,[90] whereas OPA's is crystal clear;[91] this meant that the

[85] Slaven v. BP Am., Inc., 786 F. Supp. 853, 858 (C.D. Cal. 1992).
[86] *Id.* at 859.
[87] 959 F.2d 805 (9th Cir. 1992).
[88] *Id.* at 807–08.
[89] *See supra* Part V-B*; infra* Part VII-G.
[90] In *Benefiel*, the court punted on whether *Robins/Testbank* was displaced by TAPAA. *See* 959 F.2d at 807. In *Slaven*, the court said the relevant legislative history was "ambiguous." 786 F. Supp. at 858.

TAPAA courts might conceivably have been more receptive to some kind of use-right requirement than would be appropriate under OPA (but the TAPAA courts still resisted it).

It bears emphasis that, even if Professor Goldberg could convince us that there is some kind of judicial pattern of reading statutory cause-in-fact language to include proximate cause limitations, *and* that this pattern should be carried into OPA despite OPA's seemingly carefully crafted two-step factual causation requirement, this would still provide no basis at all for the use-right limitation that is the heart of Goldberg's argument.[92] We saw in Part VI-A above that the OPA Congress intended to rip the *Robins/Testbank* rule out of the law of OPA cases, root and branch. The use-right requirement would be nothing more (or less) than a slightly flabby, slightly blurry version of *Robins/Testbank*.

B. The "Common Law Regimes from Which OPA Departs"

Federal maritime law's *Robins/Testbank* rule[93]—the rule that "there [can] be no recovery for [negligently-caused] economic loss absent physical injury to a proprietary interest [of the plaintiff]"[94]—has counterparts in the common law of most states. The most often-stated policy justification for the rule is the "pragmatic one [that] the physical consequences of negligence

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[91] *See supra* Part V-A; *supra* note 58; *infra* Part VII-D.

[92] Professor Goldberg seems to acknowledge that the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 29 (2010) sets forth the normal meaning of proximate cause as a "filter" that screens out "harms that are so haphazardly caused as to not count as the realization of one of the risks that rendered the actor's conduct careless." GOLDBERG, *supra* note 2, at 20 n.41. *See also id.* at 22 n.49 (explaining that the proximate cause filter works in strict liability cases by limiting liability to "those harms that amount to the realization of the risks of the activity that lead the law to regard the activity as appropriately subject to a rule of strict liability."). This has been the sophisticated understanding of proximate cause for decades. *See, e.g.*, Union Oil Co. v. Oppen, 501 F.2d 558, 568 (9th Cir. 1974) (quoting Dillon v. Legg, 441 P.2d 912, 919 (Cal. 1968) for the proposition that "[d]efendant owes a duty, in the sense of a potential liability for damages, only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous, and hence negligent, in the first instance.").

Professor Goldberg's use-right requirement does not fit at all well into the inherently flexible and case-specific common-law proximate cause concept. *See* Sinram v. Pa. R.R. Co., 61 F.2d 767, 771 (2d Cir. 1932) (Learned Hand, J.) (extolling the inherent flexibility of the common law's approach to proximate cause and stating that the only alternative would be "a manual, mythically prolix, and fantastically impractical"). Professor Goldberg's use-right requirement—together with his occasional inclinations to abandon it (*see infra* note 186)—sometimes has the look of a mythically prolix manual.

[93] *See supra* Part V-A.

[94] Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1023 (5th Cir. 1985) (en banc).

usually have been limited, but the indirect economic repercussions of negligence may be far wider, indeed virtually open-ended."[95]

Professor Goldberg's account of the pre-OPA common law takes maximum advantage of tort law's traditional leeriness toward non-physical harm; Goldberg misses no opportunity to tie pre-OPA maritime and common law (and ultimately his proposed reading of OPA itself) as closely as possible to "physical" criteria.[96] This campaign of extolling the inherent priority of

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[95] *Id.* at 1022 (quoting Fleming James, Jr., *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43, 45 (1972)). *See also* Harvey S. Perlman, *Interference With Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 40 U. CHI. L. REV. 61, 70–72 (1982):

> In cases of physical injury to persons or property, the task of defining liability limits is eased . . . by the operation of the laws of physics. Friction and gravity dictate that physical objects eventually come to rest. The amount of physical damage that can be inflicted by a speeding automobile or a thrown fist has a self-defining limit. Even in chain reaction cases, intervening forces generally are necessary to restore the velocity of the harm-creating object. These intervening forces offer a natural limit to liability.
>
> The laws of physics do not provide the same restraints for economic loss. Economic relationships are intertwined so intimately that disruption of one may have far-reaching consequences. Furthermore, the chain reaction of economic harm flows from one person to another without the intervention of other forces. Courts facing a case of pure economic loss thus confront the potential for liability of enormous scope, with no easily marked intermediate points and no ready recourse to traditional liability-limiting devices such as intervening cause.

[96] All of the emphasis in this footnote is supplied. GOLDBERG, *supra* note 2, at 3 (translating Section 2702(b)(2)(E)'s phrase "injury, destruction, or loss [of property or natural resources]" to require that the property or resources be "damaged, destroyed, or otherwise rendered *physically* unavailable"); *id.* at 3 (claiming that subsection E rules out tourist-trade losses "in areas *physically* unaffected by a spill"); *id.* at 11 (asserting that subsection 2702(b)(2)(B)'s phrase "injury . . . or . . . destruction" means "*physical* injury . . . or *physical* destruction"); *id.* at 18 (arguing that subsection (E) might support drawing distinctions between "*physically* harmless" and *physical[ly]* harmful" spills); *id.* at 22 (suggesting that Benefiel v. Exxon Corp., 959 F.2d 805, 807 (9th Cir. 1992) limited damages under TAPAA to damages arising out of "the *physical* effects of oil discharges"); *id.* at 22 n.49 (asserting that § 20(a) of the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (2010) limits strict liability to "instances of *physical* harm"); *id.* at 26 (characterizing the *Robins* and *Testbank* decisions as drawing a sharp distinction between economic loss and "*physical* damage"); *id.* at 28 (asserting that economic interests "warrant[] less ... legal protection than does the interest of a person in the *physical* integrity of her person or possessions"); *id.* at 29 (stating that the law needs "to prioritize claims for *physical* injury and property damage over claims for lost profits"); *id.* at 32 (arguing that the subsection E phrase "injury, destruction, or loss of [property], or natural resources" requires a claimant to show that his or her "business's profitability depends on his or her ability to exercise a right *physically* to obtain or use property or resources that are [physically] damaged or lost because of an oil spill"); *id.* at 32 (translating subsection E's phrase "injury, destruction, or loss" to mean "damaged or made *physically* unavailable"); *id.* at 36 (arguing that the law generally requires "claims for [physical] personal injury and property damage . . . to be prioritized" ahead of economic loss claims); *id.* at 36 (asserting that communities with property or resources "that have been *physically* harmed or rendered unusable by a spill" are intrinsically worse off than communities with other types of spill-caused economic losses); *id.* at 38 (arguing that claimants with losses caused by a spill's repugnant reputation are better able to protect themselves than those with economic "losses caused by *physical* damage to property or resources").

physical over economic harm eventually culminates with an argument that in both federal maritime law and state tort law, "the pure economic loss rule is . . . well-entrenched."[97] According to Professor Goldberg, widely-cited decisions that have been seen as departures from the economic loss rule—that is, as having eschewed the requirement of physical injury to a proprietary interest of the plaintiff—are actually little more than "adjustments"[98] that allow recovery in a few special situations that lie "at or just beyond the [rule's] margins."[99] Thus, in Goldberg's view,[100] the federal maritime law decision in *Union Oil Co. v. Oppen*[101] and the state tort law decisions in *Mattingly v. Sheldon Jackson College*,[102] *J'Aire Corp. v. Gregory*,[103] and *People Express Airlines, Inc. v. Consolidated Rail Corp.*[104] all involved nothing more than "push[ing] the boundaries of the economic loss rule"[105] so as to "expand[] liability for economic loss beyond owners and lessees of property [i.e., those with a proprietary interest in property] that has been damaged to any person whose business's profitability depends on his or her ability to exercise a right physically to obtain or use property or resources that are [negligently] damaged . . . or made physically unavailable."[106] To say the same thing another way, Goldberg

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It should be noted Professor Goldberg's claim, *id.* at 22 n.49, that the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (2010) limits strict liability to instances of physical harm is potentially misleading. The Foreword to this Restatement makes clear that it does not address economic harm at all, and it is generally known that Professor Ward Farnsworth is presently working as Reporter of a contemplated Restatement comprehensively dealing with economic harm. *Id.* at xi–xii.

[97] GOLDBERG, *supra* note 2, at 29.

[98] *Id.* at 29.

[99] *Id.* at 30.

[100] *See id.* at 29–32 & nn.66, 68.

[101] 501 F.2d 558 (9th Cir. 1974) (holding that commercial fishermen have a cause of action against polluters for negligent interference with their livelihood).

[102] 743 P.2d 356 (Alaska 1987) (holding that a plumbing contractor had a cause of action against those who impaired the contractor's employees' capability of performing their duties by negligently injuring them).

[103] 598 P.2d 60 (Cal. 1979) (holding that a lessee of premises with no proprietary right in the premises had a cause of action against a negligent repairer of the premises for interfering with the lessee's right of occupancy). The facts of *J'Aire* are closely parallel to those of *Robins Dry Dock*, *supra* note 36.

[104] 495 A.2d 107 (N.J. 1985) (holding that an airline forced to evacuate its undamaged premises because of defendants' negligence in creating the risk of an explosion had a cause of action for interference with the airline's business operations).

[105] GOLDBERG, *supra* note 2, at 32.

[106] *Id.* at 32.

believes that these crucially important pre-OPA decisions came nowhere near abandoning the requirement of a physical harm to a proprietary interest of the plaintiff but instead merely expanded the proprietary interest concept to include those with "legally protected interest[s] in . . . certain property that fall[] [only a bit] short of outright ownership."[107] Thus, Professor Goldberg manages to characterize important decisions that depart from *Robins/Testbank* as having accomplished very little—as merely relaxing the propriety-interest requirement only slightly and substituting a quasi-proprietary-interest or quasi-physical-interest requirement.[108]

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[107] *Id.* at 30. Professor Goldberg seems to get a bit carried away with this claim, stating (without citing any authority) that even in jurisdictions that have disavowed the *Robins/Testbank* rule, "the pattern of actual liability . . . overwhelmingly limits liability to instances in which careless conduct renders particular property unusable by persons who have a right and a commercial need to use it, which right is exclusive to those persons, or least held only by a limited class of right-holders." *Id.* at 31.

[108] Professor Goldberg's account of the four key cases drastically and skillfully narrows each of them to fit his purposes. *Union Oil Co. v. Oppen* held that commercial fishermen—who clearly have no "proprietary interest" in the fish they hope to catch—have a cause of action under federal maritime law for negligent injury to their livelihood and cited *Carbone v. Ursich*, 209 F.2d 178 (9th Cir. 1953), for the proposition that the fishermen are not subject to "the teaching of *Robins Dry Dock*." 501 F.2d 558, 560, 567 (9th Cir. 1974). *Carbone* in turn cited a number of cases antedating *Robins Dry Dock* for the proposition that commercial fishermen are "seamen [who] are the favorites of admiralty and [whose] economic interests [are] entitled to the fullest possible legal protection. These considerations have given . . . rise to a special right comparable to that of a master to sue for the loss of services of his servant, or the right of a husband or father to sue for the loss of services of wife or child." *Carbone*, 209 F.2d at 182. The *Carbone* court added that "it must be assumed that Mr. Justice Holmes, who wrote the opinion in [*Robins*, *supra* note 36], was familiar" with the fishermen's rule and yet gave no indication "of an intention to reverse" it. *Id.* at 181. Professor Goldberg was able to find some use-right language in *Oppen*, but the decision's principal thrust was toward the inapplicability of the *Robins* rule to the situation of commercial fishermen rather than the much narrower view of the case taken by Goldberg.

The Goldberg paper seeks to narrow not just the meaning and breadth of applicability of the fishermen's rule but also to undermine its pedigree, indicating at several points that the Fifth Circuit has never recognized the rule. *See* GOLDBERG, *supra* note 2, at 29 n.66, 31 n.72. This seems to be a mistake on Goldberg's part; in *In re* Taira Lynn Marine Ltd., 444 F.3d 371, 378 n.1 (5th Cir. 2006), the court said that in *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1027 n.10 (5th Cir. 1985) (en banc) "we recognized the argument in favor of an exception for commercial fishermen, but left the contours of such an exception for another day because the claims of the commercial fishermen were not before us."

Professor Goldberg's paper also repeatedly claims that the Supreme Court has never recognized the fishermen's rule. *See* GOLDBERG, *supra* note 2, at 31 n.72, 33. While this claim cannot be termed a mistake, it is highly debatable. In *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, the court noted the existence of the fishermen's rule without approving or disapproving it, stating that "courts . . . at times have provided special protection for fishermen." 476 U.S. 858, 869 n.5 (1986) (citing *Carbone*). In *Idaho v. Oregon*, Justice O'Connor—joined by Justices Brennan and Stevens in dissent—seemed to approve the fishermen's rule in stating: "[C]ourts have long recognized the *opportunity* to fish as an interest of sufficient dignity and importance to warrant certain protections." 462 U.S. 1017, 1030 (1983) (emphasis in original). As examples, Justice O'Connor cited with evident approval two cases applying the fishermen's rule—the Ninth Circuit's *Oppen* decision and *Louisiana ex rel. Guste v. M/V Testbank*, 524 F. Supp. 1170 (E.D. La. 1981).

In similar fashion, the Goldberg paper seeks to narrow the meaning and breadth of the three state law decisions diverging from *Robins/Testbank*, each of which is written in broad language repudiating the economic loss

C. Goldberg's View of the Extent of OPA's Departure from The Common Law Regimes

As we have just seen, Professor Goldberg manages to read *Oppen*, *Mattingly*, *J'Aire*, and *People Express* as resting on use-right reasoning.[109] It is then marvelously easy for him to slide into an argument that OPA ought to be read the same way. This argument runs as follows:

> Congress's aim in enacting Section 2702(b)(2)(E) was [probably] to extend liability along the lines tentatively identified by [the] judicial decisions that have pushed the boundaries of the economic loss rule. To say the same thing: OPA's economic loss provisions are best understood as expanding liability for economic loss beyond owners and lessees of property that [has] been damaged to any person whose business's profitability depends on his or her ability to exercise a right physically to obtain or use property or resources that are damaged or lost because of an oil spill. . . . Reading OPA in this manner makes sense of the "due to" clause's linkage of recovery for economic loss to property or resources being damaged or made physically unavailable. Economic loss is "due to" property or resource damage, or loss, when profits or earnings suffer because

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rule. (Goldberg acknowledges that *People Express* and *J'Aire* "purported to reject the [economic loss] rule outright," going on to characterize the decisions' results as narrow. GOLDBERG, *supra* note 2, at 30.) *See People Express*, 495 A.2d at 111 (emphatically rejecting the physical harm requirement as "capriciously shower[ing] compensation along the path of physical destruction," as "discordant with contemporary tort doctrine," and as "unnecessarily or arbitrarily foreclos[ing] redress based on formalisms or technicalisms"); *Mattingly*, 743 P.2d at 359–61 (enthusiastically adopting and endorsing the reasoning of *People Express* and quoting it at length); *J'Aire*, 598 P.2d at 64 (recognizing a cause of action for "negligent interference with prospective economic advantage," stating that its decision was "consistent with the recent trend in tort cases," criticizing the economic loss rule as "overly rigid," and noting that "injury to a tenant's business can often result in greater hardship than damage to a tenant's person or property").

Professor Goldberg also disparages the pedigree of the three state-law decisions, calling *People Express* a "lonely outpost" and implying that this is true of *Mattingly* and *J'Aire* as well. GOLDBERG, *supra* note 2, at 30 n.69 (citation and internal quotation marks omitted). But in its two most recent characterizations of *People Express*, the Supreme Court of New Jersey extolled the decision as exemplary of "[t]he creativity and flexibility of the [common law]" and as a demonstration that New Jersey's "tort law . . . has always recognized that the burden of loss should fall, as a matter of justice, on the party at fault." Ruiz v. Mero, 917 A.2d 239, 243–44 (N.J. 2007) (citation and internal quotation marks omitted); Franklin Mut. Ins. Co. v. Jersey Cent. P. & L. Co., 902 A.2d 885, 887 (N.J. 2006). The Alaska Supreme Court recently characterized *Mattingly* as having "rejected the [entire] distinction between physical and economic losses." C.P. v. Allstate Ins. Co., 996 P.2d 1216, 1222 n.32 (Alaska 2000). The most recent California Supreme Court case mentioning *J'Aire* states with apparent approval that "[t]he lower courts have applied the theory of liability articulated in *J'Aire*" and "have also expanded upon *J'Aire*." Aas v. Superior Court, 12 P.3d 1125, 1136 (Cal. 2000).

[109] *See supra* Part VII-B. *See also* GOLDBERG, *supra* note 2, at 29 (quoting *Oppen* language describing commercial fishermen as "lawfully and directly mak[ing] use of a resource of the sea" and stating that "[t]his type of use is entitled to protection from negligent conduct"); *id.* at 30 (characterizing *People Express* and *J'Aire* as involving "careless interference with a legally protected interest in the use of certain property that falls short of outright ownership"); *id.* at 30–31 (characterizing *People Express* and *J'Aire* as "granting to persons with use-rights in certain property the power to sue for economic losses caused by careless acts that damage the property or render it unavailable"); *id.* at 31 (characterizing all four of the decisions as limited to "instances in which careless conduct renders particular property unusable by persons who have a right and a commercial need to use it, which right is exclusive to those persons, or at least held only by a limited class of right-holders").

> the damage, or loss, prevents or hinders the claimant from putting that property or those resources to commercial use, as is her right.[110]

Professor Goldberg acknowledges the criticism "that OPA, so read, accomplishes very little because it merely replicates schemes of liability already in place under admiralty law and state tort law."[111] His answer to this criticism is merely to reiterate that the aim of Section 2702(b)(2)(E) was probably to guarantee the applicability of the use-right principle in the marine pollution context, while perhaps broadening that principle just a bit.[112]

D. OPA's Legislative History

The Goldberg paper's short section treating OPA's legislative history makes only one significant point: That members of Congress, the House Conference Report, and a Senate Report repeatedly instanced commercial fishermen and beachfront property owners as the most obvious beneficiaries of Section 2702(b)(2)(E).[113] But we have already seen that the Senate Report said the provision was meant to compensate "a wide range of injuries" and that many members of Congress enumerated a number of other types of beneficiaries, including seafood "dealers and processors, bait and tackle store owners, beach concessionaires, and so forth."[114] Moreover, there are nine features of the legislative history—features that Professor Goldberg's paper largely ignores[115]—that, taken in the aggregate, seem devastating to the Goldberg interpretation of Section 2702(b)(2)(E). In thinking about these nine features, we should keep in mind that the Goldberg proposal finds in the "due to" clause of Section 2702(b)(2)(E) a "proximate cause"[116] limit requiring economic loss claimants to "prove that they have suffered economic loss because

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[110] GOLDBERG, *supra* note 2, at 32.
[111] *Id.* at 32.
[112] *Id.* at 32–33.
[113] *Id.* at 33–34.
[114] *Supra* note 58.
[115] *But see infra* notes 127 and 137.
[116] GOLDBERG, *supra* note 2, at 20.

a spill has damaged, destroyed or otherwise rendered physically unavailable to them property or resources that they have a right to put to commercial use."[117]

First, Section 2702(b)(2)(E) includes no explicit use-right limitation. But Section 2702(b)(2)(C) does; it requires a subsistence-use claimant to show that he "uses natural resources which have been injured, destroyed, or lost." The first of two powerful statutory-construction canons set forth in *Russello v. United States* is this:

> Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.[118]

At an otherwise unrelated point in his paper, Professor Goldberg insists that the *Russello* canon is not applicable "where provisions in the same statute are distinctively formulated,"[119] but it is hard to see how he could so characterize subsections C and E of Section 2702(b)(2). Indeed, Goldberg explicitly acknowledges that subsections C and E are "counterpart[s]."[120] It thus seems obvious that the first *Russello* canon speaks powerfully against reading a use-right limitation into Section 2702(b)(2)(E).

Second, three of the bills that eventually coalesced to become OPA include explicit use-right limitations in their economic loss provisions.[121] As the bills made their way through the

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[117] *Id.* at 3.

[118] 464 U.S. 16, 23 (1983) (citation and internal quotation marks omitted). *See also* Hardt v. Reliance Standard Life Ins. Co., 130 S. Ct. 2149, 2156 (2010) (holding that because 29 U.S.C. § 1132(g)(2) has an explicit "prevailing party" limit on court-awarded attorneys' fees in ERISA cases whereas 29 U.S.C. § 1132(g)(1) does not, reading a "prevailing party" limit into the latter provision would "more closely resemble[] inventing a statute rather than interpreting one") (citation and internal quotation marks omitted). Under the *Hardt* analysis, Professor Goldberg's reading of a use-right limit into OPA Section 2702(b)(2)(E) amounts to inventing a statute.

[119] GOLDBERG, *supra* note 2, at 21 n.42. *See also infra* notes 127–128.

[120] GOLDBERG, *supra* note 2, at 34.

[121] As introduced by the House Merchant Marine and Fisheries Committee on March 16, 1989, H.R. 1465 provided in § 102(a)(2)(B)(v) for "Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant who derives at least 25 percent of his or her earnings from the activities which utilize such property or natural resources, or, if such activities are seasonal in nature, 25 percent of his or her earnings during the applicable season." As introduced by the House Public Works and Transportation Committee on May 11, 1989, H.R. 2325 provided in § 102(a)(3)(D) for "Damages equal to the loss of profits or impairment of earning capacity due to the

legislative process, the use-right limitations were deleted; no explanation has been found.[122]

Russello's second statutory-construction canon is the following:

> Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.[123]

This is a second heavy strike against reading a use-right limitation into Section 2702(b)(2)(E).

Third, OPA's predecessor legislation included a use-right limit. Title III of the Outer Continental Shelf Lands Act Amendments of 1978[124] provided for the recovery of pollution-caused economic loss damages "due to injury to, or destruction of, real or personal property or natural resources . . . if the claimant derives at least 25 per centum of his earnings from activities which utilize the property or natural resource."[125] OPA repealed these provisions,[126] replacing them with Section 2702(b)(2)(E). Here is the third strike against reading a use-right limitation into Section 2702(b)(2)(E). It seems very plain that the OPA Congress did not want a use-right limit.

Fourth, neither Section 2702(a) nor Section 2702(b)(2)(E) includes any mention of "proximate cause." But Section 2704(c)(1)—specifying types of conduct that will expose a polluter to liability for damages above the OPA damages caps—requires the spill in question to

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injury, destruction, or loss of natural resources, which shall be recoverable by any claimant who derives at least 25 per centum of his or her earnings from the activities which utilize such natural resources, or, if such activities are seasonal in nature, 25 per centum of his or her earnings during the applicable season." On July 27, 1989, H.R. 3027 (supported by the House Committee on Science, Space, and Technology) was introduced; § 102(a)(2)(B)(v) provided for "Damages equal to the loss of profits or impairment of earning capacity (based on prior profits and earnings) due to the injury, destruction, or loss of real property, personal property, or natural resources. Such damages shall be recoverable by any claimant who derives at least 25 percent of his or her earnings from the activities which utilize such property or natural resources, or, if such activities are seasonal in nature, 25 percent of his or her earnings during the applicable season."

[122] H.R. REP. NO. 101–241, Part 1 (to accompany H.R. 3027) was issued on September 13, 1989, showing the use-right limitation still in that bill. Part 2 of that Report, issued on September 18, 1989, to accompany H.R. 1465, shows the use-right limitation still in that bill. But on October 13, 1989, H.R. 3394 was introduced and explained as a composite bill, designed to merge the others. Section 1002(b)(2)(E) of that bill has the language that was enacted as OPA Section 1002((b)(2)(E), 33 U.S.C. § 2702(b)(2)(E)—language shorn of any version of a use-right requirement.

[123] 464 U.S. 16, 23–24 (1983).

[124] Pub. L. No. 95–372, 92 Stat. 629 (1978).

[125] *Id.*, §§ 303(a)(2)(E), 303(b)(4).

[126] *See* Pub. L. No. 101–380, § 2004 (1990).

be "proximately caused" by such conduct. This shows that Congress knew how to say "proximate cause" when it wanted to require that. Here again, the disparate formulation of two related sections of the same statute calls for the application of the first *Russello* canon, which teaches that Congress presumptively meant to require a showing of proximate cause for cap-breaking purposes but not for the imposition of liability. Applying that presumption here would make complete sense: Congress evidently decided that polluters deserve the protection of a proximate cause requirement when being sued for damages above the cap, but not for basic liability-imposing purposes.

Professor Goldberg tries to answer this fourth point with a badly flawed footnote that completely mischaracterizes the essence of Section 2704(c)(1). Goldberg erroneously says that "Section 2704(c)(1) employs the phrase 'proximately caused' in specifying the limited circumstances in which a responsible party can disclaim liability for damages,"[127] whereas the section has the completely opposite thrust of specifying conduct that will expose a responsible party to additional liability above the damages caps. This surprising mistake robs the remainder of Professor Goldberg's footnote of intelligibility: When Goldberg says that the first *Russello* canon should not apply to the difference between Sections 2702 and 2704 because the two sections are "formulated in a fundamentally different manner" from one another,[128] he is talking about an imaginary Section 2704(c)(1), not the one actually on the books.

Fifth, the second *Russello* canon—that Congress's deletion of limiting language in a bill before enacting it justifies presuming that the limitation was not intended—applies to the proximate cause point in much the same way as to the use-right point. Several of the early versions of the bills that became OPA included language requiring parties seeking pollution

[127] GOLDBERG, *supra* note 2, at 20 n.42.
[128] *Id.* at 21 n.42.

damages to show proximate causation.[129] As was true respecting the use-right language, the proximate cause language was also deleted as the bills made their way toward passage.[130] Therefore, *Russello* counsels us to conclude that the OPA Congress did not want to require claimants seeking economic loss damages to meet a proximate cause requirement.

Sixth, OPA's predecessor legislation included an explicit proximate cause limit. Title III of the Outer Continental Shelf Lands Act Amendments of 1978[131] provided for the recovery of pollution-caused damages that were "proximately caused by the discharge of oil from an offshore facility or vessel."[132] OPA repealed this provision,[133] replacing it with Section 2702(a). So here again, the second *Russello* canon calls for the presumption that the OPA Congress did not intend a proximate cause limit to be read into its economic loss provisions.

Seventh, all of the House of Representatives bills that coalesced into OPA included direct-causation requirements.[134] The bill that passed the House of Representatives included such a limit.[135] But (without any discoverable explanation) the directness requirement was deleted from the bill that emerged from the House-Senate conference and was signed into law.[136]

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[129] *See* H.R. 3027, 101st Cong. § 102(a)(1) (1989) (limiting recoverable damages to those "which are proximately caused by" a spill or substantial threat of a spill); H.R. 1465 as presented in H.R. REP. 101–242, pt. I, § 102(a)(1) (1989) (same).

[130] H.R. 3394, the composite bill introduced on October 3, 1989, included no explicit proximate cause requirement in its liability-imposing and economic-loss provisions. Nor did the version of H.R. 1465 that passed the House of Representatives in November 9, 1989. Nor, of course, does the enacted law.

[131] Pub. L. No. 99–372, 92 Stat. 629 (1978).

[132] *Id.* at § 301(15).

[133] *See* Pub. L. No. 101–380, § 2004 (1990).

[134] *See* H.R. 1465, 101st Cong. § 102(a) (as passed by House on Mar. 16, 1989) (limiting recoverable damages to those "that arise out of or directly result from" a spill or substantial threat of a spill); H.R. 2325, 101st Cong. § 102(a) (1989) (limiting recoverable damages to those "that arise out of or directly result from such discharge or threat of discharge"); H.R. 3027, 101st Cong. § 102(a)(1) (1989) (limiting recoverable removal costs to those "which arise out of or directly result from" a spill or substantial threat of a spill); H.R. 3394, 101st Cong. § 1002(a)(1) (Oct. 3, 1989) (limiting recoverable removal costs and damages to those "that directly result from" a spill or substantial threat of a spill).

[135] *See* H.R. 1465, 101st Cong. § 1002(a)(1) (1989) (limiting recoverable removal costs and damages to those "that directly result from" a spill or substantial threat of a spill).

[136] *See* H.R. REP. NO. 101–653 (1990) (Conf. Rep.) (presenting § 1002(a) of H.R. 1465 as providing for liability for removal costs and damages "that result from" a spill or substantial threat of a spill; the language is identical to the enacted Section 2702(a)).

Here once again, the second *Russello* canon requires a presumption that the OPA Congress intended that for purposes of recovering economic loss damages, the only causation requirement should be factual causation.[137]

Eighth, OPA's predecessor legislation included a direct-causation requirement. Title III of the Outer Continental Shelf Lands Act Amendments of 1978[138] provided for the recovery of pollution-related damages "by any person suffering any direct and actual injury proximately caused by the discharge of oil from an offshore facility or vessel."[139] OPA repealed this provision,[140] replacing it with Section 2702(a), which contains no "directness" or "proximate cause" language. Here we have yet another application of the second *Russello* canon.

Ninth, as we saw in Part V-B above, Goldberg's insistence that the OPA terms "result[ing] from" (Section 2702(a)) and "due to" (Section 2702(b)(2)(E)) have different meanings is flatly contradicted by the House Conference Report, which in its provision-by-provision analysis of the House-passed bill stated: "Subsection (b)(2)(E) provides that any claimant may recover for loss of profits or impairment of earning capacity *resulting from* [the statutory term is "due to"] injury to property or natural resources."[141] Here we have an authoritative statement by Congress that "resulting from" and "due to" are synonyms. It is hard to resist calling this the final nail in the coffin for Goldberg's use-right reading of subsection (b)(2)(E).

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[137] Professor Goldberg acknowledges the deletion of the "directness" requirement from the final bill, but he argues that his reading of Section 2702(b)(2)(E)'s "due to clause" as an "explicit[]" limitation going beyond "actual causation" should trump the *Russello* canon. Goldberg, *supra* note 2, at 17 n.36.

[138] Pub. L. No. 99–372, 92 Stat. 629 (1978).

[139] *Id.* at § 301(15).

[140] *See* Pub. L. No. 101–380, § 2004 (1990).

[141] H.R. REP. NO. 101–653, at 104 (emphasis supplied).

E. Judicial Decisions Interpreting OPA

Professor Goldberg's paper presents seven decisions that have involved the relevant OPA provisions.[142] Economic loss claimants prevailed in four of these, and Goldberg does not question these results.[143] *Dunham-Price Group, LLC v. Citgo Petroleum Corp.*[144] is especially instructive. An oil spill from Citgo's refinery into the Calcasieu River caused the Coast Guard to order a temporary closure of twenty-two miles of the river, which interfered with the business operations of Dunham's concrete facility "located several miles upriver from Citgo's refinery and upriver from the zone closed by the Coast Guard."[145] Citgo responded to Dunham's claim for damages under Section 2702(b)(2)(E) by moving for summary judgment and making the following argument:

> Citgo argues that under [Section 2702(b)(2)(E)], a plaintiff must prove that his injuries are directly "due to" property damage resulting from an oil discharge. Citgo further argues that Dunham Price's damages are due to the closure of the Calcasieu Ship Channel and not attributable to a physical injury to property or natural resources.[146]

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[142] *See* GOLDBERG, *supra* note 2, at 17 n.36, 34–35.

[143] Goldberg discusses these four cases in his report. *Id.* at 34–35 & n.85. In *FGDI, L.L.C. v. M/V Lorelay*, the operators of a vessel that spilled oil while berthed in the Port of Mobile conceded liability under OPA to the operator of a grain elevator that could not use its loading berth while the area was being cleaned. 193 Fed. App'x 853, 2006 WL 2351835 (11th Cir. 2006). As is explained *supra* note 15, *Settoon* and *Sekco* held that owners of undamaged property (like claimants who owned no spill-involved property) have causes of actions under Section 2702(b)(2)(E). *Dunham-Price* is discussed in the text immediately following this footnote signal.

At 35 & n.83, Professor Goldberg takes an unwarranted liberty with the *Sekco* opinion; he claims that in a passage at 820 F. Supp. 1012 "the court emphasized [that] defendant's interference with the plaintiff's right to operate its [undamaged] platform is exactly the sort of interference-with-use-rights that Section 2702(b)(2)(E) addresses." This claim distorts *Sekco*; the cited passage did not address OPA at all but was the court's tentative recognition that interference with a property owner's "right of use" might properly be viewed as harm to a proprietary interest for purposes of the *Robins/Testbank* rule. When the *Sekco* court eventually turned its attention to OPA, it said the platform owner had no claims under subsections (B) and (C) of Section 2702(b)(2) but did have a viable claim under subsection (E):

> Plaintiff alleges that the Isopar M spill caused a loss of future production revenues. Future earnings derived from drilling on the Outer Continental Shelf constitute property, but whether that property be real or personal is irrelevant; in either case, plaintiff can recover for loss of profits. Given the language of subsection (E), the Court cannot say as a matter of law that plaintiff has no cause of action here.

Sekco, 820 F. Supp. at 1015.

[144] 2010 WL 1285446 (W.D. La. Mar. 31, 2010).

[145] *Id.* at *1.

[146] *Id.* at *2.

Note that Citgo was making a proximate cause/physical injury argument closely resembling Professor Goldberg's proposed reading of Section 2702(b)(2)(E). Dunham responded to Citgo's argument by directing the court's attention to Section 2702(b)(2)(E)'s actual language, "insist[ing] that the statute does not mention or require a direct causal link between a claimant's economic losses and damages to property or natural resources."[147]

The *Dunham-Price* court accepted Dunham's statutory-language argument. The court denied Citgo's summary judgment motion and expressed its disagreement with Citgo's proximate cause argument:

> The Calcasieu River meets OPA's definition of a natural resource [quoting 33 U.S.C. § 2701(20)]. Citgo has admitted that its discharge of oil into the Calcasieu River polluted a navigable water of the United States and damaged the personal property of owners along the Calcasieu River. Moreover, the Coast Guard issued a community advisory, notifying the public of the spill and the subsequent closure of the Calcasieu River. Dunham Price has submitted evidence demonstrating genuine issues of material fact, so it will be for the trier of fact to determine whether Dunham Price's economic losses are due to Citgo's oil spill.[148]

It will be noted that there is nothing particularly remarkable about the facts, arguments, and judicial reasoning in *Dunham-Price.* The remarkable thing is the court's rejection of a version of Professor Goldberg's central argument.

The Goldberg paper treats three decisions with results adverse to OPA claimants. As Professor Goldberg comes close to acknowledging,[149] two of them are pretty clearly wrong. The widely-criticized[150] decision in *In re Cleveland Tankers, Inc.* denied recovery to plaintiffs

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[147] *Id.*

[148] *Id.* at *3.

[149] *See infra* notes 152 and 156.

[150] *See In re* Taira Lynn Marine Ltd., 444 F.3d 371, 382 (5th Cir. 2006) (citing *Cleveland Tankers* as contrary to prevailing views, including the Fifth Circuit's own, on the meaning of Section 2702(b)(2)(E)); Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 631 n.6 (1st Cir. 1994) (criticizing *Cleveland Tankers* for ignoring the fact that OPA "override[s]" the *Robins/Testbank* rule); Kodiak Island Borough v. Exxon Corp., 991 P.2d 757, 769 n.75 (Alaska 1999) (criticizing *Cleveland Tankers* for failing to recognize that OPA provides for the recovery of economic damages); Francis J. Gonynor, *Six Years Before the Mast: The Evolution of the Oil Pollution Act of 1990*, 9 U.S.F. MAR. L.J. 105, 127 (1996) (stating that *Cleveland Tankers* "interpreted OPA in a novel way").

making claims under Section 2702(b)(2)(E) because they failed to "allege[] 'injury, destruction, or loss' to *their* property."[151] This is flatly wrong, as is shown by the provision itself ("recoverable by any claimant") and by the language of the House Conference Report quoted *supra* at notes 39–40.[152]

Gatlin Oil Co. v. United States[153] seems almost as clearly wrong. Gatlin owned above-ground fuel storage tanks that were jammed open by vandals, causing oil to spill into ditches leading to navigable waters as well as a fire (ignited by the oil's vapors) that destroyed a large part of Gatlin's property. One member of the Fourth Circuit panel agreed with the trial judge that the fire damage was compensable under OPA Sections 2702(a) and 2702(b)(2)(B) because (in the language of Section 2702(a)) the fire damage "result[ed] from" the spill incident.[154] But the two-judge Fourth Circuit majority disagreed, holding that the fire damage was not compensable "because the evidence did not establish that the fire caused the discharge of oil into navigable waters or posed a substantial threat to do so."[155] It must be respectfully said that this reasoning makes no sense, and Professor Goldberg does not pretend that it does: He says that the majority's reasoning was "somewhat obscure[]."[156]

The case that Professor Goldberg makes the most of[157] is *In re Taira Lynn Marine Ltd.*,[158] but the case does not seem particularly instructive on any of the matters in contention here. The *Taira* plaintiffs sought business-interruption and similar economic damages brought

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[151] 791 F. Supp. 669, 678 (E.D. Mich. 1992) (emphasis supplied).

[152] Professor Goldberg cites *Cleveland Tankers* as interpreting OPA Section 2702(b)(2)(E) more narrowly than he thinks proper. GOLDBERG, *supra* note 2, at 35 n.81. Goldberg suggests that maybe the *Cleveland Tankers* plaintiffs—who were complaining of the blockage of a channel they used for transporting goods—lost the case because they did not have licenses to use the waterway. *Id.* at 40 n.92.

[153] 169 F.3d 207 (4th Cir. 1999).

[154] *See id.* at 215 (Niemeyer, J., dissenting) (stating that "[t]he statutory [2702(a)] test—whether fire damage 'resulted from' the discharge of oil that threatened to pollute navigable waters—was . . . satisfied").

[155] *Id.* at 212.

[156] GOLDBERG, *supra* note 2, at 17 n.36.

[157] *See id.* at 35 n.81, 40 n.92.

[158] 444 F.3d 371 (5th Cir. 2006).

about by the mandatory evacuation of their areas of operation that was necessitated when a barge ran into a bridge and discharged its cargo—"a gaseous mixture of propylene/propane"—into the air.[159] Nothing was spilled into the water or onto the shoreline. Because the OPA damages provisions are limited to situations in which "oil is discharged, or [there is a] substantial threat of a discharge of oil, *into or upon the navigable waters* or adjoining shorelines or the exclusive economic zone,"[160] *Taira* was fairly clearly not an OPA case. As was explained by the court in *Dunham-Price*:

> The Fifth Circuit found that OPA claims are limited to damages resulting "from a discharge of oil or from a substantial threat of a discharge of oil into navigable waters or the adjacent shoreline." *Taira Lynn Marine*, 444 F.3d at 383 (quoting *Gatlin Oil Co. v. United States*, 169 F.3d 207, 211 (4th Cir. 1999)). Although OPA did not apply to the discharge of gaseous cargo, the court considered it applicable for the sake of argument. *Id.*[161]

In its "for the sake of argument" discussion of OPA, the *Taira* court characterized Section 2702(b)(2)(E) as "allow[ing] a plaintiff to recover for economic losses resulting from damage to another's property"[162] and went on to state that the provision would not afford relief to the plaintiffs because they "have not raised an issue of fact as to whether their economic losses are due to damage to [anyone's] property resulting from the discharge of the gas."[163] The plaintiffs should have been arguing that the discharge of the gas polluted the air (which OPA includes within its expansive definition of "natural resources"[164]) and thus constituted "injury, destruction, or loss of . . . natural resources" within the meaning of Section 2702(b)(2)(E). But if that point was made, the Fifth Circuit completely ignored it.

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[159] *Id.* at 376.
[160] 33 U.S.C. § 2702(a) (emphasis supplied).
[161] *Dunham-Price*, 2010 WL 1285446 at *2 n.6 (W.D. La. Mar. 31, 2010).
[162] 444 F.3d at 382.
[163] *Id.* at 383.
[164] *See* 33 U.S.C. § 2701(20).

For one looking to *Taira* for lessons about the meaning of Section 2702(b)(2)(E), the returns (to borrow an apt Goldberg phrase) seem "vanishingly small."[165] The court indicated that OPA did not apply, but that if it did, the part of Section 2702(b)(2)(E) allowing a claimant to recover economic losses for damage to someone else's property would not help plaintiffs who had no evidence that the oil (or oil-based chemical) spill had damaged anyone's property. The case is no help at all on the sphere of application of the portion of Section 2702(b)(2)(E)—surely the more important portion—providing for economic damages flowing from injury to the environment.

F. Policy Considerations

1. Statutory-Construction Principles and Policies

Professor Goldberg's three-page subsection labeled "Policy Considerations"[166] includes some but not nearly all of the paper's policy arguments. These begin much earlier in the paper with the maxim that "[t]he search for an answer [to whether OPA requires economic loss claimants to establish proximate causation] must . . . begin with the plain terms of the statute."[167] In conventional thinking, this concept is perhaps more often seen as a principle rather than a policy, but it ultimately rests on the judicial branch's goal of affording (or at least seeming to afford) deference to the legislative branch.[168] As the Supreme Court recently put it:

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.[169]

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[165] *See* GOLDBERG, *supra* note 2, at 19 (arguing that the probability of an oil spill that causes economic loss but no physical damage to anything is "theoretical but vanishingly small").

[166] *See id.* at 35–38.

[167] *Id.* at 16.

[168] *See generally* David W. Robertson, *Our High Court of Admiralty and Its Sometimes Peculiar Relationship With Congress*, ST. LOUIS U. L.J. (forthcoming 2011).

[169] Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992).

Another way to say this is that when a statute is clear, it should be applied honestly and carefully, without embellishment or evasion.[170]

Professor Goldberg endorses the foregoing policy—indeed, he repeatedly proclaims his fidelity to it[171]—but his goal of finding a proximate cause/use-right limitation in Section 2702(b)(2)(E) will not allow him to actually follow it. Instead, Goldberg invokes two much older statutory-interpretation maxims or canons—ideas that pull in the opposite direction, away from deference to legislative language—that allow him some wiggle room: "Congress is presumed to incorporate the common-law meaning of familiar legal terms[,]"[172] and "when statutes depart from common law (including admiralty law), those departures should be construed narrowly."[173] In the two paragraphs just below, we will see that neither of these principles is properly applicable in the present context.

As we saw in part V-B above, the OPA terms "result from"[174] and "due to"[175] are not legal terms; they are the language of everyday English. Both terms are synonyms for "caused by." A similar synonym is "because of." In *Gross v. FBL Financial Services, Inc.*, the Supreme Court used an ordinary dictionary, together with the Court's own view of the term's "ordinary meaning," and reference to "common talk," to reach the conclusion that the statutory term

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[170] *Cf.* GOLDBERG, *supra* note 2, at 35 ("The question of OPA's proper interpretation—of what liability scheme Congress actually put into place—is distinct from the question of whether OPA's liability provisions are optimally designed to realize certain goals or principles.").

[171] *See infra* Part VII-G.

[172] GOLDBERG, *supra* note 2, at 20 n.42. Professor Goldberg cites a recent case, *United States v. Wells*, 519 U.S. 482, 491 (1997), for this proposition, but the proposition is very old. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322–23 (1992) (calling the principle "well established" and citing, *inter alia*, a case decided in 1915).

[173] GOLDBERG, *supra* note 2, at 31. Here Professor Goldberg cites *Shaw v. R.R. Co.*, 101 U.S. 557, 565 (1879). *See also* State v. Courchesne, 998 A.2d 1, 38 (Conn. 2010) (stating that "a statute in derogation of the common law" must be strictly construed) (citation and internal quotation marks omitted).

[174] 33 U.S.C. § 2702(a).

[175] 33 U.S.C. § 2702(b)(2)(E).

because of "indicates a but-for causal relationship."[176] But-for causation is factual causation; there is no hint of any "proximate" qualification, and certainly not of any use-right qualification.

The Supreme Court has repeatedly said that that the venerable statutes-in-derogation maxim must not be applied to "remedial" maritime statutes, which must "be liberally construed" in the interest of the intended beneficiaries.[177] A mere glance at OPA's legislative history confirms that OPA is quintessential remedial maritime legislation, beyond a shadow of a doubt.[178] Indeed, courts routinely refer to OPA as "remedial legislation."[179] Moreover, in its recent jurisprudence the Court has applied the broad construction principle to maritime legislation generally, without regard to the "remedial" characterization.[180] In urging the application of the statutes-in-derogation canon to the construction of OPA, Professor Goldberg

[176] 129 S. Ct. 2343, 2350 (2009) (citations and internal quotation marks omitted).

[177] The Arizona v. Anelich, 298 U.S. 110, 123 (1936). To the same effect, see Chandris, Inc. v. Latsis, 515 U.S. 347, 378–79 (1995) (Justices Stevens, Thomas, and Breyer, concurring); Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, 310 (1970); Kernan v. Am. Dredging Co., 355 U.S. 426, 432 (1958); Isbrandtsen Co. v. Johnson, 343 U.S. 779, 782 (1952); Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 789–90 (1949); Warner v. Goltra, 293 U.S. 155, 156–57 (1934); Cortes v. Balt. Insular Line, Inc., 287 U.S. 367, 375 (1932); Jamison v. Encarnacion, 281 U.S. 635, 639–40 (1930). *Cf.* Atchison, T. & S.F. R. Co. v. Buell, 480 U.S. 557, 562 (1987) (stating that the Federal Employers' Liability Act is a "broad remedial statute" which must be given a liberal construction).

[178] At 42 n.91, Professor Goldberg suggests that the Supreme Court is presently leery of applying "the canon of statutory interpretation that favors a liberal reading of 'remedial' legislation . . . to environmental protection statutes," citing Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENV'TL. L. REV. 199 (1996). Professor Goldberg provides no pinpoint citation to the Watson article, and I have not found in the piece the suggested indicia of Supreme Court leeriness.

[179] Unocal Corp. v. United States, 222 F.3d 528, 535 (9th Cir. 2000); *In re* Metlife Capital Corp., 132 F.3d 818, 822 (1st Cir. 1997); Rice v. Harken Exploration Co., 89 F. Supp. 2d 820, 826 (N.D. Tex. 1999); *In re* Jahre Spray II K/S, 1996 WL 451315 at *4 (D. N.J. Aug. 5, 1996); Sun Pipe Line Co. v. Conewago Contractors, Inc., 1994 WL 539326 at *2 (M.D. Pa. Aug. 22, 1994); Avitts v. Amoco Prod. Co., 840 F. Supp. 1116, 1122 (S.D. Tex. 1994).

[180] *See* Dooley v. Korean Air Lines Co., 524 U.S. 116 (1998) (holding that the Death on the High Seas Act, 46 U.S.C. §§ 30301–30308, displaces federal maritime common law); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) (same); Miles v. Apex Marine Corp., 498 U.S. 19, 36 (1990) (holding that the Jones Act, 46 U.S.C. § 30104, displaces key features of federal maritime law); Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) (holding that the Death on the High Seas Act preempts state law).

seeks to resurrect a bygone (and largely unlamented[181]) era in admiralty and maritime jurisprudence.[182]

The last of Professor Goldberg's statutory-interpretation policies is an admonition that OPA ought not to be construed in such a way as "to draw irrational or entirely arbitrary distinctions among classes of possible claimants."[183] This is surely sound advice, but it supports fidelity to the cause-in-fact requirements that Congress actually wrote into the statute[184] rather than calling for engrafting a proximate cause/use-right requirement onto the statute as Goldberg proposes. Part VI above demonstrates that Congress's actual factual-causation requirements enable courts to draw principled lines,[185] while Professor Goldberg's proposed use-right requirement would exclude ships' chandlers, who ought to be regarded as righteous claimants under any principled reading of OPA's remedial scheme. Indeed, it is noteworthy that at several points, Professor Goldberg tries to avoid the appearance of arbitrary exclusions by confessing that he would not always insist on the use-right requirement.[186]

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[181] *See generally* Robertson, *supra* note 168.

[182] *Cf.* GOLDBERG, *supra* note 2, at 25 n.56 (stating that "[t]he substantive rules of federal admiralty law have been developed primarily by federal courts"). This claim is belied by *Miles*, where the unanimous Supreme Court proclaimed: "Maritime tort law is now dominated by federal statute." 498 U.S. at 36.

[183] GOLDBERG, *supra* note 2, at 36.

[184] As is emphasized throughout this Article, Section 2702(a) requires claimants to show that their damages "result[ed] from" an oil spill or a substantial threat of one, and Section 2702(b)(2)(E) requires economic loss claimants to show that their damages were "due to injury, destruction, or loss" of tangible property or natural resources. As we saw *supra* Part VI, these provisions establish a principled distinction between hypothetical "Universe" claimants 1 through 10 (whose damages probably would not occurred if there had been only the threat of a spill or somehow a spill that caused no physical harm to anything) and claimants 11 through 17 (who probably would have had much the same kinds of losses from even the threat of a significant spill).

[185] *See supra* Part VI.

[186] *See* GOLDBERG, *supra* note 2, at 33 (suggesting that liability might properly be "extend[ed] to certain additional claimants" who did not have the "exclusive or near-exclusive [use] rights" that Goldberg would generally require); *id.* at 40 & n.92 (indicating that "Universe" claimant # 5—the barge owner/operator—should probably be compensated although he might not be able to meet the use-right requirement); *id.* at 41–42 (seemingly calling for similar leniency for claimants 6 through 8—restaurant, real estate agent, furniture store near spill).

2. Other Policy Considerations

The "Policy Considerations" subsection of the Goldberg paper[187] has two main themes. The first is to proclaim the inherent wisdom of "prioritiz[ing]" physical-injury claims over economic loss claims.[188] This seems a bit *ex cathedra* on Goldberg's part; in fact the wisdom of treating physical property damage more favorably than other kinds of financial setbacks has been widely debated.[189] More importantly, Congress made a different choice in OPA. Subsection B of Section 2702(b)(2) provides that property owners and lessors can recover damages for "injury to" or "destruction of" property, whereas subsection E treats property owners, lessors, and all other claimants alike in allowing recovery of damages "due to the injury, destruction, or loss of [property] or natural resources." The structure and language of the two subsections seem to reflect equal prioritization of physical property damage and other types of economic loss claims.[190]

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[187] *See* GOLDBERG, *supra* note 2, at 35–38.

[188] *See id.* at 35.

[189] *See, e.g.*, People Express Airlines, Inc. v. Consol. Rail Corp., 495 A.2d 107, 111 (N.J. 1985) (criticizing a physical-injury requirement as "capricious[]," "arbitrar[y]," "formalis[tic]," and hyper-technical); J'Aire Corp. v. Gregory, 598 P.2d 60, 64 (Cal. 1979) (stating that "injury to a tenant's business can often result in greater hardship than damage to a tenant's person or property"); Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1044 (5th Cir. 1985) (en banc) (Wisdom, J., joined by four other judges, dissenting) (stating that "[a]t bottom . . . the requirement of a tangible injury is artificial because it does not comport with accepted principles of tort law").

[190] Suppose an oil spill fouls a tourist hotel's private beach and the ocean near it, causing the hotel to lose business and lay off a worker. Sections 2702(b)(2)(B) and 2702(b)(2)(E) seem to put the hotel's owner and laid-off employee on equal footing; both would be entitled to the economic damages that provably resulted from the spill's fouling the beach and ocean. Professor Goldberg apparently agrees. *See* GOLDBERG, *supra* note 2, at 40 (treating "Universe" claimants 3 and 4 as equally deserving).

Now imagine a similar scenario in which the precipitating event is not an actual spill with consequent fouling of the beach and ocean but instead the widely reported threat of such a spill. Here again, it seems that subsections (B) and (E) would put the hotel and its laid-off employee on equal footing. Because no tangible property has been injured or destroyed, subsection (B) would presumably avail the owner nothing. Nor would the "injury" and "destruction" categories of subsection (E) afford either claimant any relief. The owner and employee could argue (perhaps successfully, but see *supra* note 32) that the threat caused the "loss" of property and of a natural resource. Neither would have a better argument than the other.

In connection with the threat scenario, it should be noted that Professor Goldberg is probably wrong in arguing that subsection (E) may be more restrictive in threat situations than any of the other subsections of Section 2702(b)(2*). See* GOLDBERG, *supra* note 2, at 19–20 n.40. Subsection (F) applies only when there has been "a discharge of oil." Subsection (B) requires "injury to" or "destruction of" property, which might not normally occur in threat situations. Subsections (C), (D), and (E) are alike in requiring that property or natural resources have been injured, destroyed, or lost, so none of them would generally apply in threat cases unless "loss" is read to include

Professor Goldberg's second policy theme is that there are several good arguments for preferring victims "most immediately and tangibly affected by a spill" over "what might be termed 'second-order' claim[ants]."[191] All of this is entirely plausible, and it helps to explain why Congress included the factual causation limit in Section 2702(b)(2)(E). None of Goldberg's arguments against compensating second-order claimants provides a basis for choosing his proximate cause/use-right limit over the one Congress wrote into the statute.

G. Back to the Beginning: The Actual Language of OPA

As has been emphasized throughout this Article, there is no "direct" causation, "proximate cause," or "use-right" language in Section 2702. Professor Goldberg puts it there in a brilliant demonstration of "that subtle technique of misdirecting the attention of his audience, which is the beginning and end of the conjurer's art."[192] The Goldberg paper cannot be fully understood and appreciated without taking a close look at the essence of Professor Goldberg's art.

1. The Conjurer's Art: Seven Steps and Three Rabbits

We begin with a review of what the statute actually says (with emphasis supplied). Section 2702(a) says that claimants can recover the "damages specified in subsection (b) of this section that *result from such incident*." ("Such incident" means "the discharge or threatened discharge of oil."[193]) Section 2702(b)(2)(E) says that "any claimant" (including those who claim no proprietary interest in anything affected by the oil spill or threatened oil spill) can recover economic damages (for lost profits or impairment of earning capacity) when such damages are "*due to the injury, destruction, or loss of real property, personal property, or natural*

"loss of use." *But see supra* note 32 (noting a problem with reading "loss" in Section 2702(b)(2) to include "loss of use").

[191] GOLDBERG, *supra* note 2, at 36–37.

[192] ROBERTSON DAVIES, FIFTH BUSINESS 215 (King Penguin ed. 1983).

[193] *In re* Taira Lynn Marine Ltd., 444 F.3d 371, 383 (5th Cir. 2006).

resources." The artful process by which Professor Goldberg transforms those provisions into a proximate cause/use-right requirement involves seven steps.

Step One. Goldberg begins by taking every opportunity to state or imply that it is self-evident that the subsection (a) term "result from" and the subsection (b)(2)(E) term "due to" are bound to have different meanings.[194]

Step Two. Eventually—when the reader has presumably become suitably conditioned to accepting that the different phrasings simply *must* convey different meanings—comes the second step, where Professor Goldberg sets the stage for the demonstration by stating:

> With respect to liability for economic loss that does not arise out of damage to property or resources that the claimant herself owns or leases, the key issue is whether OPA contains an additional requirement beyond: (1) proof of responsibility for a discharge under Section 2702(a); (2) proof of actual economic loss; and (3) proof of actual [i.e., factual] causation, or whether these are the only requirements.[195]

Some conjurer's misdirection is involved at this step, because whether subsection (b)(2)(E)'s "due to" clause adds *something* to subsection (a)'s "result from" clause is not a meaningful issue at all, much less the "key issue"—obviously the answer is yes. At Step Two, Goldberg is putting three rabbits into the hat.

Step Three. In fairly short order, Professor Goldberg then flourishes the first rabbit, proclaiming the obviousness of the fact that Section 2702(b)(2)(E)'s "due to" clause "imposes a second-layer causation requirement on top of the initial 'result from' requirement set by Section 2702(a). A claimant relying on these sections must prove damage to, or loss of, property or natural resources that 'result[s] from' a discharge, *and* lost profits or impaired earning capacity

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[194] *See* GOLDBERG, *supra* note 2, at 3 (juxtaposing the "result from" and "due to" phrases so as to imply they have different meanings); *id.* at 10 (same); *id.* at 11 (subtitle featuring "The 'Due To' Requirement"); *id.* at 15 (subtitle featuring "Actual Causation" [i.e., factual causation] introducing two paragraphs that treat only the Section 2702(a) "result from" requirement and omit any mention of the Section 2702(b)(2)(E) "due to" requirement); *id.* at 16 (subtitle on the "'Due To' Clause" designed to imply that the clause addresses something other than "actual [i.e., factual] causation); *id.* at 16 (juxtaposing the "result from" and "due to" phrases so as to imply that the terms have different meanings).

[195] *Id.* at 16.

'due to' that damage or loss."[196] A page later, Goldberg emphasizes the solidity of this first rabbit by noting that a failure to read subsection (b)(2)(E)'s "due to" clause as adding something to subsection (a)'s "result from" clause would involve treating the (E) clause as "mere surplusage."[197] This first rabbit, whose name is Second-Layer Causation, is well credentialed.[198]

Step Four. Professor Goldberg then proceeds with setting the stage for the production of the second rabbit. He does this by speculating about the operation of two imaginary statutes, one without subsection (E)'s "due to" clause[199] and another with the phrase "due to" defined to mean "accompanied by" rather than "caused by."[200]

Step Five. In an elegant segue from the imaginary statutes back to the real-world OPA, Goldberg then produces the second rabbit, stating:

> By contrast [with the imaginary statutes], it is entirely natural to read Section 2702(b)(2)(E)'s "due to" clause as requiring as a condition of recovery for lost profits or impaired earning capacity a *nexus beyond bare causation between the lost profits or impaired earning capacity (on the one hand) and the damage to or loss of, property or natural resources (on the other).* No interpretive gymnastics are required. Rather, one need only treat the phrase "due to" as refining the actual [i.e., factual] causation requirement already specified by the "result from" language of Section 2702(a).[201]

Professor Goldberg then announces this rabbit's name: it is "a proximate cause limitation."[202] Whereas the first rabbit, Second-Layer Causation, was not totally unexpected, this second one, Proximate Cause, is an impressive surprise: Goldberg has now read "common law notions of proximate cause"[203] into subsection (E)'s "due to" clause. In flourishing the rabbit named

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[196] *Id.* at 17 (Goldberg's emphasis).
[197] *Id.* at 18.
[198] Professor Goldberg is obviously right that the "due to" clause must mean *something*. And two-level factual causation inquiries are staples of environmental and tort law. See the discussion of *Ohio v. U.S. Dep't of Interior* and *E. Tex. Theatres, Inc. v. Rutledge* at *supra* notes 71 and 78. (The *Rutledge* court explained, 453 S.W. 2d at 468–69, that it used the term "proximate cause" to mean cause-in-fact.)
[199] *See* GOLDBERG, *supra* note 2, at 17–18.
[200] *Id.* at 18–20.
[201] *Id.* at 20 (emphasis supplied).
[202] *Id.* at 20 (emphasis supplied).
[203] *Id.* at 22.

Proximate Cause, Professor Goldberg proclaims that reading subsection (E)'s "due to" language to mean "proximately caused by" has the effect of "setting an additional filter on liability beyond actual [i.e., factual] cause—one that requires as a condition of recovery for lost profits or impaired earning capacity a more substantial [than factual causation] connection between the happening of those losses and the happening of harm to property or resources."[204]

Step Six. It takes a while for the third rabbit to come out of the hat. Professor Goldberg must first take his audience on a journey into the operations of and exceptions to the *Robins/Testbank* rule in federal maritime and state tort law. This is not misdirection—by now we suspect what's coming—but it sets the stage by heightening the anticipation.

Step Seven. Then out comes the third rabbit. Waving the venerable but nowadays largely discredited "statutes in derogation" maxim[205] like a magic wand, Professor Goldberg proclaims:

> [Probably] Congress's aim in enacting Section 2702(b)(2)(E) was to extend liability along the lines tentatively identified by [the] judicial decisions that have [modestly] pushed the boundaries of the economic loss rule. To say the same thing: OPA's economic loss provisions are best understood as expanding liability for economic loss beyond owners and lessees of property that has been damaged to any person whose business's profitability depends on his or her ability to exercise a right physically to obtain or use property or resources that are damaged or lost because of an oil spill. . . . Reading OPA in this manner makes sense of the "due to" clause's linkage of recovery for economic loss to property or resources being damaged or made physically unavailable. Economic loss is "due to" property or resource damage, or loss, when profits or earnings suffer because the damage, or loss, prevents or hinders the claimant from putting that property or those resources to commercial use, as is her right. Any claimant who has such a use-right—regardless of whether the right amount to an ownership or lease interest—stands to recover.[206]

Voila! Say hello to the Use-Right Rabbit.

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[204] *Id.* at 23.
[205] *See supra* notes 173 and 177–182.
[206] GOLDBERG, *supra* note 2, at 32.

2. Magician's Patter[207] (with brief rejoinders)

The Goldberg paper augments its presentation of the three rabbits—Second-Layer Causation, Proximate Cause, and Use-Right—with a surprisingly effective running commentary that continually asserts Professor Goldberg's fidelity to the statute. Here are the main bits, followed in indented italics by this Article's brief rejoinders:

> [T]he "due to" clause of Section 2702(b)(2)(E) stands separate and apart from 2702(a)'s "result from" clause, and, as such, *explicitly states* an independent limitation on [economic loss] liability.[208]
>
> > *Yes, but it does not explicitly state a proximate cause or use-right limit. On its face it sets an additional factual causation requirement.*
>
> [This paper's] reading of OPA does not purport to find buried within the statute an implicit, unstated limitation on liability for economic loss. Rather, it identifies the "due to" clause as an *expressly stated* limitation on such liability.[209]
>
> > *The proximate cause and use-right limits were deeply buried if there at all. Goldberg the conjurer worked hard and skillfully to produce them.*
>
> [I]t is *entirely natural* to read Section 2702(b)(2)(E)'s "due to" clause as requiring . . . a nexus beyond bare causation . . . *No interpretive gymnastics* are required.[210]
>
> > *It seems unnatural to read the phrase "due to" to mean "proximately caused by," and still more unnatural to find a use-right limitation in that phrase. The performance of Goldberg, the conjurer, was far more impressive than the doings of any ordinary gymnast.*
>
> [This paper's] reading of OPA's economic loss provisions is perfectly consonant with judicial readings of highly comparable statutes.[211]
>
> > *For many reasons, the statutes Goldberg has in mind—CERCLA and TAPAA—are far from being "highly comparable" to OPA.*[212] *Neither included a two-level cause-in-fact requirement like OPA's, and neither had anything like the many*

[207] WEBSTER'S NEW TWENTIETH DICTIONARY OF THE ENGLISH LANGUAGE 1315 (unabridged 2d ed. 1975) defines *patter* to mean "the glib, rapid speech of salesmen, circus barkers, magicians, etc." Professor Goldberg's commentary on his presentation of the proximate cause/use-right interpretation of Section 2702(b)(2)(E)'s "due to" clause is eloquent rather than glib. But the rest of the definition fits.

[208] GOLDBERG, *supra* note 2, at 17 n.36 (emphasis supplied).

[209] *Id.* at 18 n.38 (Goldberg's emphasis).

[210] *Id.* at 20 (emphasis supplied).

[211] *Id.* at 20 (emphasis supplied).

[212] *See supra* Part VII-A.

features of OPA's legislative history demonstrating that Congress did not want to require economic loss claimants to show proximate causation or a use right.

[T]he interpretation of OPA provided here does *not* rest on finding in Section 2702(b)(2)(E) an implicit proximate cause limitation of a sort that might run afoul of the *Russello*[213] inference of intentional exclusion. Rather it rests on the fact that OPA explicitly sets two distinct causation-related requirements.[214]

The implication that the "due to" clause "explicitly" sets a proximate cause or use-right requirement is fabulously false.

If [CERCLA and TAPAA] are properly read to contain a proximate cause limitation, the implication that OPA includes a categorical limit on liability for economic loss is *irresistible*. As we have seen, *the only function that can possibly be ascribed* to the "due to" clause is that of setting an additional filter on liability beyond actual [i.e., factual] cause—one that requires as a condition of recovery for lost profits or impaired earning capacity a more substantial connection between the happening of those losses and the happening of harm to property or resources.[215]

Professor Goldberg has failed to establish that CERCLA and TAPAA were interpreted to include a proximate cause limit, and certainly they were never read to include any use-right limitation of the sort that Goldberg envisages.[216]

[No] . . . irrational or entirely arbitrary distinctions [are created by this paper's] interpretation of OPA's economic loss provisions.[217]

The use-right requirement seems to deny compensation to ships' chandlers, and denying them compensation seems irrational and arbitrary.[218] *The Goldberg paper handled this problem by ignoring it. If the problem is handled by relaxing the use- right requirement, this seems to undercut the entire Goldberg proposal.*

H. Postscript: Professor Goldberg Argues Against His Own Proposal

The Goldberg paper acknowledges that "the various damages provisions of Section 2702(b) are written generically to cover all violations of Section 2702(a) . . . [E]ach of the . . . six separate damages provisions purport to apply to any type of discharge that violates Section

[213] *See supra* note 118.
[214] GOLDBERG, *supra* note 2, at 21 n.42 (Goldberg's emphasis).
[215] *Id.* at 22–23 (emphasis supplied).
[216] *See supra* Part VII-A.
[217] GOLDBERG, *supra* note 2, at 36.
[218] *See supra* Part VI.

2702(a)."[219] Thus, whether the situation at hand is a threatened spill, a relatively small spill, or a monster like Macondo—and whether the conduct of the responsible party is merely enough for strict liability, or bad enough to expose the responsible party to damages above the OPA caps, or still more blameworthy, moving into potential punitive damages territory—the six separate damages provisions ought to take a coherent approach to determining conceptual limits on compensatory damages. They ought not be read in such a way as to clash with one another or to create arbitrary or irrational distinctions among themselves.

The best way to achieve such coherence would be to aim for complete fidelity to the language of the six separate subsections of 2702(b). On that view, subsection (A) allows governmental trustees to recover damages for injury, destruction, loss, or loss of use of natural resources caused by a spill or threatened spill. Subsection (B) allows owners and lessors of property to recover damages for injury or destruction of their property caused by a spill or threatened spill.[220] Subsection (C) allows subsistence users of natural resources to recover damages for loss of use of such resources when brought about by a spill or threatened spill that has caused injury, destruction, or loss of natural resources.[221] Subsection (D) allows political entities to recover damages for loss of taxes and similar revenues when brought about by a spill or threatened spill that has caused injury, destruction, or loss of property or natural resources. Subsection (E) allows any claimant to recover damages for loss of profits or impairment of earning capacity brought about by a spill that has caused injury, destruction, or loss of property or natural resources. Subsection (F) allows governmental entities to recover damages for the

[219] GOLDBERG, *supra* note 2, at 19–20 & n.40.

[220] A threatened spill might cause injury or destruction of property through the actions of threat responders.

[221] A threatened spill might cause injury or destruction of natural resources through the actions of threat responders. Additionally, it may be appropriate to hold that natural resources have been "lost" when a threat-induced embargo prevents their availability. *See supra* note 32.

costs of providing additional public services caused by a spill; it does not apply to threatened spills.

No arbitrary or irrational distinctions are apparent in the preceding paragraph, which does what Professor Goldberg calls for: It applies the "liability scheme Congress actually put into place."[222] In sharp contrast, the Goldberg use-right proposal would either create confusion approaching chaos, *or* it would place subsections (D) and (E) at odds with one another. These two subsections use identical language in describing their second-layer causation requirements: "due to the injury, destruction, or loss of real property, personal property, or natural resources." If the quoted clause entails a use-right limit on damages under (E), should it not also have the same effect on damages under (D)? But would it make any kind of sense to bring a use-right inquiry into the taxes-and-revenues context? If not, then what would be the effect of the "due to" clause in (D) cases? To bring traditional common-law proximate cause[223] into play? To require the invention of yet another new variant of proximate cause?

VIII. CONCLUSION

The commercial-use-right proposal of the Goldberg paper is at war with OPA's language and legislative history. One of the handful of judicial decisions addressing the relevant OPA provisions has rejected an argument fairly closely resembling the Goldberg proposal. Moreover, the proposal seems somewhat vulnerable to criticism on policy and coherence grounds. The impressive plausibility of the Goldberg paper stems entirely from the author's remarkable analytical and rhetorical skills. If at the end of the day it emerges that a legal craftsman of Professor Goldberg's high degree of proficiency cannot sell a conceptual product, it is probably safe to assume that the product itself is seriously flawed.

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[222] GOLDBERG, *supra* note 2, at 35.
[223] *See supra* note 92.