Cleaning Up Oil Spill Liability Through Commercial Quasi-Property Rights

Troy S Brown, Michigan State University College of Law
Cleaning Up Oil Spill Liability Through Commercial Quasi-Property Rights

Troy S. Brown

Table of Contents

Abstract ....................................................................................................................................................................................... 2

Introduction ............................................................................................................................................................................... 2

Part I: Oil Spill Liability: Before & After Passage of the Oil Pollution Act of 1990 ........................................ 5
A. Federal Statutes Affecting Oil Spill Liability Prior to the Oil Pollution Act of 1990 ....................... 5
B. Contextualizing the Oil Pollution Act: Policy of Inclusion ................................................................. 7
C. Legislative History of OPA .................................................................................................................... 10
D. OPA §2702(b)(2)(E): Departing the Rocky Shores of Common Law for the Land of Doctrinal Coherence ................................................................................................................................................... 12

Part II: Superiority of Commercial Quasi-Property Rights Theory in Determining Economic Loss under OPA §2702(b)(2)(E) ................................................................................................................................................................ 17
A. Balancing Relational Rights, Duties, and Liability in Interpreting §2702(b)(2)(E) ....................... 17
B. Evaluating the Spectrum of §2702(b)(2)(E)‘s Competing Interpretations ........................................ 22
   1. Professor Goldberg’s “Use-Right” Test ............................................................................................ 24
   2. Professor Peterson’s Heightened “But For” Test ............................................................................. 32
   3. The Commercial Needs Requirement ............................................................................................... 34
C. Articulation of a Commercial Quasi-Property Rights Test for interpreting §2702(b)(2)(E) ......... 37
D. Application of the Quasi-Property Right Test to the Goldberg/Peterson Universe of Potential Pure Economic Loss Claimants ............................................................................................................................ 38

Conclusion ................................................................................................................................................................................. 42

1 Associate Professor of Law, Michigan State University College of Law. I thank Professors Joe Singer, Ben Walther, and James Ming Chen for comments on this Article, and the Faculty of Michigan State University College of Law for its support.
Abstract
The pure economic loss rule, embodied in Robins Dry Dock v. Flint, has denied many individuals and businesses who commercially use and rely upon oil spill damaged land and resources, because their economic losses were unaccompanied by physical injury. In passing the Oil Pollution Act of 1990, the U.S. Congress sought to ameliorate the harshness of the pure economic loss rule by creating §2702(b)(2)(E), a cause of action to recover such economic losses, even in the absence of a recognized proprietary interest in an affected resource. However, the persistence of the pure economic loss rule, the Oil Pollution Act’s vague legislative history, and competing scholarly interpretations have added confusion on what §2702(b)(2)(E) requires of claimant seeking recovery of pure economic losses. Recent scholarship on the proper interpretation of §2702(b)(2)(E) can be placed on a spectrum: at one extreme, a bright-line proximate-cause like rule to exclude most from recovery; at the opposite extreme exists a modified “but-for” test to allow for a more inclusive range of claimants; and closer to the proximate-cause extreme exists a test that requires a claimant to demonstrate a “commercial need” in the damaged land or resource to justify recovery. All three of these tests fail to achieve the proper balance among policy, rights and duties, and liability. This Article suggests a balanced alternative method that actualizes Congressional intent to provide broad recovery for economic losses negligently caused by oil spills: for a claimant to recover under OPA’s provision for economic loss the claimant must demonstrate a Commercial Quasi-Property Right, as defined herein, in the oil spill damaged land or resource. This interpretation supplies a coherent and rational method for interpreting §2702(b)(2)(E). The purpose of this new approach is to honor Congress’s intent to provide reasonable compensation for a wide range of injuries to those with no traditionally recognized proprietary interest, but nevertheless rely upon and commoditize property and natural resources affected by the oil spill. Confusion surrounding how to interpret §2702(b)(2)(E) manifested in In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, and, given the increase in frequency and severity of these types of catastrophes, the same questions will be asked again, soon.

Introduction
A recently published book argues that the most important determinant in why some nations fail and others succeed is the nature of their political and economic institutions, rather than policies, geography, culture, or value systems, as some economists have earlier argued. The political and economic institutions it creates and maintains no doubt largely influence a country’s economic success. In their book, the authors argue that wide levels of inclusion through respect for private property, rule of law, and the relative absence of government-granted privilege are necessary for long term and sustained socio-economic innovation. The converse is true as well; exclusion, insecure property rights, and domination by narrow interests are usually detrimental to an economy. While the book’s authors proclaim the United

---

2 Daron Acemoglu and James Robinson, Why Nations Fail: The Origins of Power, Prosperity, and Poverty (2012). While the book does not explore the subject of this article, the authors discuss the role of property rights, institutions, creative destruction, and contemporary issues.


4 See generally, Acemoglu and Robinson, supra note 1.

5 See e.g., Acemoglu and Robinson, supra note 1, at 66. The authors cite the experience and history of Africa as a prime example: “Similarly, leaders of African Nations that have languished over the last fifty years under insecure property rights and economic institutions, impoverishing much of their populations, did not allow this to happen because they thought it was good economics; they did so because they could get away with it and enrich themselves at the expense of the rest, or because they thought it was good politics, a way of keeping themselves in power by buying the support of crucial groups or elites.”
States as an example of inclusion, the recent passage of the third anniversary of 2010’s Deepwater Horizon crisis and attendant litigations remind us that modern-day America is more nuanced than the authors claim.

The evolution of oil spill liability in the United States demonstrates a move toward inclusion. Historically, liability for pure economic damages negligently caused by an oil company had been prohibited by common law, under the Robins Dry Dock rule. In response to the Exxon Valdez crisis, however, Congress passed the Oil Pollution Act of 1990 (“OPA”)\(^6\) to broaden civil liability of oil companies causing oil spills off the coast of the United States. It explicitly states that companies must have a “plan to prevent spills that may occur” and have a “detailed containment and cleanup plan” for oil spills.\(^7\) Passage of the OPA was significant because there were a many well-known flaws to liability and oil removal laws preceding the Exxon Valdez oil spill. Those flaws included the need for a more inclusive definition of compensable damages and a structure to pay for the costs of spill removal, abatement, and damages.\(^8\) Significantly, OPA §2702(b)(2)(E) makes the responsible party liable to claimants for pure economic losses, when those losses are caused by and result from an oil spill.\(^9\)

Despite the OPA providing a cause of action for pure economic losses, actualizing Congress’ inclusionary intent to compensate broader categories of oil spill victims requires courts to understand the common law backdrop against which the OPA was passed, and requires prudent judgment to properly determine the standard for recovery. Uncertainty regarding the proper standard of duty and causation under OPA §2702(b)(2)(E) following the 2010 Deepwater Horizon crisis indicates the tension between extractive nature of common law and the more inclusive nature of the OPA. The Deepwater Horizon crisis, which caused massive damage to the Gulf of Mexico, billions of dollars in damage, and the loss of eleven lives, predictably led to myriad of lawsuits by thousands of claimants,\(^10\) including over 100,000 claims for economic loss and property damage.\(^11\) When the veritable deluge of lawsuits against BP became massive, most of the claims arising from the crisis were consolidated into two Multidistrict Litigation (“MDL”) proceedings.\(^12\) The litigations involved hundreds of claims for environmental, economic, and personal harms arising from the spill. To efficiently manage the complex case, the federal district court for the eastern district of Louisiana organized the various types of claims into several

---

6 The bill was introduced to the House by Walter B. Jones, Sr., a Democratic Party congressman from North Carolina’s 1st congressional district, along with 79 cosponsors following the 1989 Exxon Valdez oil spill, which at the time was the largest oil spill in U.S. history. It enjoyed widespread support, passing the House 375-5 and the Senate by voice vote before conference, and unanimously in both chambers after conference. See (101 H.R.1465, P.L. 101-380[1]) See also 33 U.S.C. §§ 2701–2762 (2006). Ironically, the historic catastrophe BP exacerbated in 1989, known as the Exxon-Valdez crisis, became the historical impetus for passage of the Oil Pollution Act, one of the major laws BP found itself subject to as a result of the Deepwater Horizon crisis.

7 In addition to these restrictions, OPA also denies limitation to a responsible party where the proximate cause of the violation was a federal safety, construction, or operating regulation. See 33 U.S.C. § 2704(c)(1)(B). This was also a late addition to the limitation provision during the OPA negotiations, and it significantly increased the number of spills that will not be subject to limitation of liability. Limitation was further restricted by the provisions contained in 33 U.S.C. § 2704(c)(2), which denies limitation to any responsible party that fails to report the spill as required by law or fails to provide all reasonable cooperation and assistance requested by a responsible official coordinating the spill response.

8 In fact, the primary legislative vehicle for OPA 90, “The Oil Pollution Prevention, Removal, Liability, and Compensation Act of 1989,” H.R. 1465, was introduced in the 101st Congress on March 16, 1989 - before the EXXON VALDEZ grounded on Bligh Reef.

9 The OPA also provides for an opportunity to make claims for compensation from a dedicated Oil Spill Liability Fund. See 33 U.S.C. § 2714(c).


11 In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010 (Order of Aug. 26, 2011), 808 F. Supp. 2d 943, 947 (E.D. La. 2011) (order addressing motions to dismiss claims for “non-governmental economic loss and property damages”).

12 Id.
pleading bundles.” The “B1” pleading bundle included all claims for private or non-governmental economic loss and property damages. On August 26, 2011, a federal district court, following the lead of most courts and scholars, ruled on a motion to dismiss the economic loss claims related to the spill. That Order held that the OPA permits recovery for economic damages “due to the injury, destruction, or loss of real property, personal property, or natural resources,” regardless of whether the claimant has an ownership interest in the property or resource. In so ruling, the Court implicitly recognized that OPA was intended to allow a broader class of claimants to recover for economic losses than allowed under general maritime law. Therefore, the Order clearly disavowed the applicability of the common law pure economic loss rule to OPA. In other words, OPA allows recovery for economic loss from an oil spill “regardless of whether the claimant sustained physical damage to a proprietary interest.” However, the Order of August 26, 2011 did not decide what specific causation standard governs OPA economic loss claims, and, that these claimants had to rely exclusively on under-interpreted provisions of §2702(b)(2)(E). The Court specifically stated:

The Court notes that OPA does not expressly require “proximate cause,” but rather only that the loss is “due to” or “resulting from” the oil spill. While the Court need not define the precise contours of OPA causation at this time, it is worth noting that during oral argument both counsel for BP and the PSC conceded that OPA causation may lie somewhere between traditional “proximate cause” and simple “but for” causation.

This topic generated rich scholarship on the proper interpretation of OPA §2702(b)(2)(E). Professor John C.P Goldberg and Professor David W. Robertson articulated opposing tort-based approaches on the proper causation standard for §2702(b)(2)(E). On the proximate-cause end of the spectrum, Professor Goldberg proposed the bright-line “use-right” test which first seeks to determine whether a claimant commercially used oil spill affected land or resources and then whether that claimant possessed a near exclusive right to such land or resources. On factual cause end of the spectrum, Professor Robertson

---

14 Id.
15 Where claimants complied with the OPA presentment procedures (i.e., tendered their claims to the responsible parties), the court held the plaintiffs may not assert maritime causes of action against a Responsible Party. The court also ruled that the OPA did not displace all maritime law claims. See Order of Aug. 26, 2011, 808 F. Supp. 2d at 959.
16 Id.
17 Id.
18 Judge Barbier briefly addressed OPA’s causation standard, allowing OPA claims submitted by Vessel of Opportunity (“VoO”) and Moratorium plaintiffs to proceed, without determining the appropriate causation standard. See Order of Aug. 26, 2011, 808 F. Supp. 2d at 966. The order determined that OPA’s causation requirements were not required for a motion to dismiss, and that the “Pure Stigma” plaintiffs had “stated a plausible claim for relief.” See Pretrial Order No. 11, 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. Oct. 19, 2010), available at http://www.laed.uscourts.gov/OilSpill/10192011Agenda.pdf., at 19.
19 See Order of Aug. 26, 2011, 808 F. Supp. 2d at 965-966 (Citing CSX Transp. Inc. v. McBride, 131 S. Ct. 2630, 2642-43, (2011) (“Congress, it is true, has written the words ‘proximate cause’ into a number of statutes. But when the legislative text uses less legalistic language, e.g., ‘caused by,’ ‘occasioned by,’ ‘in consequence of,’ . . . and the legislative purpose is to loosen constraints on recovery, there is little reason for courts to hark back to stock, judge-made proximate-cause formulations.”)).
21 Goldberg, supra note 20, at 366.
argues that §2702(b)(2)(E) simply requires heightened “but-for” causation test centering on the following counterfactual: but for the fact that this oil spill caused damages to property and natural resources, would the loss have occurred? A third approach, akin to Professor Goldberg’s use-right test, is the commercial needs requirement proposed by Mr. Brendan Selby. The commercial needs requirement asks whether a claimant has been deprived of the benefit of a specific real property, personal property, or natural resource that is reasonably necessary for the production or sale of the claimant’s good or service. As detailed below, courts will find each of these tests flawed doctrinally and as a matter of policy, as well as functionally inconsistent. While the Fifth Circuit avoided identifying the proper duty and causal standard applicable to §2702(b)(2)(E) in that case, the increasing frequency and severe damages caused by large oil spills, like Exxon Valdez and Deepwater Horizon, necessitate that a principled test be applied. What is also clear is that In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico left future claimants and Responsible Parties unclear as to their rights and duties under OPA §2702(b)(2)(E) following the next catastrophic oil spill.

This article will argue that determining whether a claimant possesses a commercial quasi-property right is the proper interpretation of OPA §2702(b)(2)(E) as a nexus for the economic damage provision is not only fairer from a policy perspective, but also consistent with the OPA’s legislative history. This Article proceeds in three parts. Part I reviews liability for oil spills before and after passage of the OPA, including the origins of the Robins Dry Dock Rule, and its exclusionary effects. In Part II, this Article examines and evaluates three competing interpretations of 33 U.S.C. §2702(b)(2)(E) then suggests an alternative method that actualizes Congress’s intent to provide broad recovery for economic losses pursuant to 33 U.S.C. §2702(b)(2)(E): The claimant must demonstrate a commercial quasi-property right, as defined herein, in the oil spill damaged land or resource. Interpreting the cause of action created by 33 U.S.C. § 2702(b)(2)(E) is best viewed as creating a commercial quasi-property right that respects the relational rights and duties of qualified claimants and Responsible Parties, given the inclusive intent underlying the OPA’s legislative history, conventional tools of statutory construction, the historical context against which Congress passed the OPA, and limited case law. Part II also focuses on the potential types of claims for economic damages “due to the injury, destruction, or loss of real property, personal property, or natural resources” using the MDL, In re: Oil Spill by the Oil Rig “Deepwater Horizon” on the Gulf of Mexico. A commercial quasi-property right would be a faithful interpretation of OPA’s economic loss provisions. It honors Congress’s intent to provide reasonable compensation for a wide range of injuries to those with no traditionally recognized proprietary interest. It is also a fair and pragmatic way of conceptualizing a duty that gives courts structure and predictability, while protecting users of precious resources.

Part I: Oil Spill Liability: Before & After Passage of the Oil Pollution Act of 1990

A. Federal Statutes Affecting Oil Spill Liability Prior to the Oil Pollution Act of 1990

The evolution of the law governing oil spills is essential to a proper understanding of how Congress intended the OPA to broaden oil companies’ liability for damages negligently caused by their oil spills.

22 Robertson, supra note 20, at 168–69.
23 Id.
25 An MDL is a “coordinated or consolidated” pretrial proceeding for when “civil actions involving one or more common questions of fact are pending in different districts.” 28 U.S.C. § 1407 (2006). An MDL is intended “to avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties, their counsel and the judiciary.” Overview of Panel, U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., http://www.jpml.uscourts.gov/panel-info/overview-panel (last visited June 14, 2012) (on file with the Harvard Law School Library). This MDL was assigned to Judge Barbier in the U.S. District Court for the Eastern District of Louisiana.
The evolution of oil spill liability laws has evolved from protectionist laws limiting the liability of oil companies to laws expanding liability to include more areas of recovery, but until passage of the OPA, none allowed for recovery of pure economic losses, unless those losses were accompanied by physical damages. To protect the U.S. shipping industry, Congress enacted the Limitation of Liability Act in 1851. The Limitation of Liability Act limited the liability of vessel owners to the post-casualty value of the vessel, plus “pending freight,” as long as the owner could prove it lacked knowledge of the problem beforehand. Historically the statute has been invoked to limit the liability of certain parties and thereby exclude potential plaintiffs for recovery of pure economic losses. The consequences of this statute became clear during the sinking of the RMS Titanic in 1912, when Supreme Court Justice Oliver Wendell Holmes ruled liability for the Titanic's British owner was limited to the ship's post-wreck value, about $92,000 worth of lifeboats. In 1967, the statute also limited the recovery resulting from the Torrey Canyon oil spill, which released over 100,000 tons of crude oil into the English Channel, polluting 100 miles of British and French coasts. While Congress had enacted the Oil Pollution Act of 1924, it only placed limitations on the deliberate discharge of oil into coastal waters. Thus, under the Limitation of Liability Act, compensation for the $8 million cleanup costs occasioned by the Torrey Canyon spill was limited to $50 - the value of the sole surviving lifeboat.

Shortly after the Torrey Canyon oil spill, an oil platform blowout released oil into the Santa Barbara Channel in 1969. Acknowledging that oil pollution had become a serious problem, and that previous legislation poorly addressed such pollution, Congress brought oil pollution within the scope of the Federal Water Pollution Control Act (“FWPCA”). Under the FWPCA, as subsequently amended, the party responsible for discharging oil into U.S. waters was also responsible for its cleanup. If the responsible party was unable to properly clean up the affected area, the federal government was authorized to do so and hold the responsible party strictly liable for cleanup costs. Nevertheless, the FWPCA still protected the industry from ruinous liability by setting specific liability limits. For vessels carrying oil cargo, liability was limited to $250,000 or $150 per gross ton whichever was greater. Even though the FWPCA permitted unlimited liability in the case of willful negligence or willful misconduct, scholars have noted that the statute's liability limits were overly exclusionary. Additionally, liability for oil pollution was also limited under state law.

30 Percival et al., *supra*, note 28, at 135.
33 33 U.S.C. 1321(f)(3).
34 *Id.*
37 Although the FWPCA did not preempt state laws providing for unlimited recovery of actual cleanup costs, state claims were subject to the Limitation of Liability Act. See 33 U.S.C. 1321(o)(2) (1988). Thus, where the source of oil discharge was a vessel, even under state law recovery was limited to the post-accident value of the vessel. Moreover, federal maritime law preempted the recovery of damages by individual claimants unless the person seeking recovery had suffered physical damage to a proprietary interest. See *State of Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985) (en banc), cert. denied, 477 U.S. 903 (1986); *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50 (1st Cir. 1985).
In the 1970s, beyond the more general provisions of the FWPCA, Congress enacted a number of laws addressing oil spills resulting from specific activities or occurring in specific locations, they included: The Trans-Alaska Pipeline Authorization Act (“TAPAA”);38 The Outer Continental Shelf Lands Act Amendments of 1978 (“OCSLA”);39 and the Deepwater Port Act (“DPA”).40 TAPAA, OCSLA, and the DPA each imposed strict liability on parties responsible for the discharge of oil. Each statute established its own liability scheme, but none allowed victims to recover pure economic losses. Demonstrating Congress’ attempts to make the oil spill liability more inclusive, each statute set up a separate fund to cover cleanup costs exceeding liability limits. Despite calls to design a more comprehensive approach to oil spill liability, however, Congress did not pass any comprehensive oil spill law until the Exxon-Valdez crisis. By the time of the Exxon-Valdez crisis, a web of different laws, including general maritime law, the Clean Water Act, and the various laws of affected states, governed an oil spill caused by a vessel on navigable water.41

B. Contextualizing the Oil Pollution Act: A Policy of Inclusion

In the wake of the Exxon Valdez crisis, Congress enacted the OPA of 1990. A font of scholarship developed analyzing how the OPA purports to compensate victims of Exxon Valdez and Deepwater Horizon-magnitude disasters, precisely because of the various environmental, ecological, and economic ramifications of such oil spills.42 Some of the most profound economic losses befall those who rely on oil spill damaged natural resources to support their commercial activities. Section 2702(b)(2)(E) allows claimants who have suffered economic loss to recover from a “Responsible Party” or parties (typically the vessel or facility owner), even if those claimants’ commercial activities bear no acknowledged proprietary interest in the damaged land or resource. As is often the case with statutes, some portions of the OPA, like §2702(b)(2)(E), are susceptible to multiple, and somewhat contradictory, interpretations. Because of §2702(b)(2)(E)’s limited legislative history, many scholars43 and courts44 have specifically questioned who was intended to recover under §2702(b)(2)(E). Notwithstanding these various interpretations, the obvious overall purpose of the OPA was to establish a scheme by which a designated Responsible Party was held strictly liable (in most instances) for cleanup costs, and held to account for the more attenuated damages caused by their negligence.45 The question addressed in this Article is: What must a pure


40 33 U.S.C. 1501-24 (1988). The Deepwater Port Act applied to oil handling facilities located beyond the U.S. territorial sea and used for the trans-shipment of oil from tankers to pipelines.


42 Some of these effects are immediately apparent (i.e. – loss of wildlife, human life, property damage, etc), while others may be more latent.

43 For various postulations on proper or “better” ways to interpret §2702(b)(2)(E)’s causation requirements. See supra note 20.

44 Few courts have had occasion to address the question of OPA causation. See, e.g., Gatlin Oil Co. v. United States, 169 F.3d 207 (4th Cir. 1999) (holding that a plaintiff could not recover for fire damage because the evidence did not show that the fire caused the discharge of oil into navigable waters); In re Settoon Towing LLC, 2009 U.S. Dist. LEXIS 113530, 2009 WL 4730969 (E.D. La. Dec. 4, 2009) (explaining that it was potentially possible for an injured party to recover for damages incurred as the result of a shutdown of the Gulf Intracoastal Waterway in the wake of a spill).

economic loss claimant demonstrate to establish that his damages “resulted from” a spill (or threat) and were “due to the injury, destruction, or loss of [property] or natural resources?”

The starting point in addressing this question must begin the language of the statute itself. The Supreme Court often recites the “plain meaning rule,” that, if the language of the statute is clear, there is no need to look outside the statute to its legislative history in order to ascertain the statute’s meaning. As Chief Justice Taney noted in 1850, “in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.” Thus, 33 U.S.C. §2702(a) and (b) state the following:

(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
The removal costs referred to in subsection (a) of this section are—

(A) all removal costs incurred by the United States, a State, or an Indian tribe under subsection (c), (d), (e), or (l) of section 1321 of this title, under the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.), or under State law; and

(B) any removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan.

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

(A) Natural resources

---

46 For simplicity, both “loss of profits” and “impairment of earning capacity” covered by subsection (b)(2)(E) will be grouped together as “pure economic loss,” unless stated otherwise.

47 The classic extremes are represented by Caminetti v. United States, 242 U.S. 470 (1917), and Church of the Holy Trinity v. United States, 143 U.S. 457 (1892). In Caminetti, the Court applied the plain meaning rule to hold that the Mann Act, or “White Slave Traffic Act,” which prohibits transportation of women across state lines for purposes of “prostitution, debauchery, or any other immoral purpose,” clearly applies to noncommercial immorality, in spite of legislative history showing that the purpose was to prohibit the commercial “white slave trade.” In Holy Trinity, the Court held that a church’s contract with a foreigner to come to this country to serve as its minister was not covered by a statutory prohibition on inducements for importation of aliens “to perform labor or service of any kind.” The Court brushed aside the fact that the statute made no exception for ministers, although it did so for professional actors, artists, lecturers, singers, and domestic servants, and declared the law’s purpose to be to prevent importation of cheap manual labor. “A thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers,” the Court explained. 143 U.S. at 459.

48 United States v. Boisdoré’s Heirs, 49 U.S. (8 How.) 113, 122 (1850) (opinion of Court). For a modern instance in which the Court’s reading of text was informed by statutory context and statutory purpose, see Brotherhood of Locomotive Engineers v. Atchison, T. & S.F.R.R., 516 U.S. 152, 157 (1996) (purpose of Hours of Service Act of promoting safety by ensuring that fatigue employees do not operate trains guides the determination of whether employees’ time is “on duty”). As Justice Breyer explained, dissenting in FCC v. NextWave Personal Communications, Inc., 537 U.S. 293, 311 (2003), “[i]t is dangerous . . . in any case of interpretive difficulty to rely exclusively upon the literal meaning of a statute’s words divorced from consideration of the statute’s purpose.” The Justice cited the stock example that “‘no vehicles in the park’ does not refer to baby strollers or even to tanks used as part of a war memorial,” as well as Justice Field’s opinion for the Court in United States v. Kirby, 74 U.S. (7 Wall.) 482, 486 (1869) (prohibition on obstructing mail does not apply to local sheriff’s arrest of mail carrier on a murder charge; “[g]eneral terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence”).
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, an 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, a State, 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

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.

(emphasis added.)

Paraphrased and combined, subsections 2702(a) and (b)(2)(E) appear as follows:49

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.”

Further, the OPA allows recovery for “[d]amages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, or natural resources, which shall be recoverable by any claimant.”50 Moreover, §2702(b)(2)(E)’s plain language clearly enables economic-loss claimants to recover monetarily capped damages and, while §2702(b)(2)(E) does not expressly include proximate cause among the required elements of proof, there is no indication that Congress intended to depart from the traditional practice of holding defendants responsible for the harm within the risk created by their activity.51

Several conclusions can be drawn in comparing §2702(b)(2)(E) against the other damage provisions of §2702(b), and few, if any scholars, find these conclusions controversial. First, the claimant need not have any traditionally recognized property interest in any property or resource. Both the text of §2702(b)(2)(E) and the House Report specifically note that “[t]he claimant need not be the owner of the damaged property or resources to recover for lost profits or income.”52 Moreover, OPA§2702(b)(2)(E)

---

49 For convenience, I am adopting the paraphrased format articulated by Professor Peterson in his article. See Peterson, supra, note 43 at 170-172.


specifically allows recovery for economic losses “resulting from” or “due to” the oil spill, regardless of whether the claimant sustained physical damage to a traditional proprietary interest. The exclusion of the “owns or leases” requirement in subsection E, compared with subsection B, demonstrates Congress’s intent to move beyond the pure economic loss rule. Furthermore, a provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme when the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law. It is clear when Congress intended a claimant, pursuant to §2702(b), to have either an ownership-like interest, or trustee-like interest, in oil spill damaged land or resources in order to recover. Congress clearly refrained from including such a requirement in §2702(b)(2)(E). Thus, it is clear that §2702(b)(2)(E) claimants will not and need not have any traditionally recognized property interest in the oil spill damaged land or resource, beyond a use-based relationship.

Second, even though the precise relationship required between the economic loss and the oil spill damaged land or resource remains a controversial issue, the text of §2702(b)(2)(E) and the OPA’s legislative history, at least, require that an interpretation of “due to” examine the nexus between the physical injury and the claimed economic loss to merit recovery beyond what was available at common law.

Third, the presence of the proximate cause requirement in the liability-enhancing provision, together with its conspicuous absence in the strict-liability capped-damages provision, provides strong indication that Congress did not want to require traditional proximate causation. Congress clearly expected plaintiffs who seek uncapped damages to meet a higher causation standard than those who merely seek capped damages.

C. Legislative History of OPA

Reference to the OPA’s legislative history helps further illuminate Congressional intent behind §2702(b)(2)(E), and “proper construction frequently requires consideration of [a statute’s] wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve.” While some nuances may be unclear, the purpose of OPA §2702(a) and (b) clearly reveal an inclusionary intent to compensate a great number and variety of victims who suffer economic losses. The OPA was passed to adequately compensate the victims of oil spills without the need for litigation, to

---

54 See, e.g., Keene Corp. v. United States, 508 U.S. 200, 208 (1993) (“[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (citing Kusello v. United States, 464 U.S. 16, 23 (1983)). See also Selby, infra note 20, at 543.
55 See infra, section D for a more detailed discussion of the Robins Dry Dock rule.
57 Section 2702(b)(2)(B) allows recovery for “a claimant who owns or leases that property.”
58 Section 2702(b)(2)(A), (D), and (F) allow recovery by an appropriate government or Indian tribe trustee, U.S. or State subdivision.
59 33 U.S.C. §2704(c)(1) allowing plaintiffs to go beyond strict liability and make a showing of fault in order to recover damages above the monetary caps does expressly include proximate cause among the required elements of proof.
60 Wirtz v. Bottle Blowers Ass’n, 389 U.S. 463, 468 (1968). For examples of reliance on legislative history for guidance on broad congressional purposes, see Shell Oil Co. v. Iowa Dep’t of Revenue, 488 U.S. 19, 26 (1988) (purposes of OCSLA, as evidenced in legislative history, confirm a textual reading of the statute and refute the oil company’s reading); Wilder v. Virginia Hosp. Ass’n, 496 U.S. 498, 515 (1990) (reference to Senate report for evidence of “the primary objective” of the Boren amendment to the Medicaid law).
61 The OPA’s damages 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.” S. REP. NO. 101-94, at 12 (1989).
provide quick and efficient cleanup, and to prevent future spills. At least one proponent believed that the OPA would allow commercial fishermen, for example, to not only receive the equivalent of unemployment compensation, but also receive compensation to prevent loss of a boat, because lost wages are of limited value if the means of earning wages, such as a boat, go uncompensated.

In the Conference Report on OPA, Representative Walter B. Jones, Sr. of North Carolina, who sponsored the original version the bill passed by the House of Representatives (before the Exxon Valdez crisis), stated that the intent behind the OPA was to make it easier for victims of oil spills to recover for economic damages, natural resource damages, subsistence loss, and others. For example, it has been noted that Representative Jones stated, “an employee at a coastal motel may have standing to make a claim for damages even though the employee owns no property which has been injured as a result of an oil spill.” If this example were meant to be a remedy exclusive to such employees, it is doubtful that Congress would have passed such a broad provision. Moreover, use of the word “may” indicates doubt, so clearly other classes of claimants were contemplated as well. Another indication of the Congressional intent that §2702(b)(2)(E) be given a more inclusive effect then available at common law was again offered by Representative Jones, continued, by stating the following:

“There is concern about the recovery of unjustified ‘speculative’ damages, particularly with regard to loss profits and earning capacity. Some documentation of prior profits and earnings should be evidenced to support a claim. Of course, the Committees recognize that for new businesses such information will not be available; therefore, a basis other than prior profits and earnings must be used.”

While scholars have taken different perspectives on the legislative history of the OPA, and these pieces of legislative history are scant, at least one congressman believed that the OPA was intended to compensate a wide variety of quasi-property interests, such as “economic damages to third parties such as fishermen and beachfront property owners who can clearly demonstrate they meet requirements for standing.” While Professor Goldberg also notes that a few Representatives focused on commercial

53 Id.
54 Congressman Walter Jones of North Carolina stated “Finally, we make it easier for victims of oil spills to recover for economic damages, natural resource damages, subsistence loss, and others. They can seek reimbursement from the spiller or directly from the $1 billion Federal trust fund. The 1978 Amoco Cadiz spill off the coast of France was the biggest spill in history to come ashore. The litigation on that spill is still going on after 12 years, and not one penny in damages has yet been paid. This bill will make sure that doesn't happen here.” 136 Cong Rec H 6933 (1989).
55 Selby, supra note 20, at 543.
56 135 CONG. REC. 26,851 (Nov. 1, 1989) (statement of Rep. Jones). Though the statement comes from only one representative, the view of the sponsor of a bill carries more weight.
57 Id.
58 See, e.g., Selby, supra note 20, 540-543; Andrew B. Davis, Pure Economic Loss Claims Under the Oil Pollution Act: Combining Policy and Congressional Intent, 45 COLUM. J. L. LAW & SOC. PROBS. 1, 24 (citing a statement by the House Committee on Public Works that the act creates incentives to avoid economic and ecological damages as evidence that “Congress intended to provide broad recovery”); John C.P. Goldberg, Liability for Economic Loss in Connection with the Deepwater Horizon Spill, 30 MISS. C. L. REV. 335, 368 (2011) (citing individual lawmakers who provided examples of hypothetical claimants, such as beachfront property owners and fishermen, who should recover); David W. Robertson, The Oil Pollution Act’s Provisions on Damages for Economic Loss, 30 MISS. C. L. REV. 157, 174 n.58 (2011) (accusing Professor Goldberg of taking an “overly narrow view of the legislative history” and relying on a wide range of comments by individual lawmakers proposing hypothetical deserving claimants).
59 Representative Arlan Stangeland noted the OPA was designed to not only address oil spill clean-up, but also “economic damages to third parties such as fishermen and beachfront property owners who can clearly demonstrate they meet requirements for standing.” 136 Cong Rec H 6933.
fisherman and hotel beachfront owners recovering.\textsuperscript{70} there is no reason to think that Congress intended to limit recovery to these types of claimants. A narrowed reading of the OPA cuts squarely against its stated intent. In fact, reliance on legislative history “excerpts” said to reflect congressional intent is inappropriate in ascertaining the scope or intent of a statute.\textsuperscript{71} Therefore, to understand what the OPA was designed to achieve, one must examine the common law background against which it was enacted.

**D. OPA §2702(b)(2)(E): Departing the Rocky Shores of Common Law for the Land of Doctrinal Coherence**

1. **Pervasiveness of Common Law in Recovering Pure Economic Losses: The Robins Dry Dock Rule**

Despite the statutory trend to broaden oil companies' liability for negligently caused oil spills, courts have consistently adhered to the Robins Dry Dock rule, the common law rule prohibiting recovery for pure economic losses. As a result of the Robins Dry Dock rule, many who suffered pure economic losses because of oil spills were precluded from any recovery. The conceptual basis for the rule barring recovery for pure economic loss was first expounded in the mid-nineteenth century in *Cattle v. Stockton Waterworks*.\textsuperscript{72} In that case, the defendant, a waterworks company, laid a water main adjacent to property belonging to Knight. The plaintiff contracted with Knight to tunnel under a road to connect Knight's property on either side. The defendant's water main began leaking, creating a delay and making the tunneling more expensive. The plaintiff sued to recover his losses. Blackburn J., speaking for the court on the Queen's Bench, ruled that a plaintiff was barred from recovering for wrongful acts, which were held as a matter of law, to be too remote.\textsuperscript{73} In distinguishing between negligent interference and intentional or malicious interference with another's contract, the court determined that only intentional or malicious interference was compensable.\textsuperscript{74} Subsequent courts adhered to the rationale of *Cattle v.*

\textsuperscript{70} Goldberg, * supra* note 20, at 368. Here, Professor Goldberg cites statements by Representatives Schneider and Studds. Representative Schneider lamented that, one year after the World Prodigy spill in Narragansett Bay, "[t]he economic losses incurred by shell fishermen and related business are still being felt." 136 CONG. REC. 15077, 15368 (June 21, 1990). Representative Studds advocated for OPA as a guarantee "that our fishermen and beachfront property owners will be compensated promptly and in full for any oil spill damages they might suffer." 135 CONG. REC. 26934 (Nov. 2, 1989).

\textsuperscript{71} Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 501 (1988). The Court explained further that, “without a text that can, in light of those [legislative history] statements, plausibly be interpreted as prescribing federal pre-emption it is impossible to find that a free market was mandated by federal law.” *See also* Secretary of the Interior v. California, 464 U.S. 312, 323 n.9 (1984) (a committee report directive purporting to require coordination with state planning is dismissed as purely “precatory” when the accompanying bill plainly exempted federal activities from such coordination); *Shannon v. United States*, 512 U.S. 573, 583 (1994) (Court will not give “authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute”); and *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 237-38 (D.C. Cir. 2003) (explanatory statement accompanying conference report purported to explain a previous enactment rather than the current one, and could not operate to abrogate an executive agreement). For what is arguably a departure from the general principle, *see Wisconsin Project on Nuclear Arms Control v. United States Dep’t of Commerce*, 317 F.3d 275 (D.C. Cir. 2003) (relying on “congressional intent” relating to a lapsed statute). As dissenting Judge Randolph characterized the majority’s approach, “the statute has expired but its legislative history is good law.” *Id. at 285*.

\textsuperscript{72} [1875] 10 L.R.-Q.B. 453.

\textsuperscript{73} Id. at 457.

\textsuperscript{74} Id. at 458. Of special importance is the rationale for the decision. The court spoke in terms of the inherent limits of the law to provide a remedy under all situations:

Courts of justice should not “allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds, which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts.” *Id. at 457* (quoting *Lumley v. Gye*, 118 Eng. Rep. 749, 762 (Q.B. 1853)).
of negligent interference with contract.\(^7\) In 1921, an important precursor to the Robins Dry Dock rule was announced in Elliot Steam Tug v. The Shipping Controller.\(^7\) In that case, the plaintiff chartered a tug requisitioned by the admiralty under wartime indemnity statute.\(^7\) While the plaintiff charterer could recover lost profits under the statute, the court noted that the plaintiff would have been unable to do so under the common law.\(^7\) Moreover, as another scholar has noted, the dicta in Elliot Steam Tug demonstrates that early common-law courts relied upon a contract-based analysis of pure economic loss in the chartering context, rather than a tort-based analysis.\(^7\) Adopting the dicta of Elliot Steam Tug in Robins Dry Dock & Repair Co. v. Flint, the U.S. Supreme Court held that there could be no recovery for economic losses arising out of negligent interference with contract.\(^8\) Thus, many federal courts have read Robins Dry Dock to establish a per se rule denying recovery for economic loss “caused by an unintentional maritime tort absent physical damage to property in which the victim has a proprietary interest,” this concept is known as the Robins Dry Dock rule.\(^9\) Because the Robins Dry Dock rule is an extension of negligent interference with contract, it has led to inconsistent and arbitrary results in tort-based economic loss cases.\(^2\)

Several circuits have acknowledged that limiting liability is the policy rationale underlying the Robins Dry Dock rule. The First, Third, and Fifth Circuits have held that Robins Dry Dock is a total bar to recovery for pure economic losses. The Fifth Circuit, in denying recovery in Louisiana ex rel Guste v. M/V Testbank,\(^5\) saw Robins Dry Dock as delineating the limits on a tortfeasor's liability and setting forth a “pragmatic limitation . . . upon the tort doctrine of foreseeability.”\(^8\) Thus, the Fifth Circuit’s approach has supposedly been to apply a traditional tort analysis and rely upon the language of proximate cause, remoteness, foreseeability, in order to determine whether or not there should be recovery.\(^8\) The Fifth

\(^{75}\) (1875) LR 10 QB 453. See Chargeurs Reunis Compagnie Francaise de Navigation a Vapeur v. English & American Shipping Co., 9 Lloyd's List L.R. 464 (C.A. 1921) (charterer not entitled to recover for loss due to negligent damage to the vessel).

\(^{76}\) [1922] 1 K.B. 127 (C.A. 1921).

\(^{77}\) Indemnity Act, 1920, 10 & 11 Geo. 5, ch. 48, § 2(1)(b), sched. part II. This Act provided for indemnity to private citizens for loss or damage arising from the exercise of powers during wartime as conferred by the Defence of the Realm Act of 1914, 4 & 5 Geo. 5, ch. 29, § 1.

\(^{78}\) [1922] 1 K.B. at 140


\(^{80}\) 275 U.S. 304 (1927) at 309. In that case, the plaintiff charterer docked their leased vessel with the defendant under a provision of the charter for docking every six months and suspension of payment of hire by the plaintiffs until the vessel was ready for service. The defendant negligently damaged the vessel, causing delay, but repaired said vessel, settled with the owners, and received a release of all their claims. The defendant was initially unaware of the charter. The plaintiff charterer sued the defendant for its lost profits. The Supreme Court held that the plaintiff had no protected interest in the vessel itself, and the loss arose only because of the lost benefit of the contract.

\(^{81}\) See Louisiana ex rel Guste v. M/V Testbank, 752 F.2d 1019, 1022 (5th Cir. 1985) (en banc), cert. denied, 106 S. Ct. 3271 (1986).

\(^{82}\) See Pruitt v. Allied Chem. Corp., 523 F. Supp. 975 (E.D. Va. 1981). In Pruitt, commercial fishermen, seafood wholesalers, retailers, distributors and processors, restauranteurs, marina, boat, tackle and bait shop owners, and all of their employees brought an action against Allied Chemical for damages resulting pollution of the James River and Chesapeake Bay. While the District Court allowed the commercial fishermen to recover their losses under a judicially created exception applying only to them, the District Court held that businesses that sell to commercial fishermen had legally cognizable claims, but those businesses purchasing from the fishermen did not.

\(^{83}\) The district court granted defendants summary judgment as to all claims of economic loss where there was no physical damage. Louisiana ex rel. Guste v. M/V Testbank, 524 F. Supp. 1170, 1173-74 (E.D. La. 1981). The Fifth Circuit affirmed, holding that economic loss unaccompanied by physical damage was not a recoverable maritime tort. Louisiana ex rel. Guste v. M/V Testbank, 728 F.2d 748, 749 (5th Cir. 1984), adhered to, en banc, 752 F.2d 1019 (5th Cir. 1985), cert. denied, 106 S. Ct. 3271 (1986). Both of the above decisions followed Robins Dry Dock.

\(^{84}\) Testbank, 752 F.2d 1019, 1023.

\(^{85}\) In re Taira Lynn Marine Ltd. No. 5, LLC, 444 F.3d 371, 377 (5th Cir. 2006), citing Robins Dry Dock & Repair v. Flint, 275 U.S. 303, 309 (1927) (“It is unmistakable that the law of this circuit does not allow recovery of purely economic claims absent physical injury to a propriety interest in a maritime negligence suit.”) Interestingly, in the
Circuit’s defense of the *Robins Dry Dock* rule, however, relies more on the need to draw “sufficiently sharp” lines to inject “predictability” into the law, and on its fear that any other rule would open the “floodgates” of litigation. The Fifth Circuit has also recently reaffirmed its position in *In Re: Bertucci Contracting Company, L.L.C.*.

*In Barber Lines A/S v. M/V Donau Maru,* the First Circuit, relying on *Robins, Kinsman II,* and *Testbank,* held that charterers of a vessel unable to dock at a berth due to an oil spill negligently caused by defendant could not recover extra costs incurred in having to discharge at another pier. Drawing on policy considerations similar to those articulated by Fifth Circuit in *Testbank,* the First Circuit interpreted the holding in *Kinsman II* “as drawing a legal line, based on considerations of policy . . . that forbids compensation for certain types of foreseeable, negligently caused, financial injury.” Nevertheless, the court recognized certain classes of plaintiffs where the “administrative” and “disproportionality” factors “seem insignificant or where some strong countervailing consideration militates in favor of liability.

The Third Circuit, in *Getty Refining and Marketing Co. v. M/T Fadi B,* also chose to follow the First and Fifth Circuits reasoning and policy considerations. The key to the court's analysis was finding that Getty's loss resulted from negligent interference with contract. Importantly, the court rejected Getty's argument that a special relationship developed between it and the Fadi B, because the vessel interfered with its riparian rights to the pier. The court noted that even if there had been interference with a property right it was only negligent interference and, thus, not recoverable under the *Robins Dry Dock* rule.

Thus, underlying these Circuits’ adherence to the *Robins Dry Dock* rule is pragmatism and the practical need to limit liability. Regardless of the policy justifications for the *Robins Dry Dock* rule, the rule clearly lacks a coherent doctrinal foundation for broader application beyond the context of a tort action premised on a contract. Moreover, because the rule abandons conventional tort principles of foreseeability and proximate cause, the Second and Fourth Circuits have held that *Robins Dry Dock* is not a total bar to recovery for economic loss where there is sufficient proximity between the parties.

opinion of the district court, the injuries suffered by the residents and businesses in the geographic area of the allision were just as foreseeable as the injuries suffered by the commercial fishermen in *Union Oil.*

86 *Id.* at 1029.
87 The court does not argue that these consequences are not foreseeable; rather, it speaks of imposing a limit on foreseeability. *Id.* at 1023, 1028-29.
88 712 F.3d 245 (5th Cir 2013).
89 764 F.2d 50 (1st Cir. 1985).
90 *Id.* at 57.
91 *Id.* at 52. *But see Testbank,* 752 F.2d at 1042 (Wisdom, J., dissenting) (“the [Kinsman II] opinion represents an important departure from *Robins* because the Court was willing to rely on a case-by-case application of proximate cause principles rather than the blanker bar of *Robins*.’’); *Federal Commerce & Nav. Co. v. M/V Marathonian,* 392 F. Supp. 908, 913 (S.D.N.Y. 1975) (“were this Court free to write upon a tabula rasa and not constrained by the weight of precedent, we would reject the negligent interference with contract doctrine in favor of a negligence-causation-foreseeability analysis, such as that adopted by Chief Judge Kaufman in . . . *Kinsman* [II]’’), aff’d, 528 F.2d 907 (2d Cir. 1975) (per curiam), cert. denied, 425 U.S. 975 (1976).
92 *Id.* at 56.
93 766 F.2d 829 (3d Cir. 1985). In *Getty,* plaintiff was denied the use of one of its docks when it was discovered that the Fadi B had a crack in the deck and hull and could not leave its berth. The plaintiff sued to recover demurrage it paid to other vessels that had been scheduled to dock at the terminal. The court found that the economic losses suffered by Getty were predicated upon Getty's contracts with the other vessels and not upon Fadi B's negligence. The court held that recovery for economic loss was barred as a matter of law. 766 F.2d at 833.
94 766 F.2d at 834.
95 *Id.* at 835.
the Second Circuit, in 1968, rejected the Robins Dry Dock rule for “more familiar tort terrain.” As a result, many courts have acknowledged dissatisfaction with the rule’s rigidity, and have created an exception for commercial fishermen to avoid some of the rule’s rigidity. While the conceptual basis for the commercial fishermen exception has been traditionally explained as them simply being “favorites in admiralty,” within the exception exists the foundation for developing a coherent doctrinal approach for interpreting §2702(b)(2)(E) that actualizes and is consistent with Congressional intent to move away the Robins Dry Dock rule.

2. Sailing Away from Robins Dry Dock, Setting a Course Toward Conceptual Coherence

An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent; nevertheless, there is a presumption favoring continuation of judge-made law. “The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.” The Supreme Court has reaffirmed that it will not abandon common law absent a clear indication that Congress intended such a departure. Judicial preference for Congress to be explicit is closely akin to the principle noted above that, when Congress employs legal terms of art, it normally adopts the meanings associated with those terms. In application to the OPA, Congress could have explicitly abrogated the Robins Dry Dock rule, rather than remain silent. Regardless, statutory silence is not always “pregnant,” and legislative silence is seldom significant. Instead, the conference report uses the statute’s text to explain its meaning and nowhere incorporates Robins Dry Dock. It is axiomatic,

97 Shephard, supra note 79 (citing 388 F.2d 821, 824 (2d Cir. 1968)).
98 Burgess v. M/V Tamano, 370 F. Supp. 247 (D. Me. 1973) (commercial fishermen and clam diggers have a special, protected interest to the use of coastal waters), aff’d mem., 559 F.2d 1200 (1st Cir. 1977); Marine Nav. Sulphur Carriers v. Lone Star Indus., 638 F.2d 700 (4th Cir. 1981) (the Oppen exception is a narrow one confined to the special duty owed by oil spillers); Miller Indus. v. Caterpillar Tractor Co., 733 F.2d 813 (11th Cir. 1984) (the crew members of fishing vessel could recover against negligent engine manufacturer).
99 See Carbone v. Ursich, 209 F.2d 178 (9th Cir. 1953) (“[t]he special situation of the fishermen who, as we have here indicated, had long been recognized as beneficiaries under a special rule which made the wrongdoer liable not only for the damage done to the fishing vessel, but liable for the losses of the fishermen as well. This long recognized rule is no doubt a manifestation of the familiar principle that seamen are the favorites of admiralty and their economic interests entitled to the fullest possible legal protection.”)
103 “[A] statute is not to be confined to the ‘particular application[s] . . . contemplated by the legislators.’” Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980) (ruling that inventions not contemplated when Congress enacted the patent law are still patentable if they fall within the law’s general language) (quoting Barr v. United States, 324 U.S. 83, 90 (1945)).
104 H.R. REP. NO. 101-653, at 4 (1990) (Conf. Rep.) [hereinafter Conference Report], reprinted in 1990 U.S.C.C.A.N. 779, 781. The Conference Report states: “Subsection [2702](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.” Id.
105 NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING, REPORT TO THE PRESIDENT (2011) [hereinafter REPORT TO THE PRESIDENT], available at http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ ReporttothePresident_FINAL.pdf. at 186 (“[T]here is no easy legal answer to the question of how closely linked those lost profits or earnings must be to the spill before they should be deemed compensable. The search for such a rationale endpoint for liability has already stymied the Gulf Coast Claims Facility in its processing of claims. The absence of clear and fair procedures for systematically evaluating such claims deserves focused attention as the
however, that every right must have a remedy. Grounding interpretation of §2702(b)(2)(E) with a cogent understanding of the commercial fishermen exception provides a sound conceptual basis for developing reasonable standard of economic recovery. The best articulation of the commercial fishermen exception is Union Oil Co. v. Oppen, wherein the Ninth Circuit held that commercial fishermen could recover their lost profits resulting from the loss of fishing potential after an oil spill. In Oppen, the Ninth Circuit held that commercial fishermen “directly make use of a resource of the sea,” and that they conduct their enterprise “in, on and under the sea.” Professor Robert Rhee, in a recent article, provided an in-depth understanding for the protection afforded commercial fishermen, and concludes that the commercial fishermen exception is actually a kind of consequential loss, rather than an exception to the pure economic loss rule. That the sea is a factor of production distinguishes the claims of commercial fishermen from other victims of fortuitous economic loss. From a theoretical perspective, Professor Rhee argues that it is wrong to draw the line between consequential and pure economic loss based on whether a claimant suffered a physical loss. In most accidents that result in economic loss, the vast majority of cases fall into two patterns: the loss of a factor of production as property damage or personal injury, thus invoking the consequential economic loss rule without controversy; or there is no loss of a factor of production, thus invoking the pure economic loss rule equally without controversy. As Professor Rhee observed, this conventional view breaks down in the grey area between these two poles. The commercial fishermen exception allows the owners of an enterprise to recover lost profit when the defendant harmed the enterprise’s factor of production. In this regard, the commercial fishermen exception operates like a claim for consequential loss, which, by definition, requires a property-like interest. By implication, commercial fishermen possess a property-like right, or a quasi-property-right, even though they do not own the sea. The sea, albeit a commons, satisfies this definition, because it is a means of production in the “manufacturing” of seafood. Thus, the commercial fishermen exception aligns with the consequential loss rule.

Similarly, in application to OPA §2702(b)(2)(E), the relational nexus between the claimant and the oil spill damaged land or resources, should therefore require identifying a property-like, or quasi-property, interest. A Responsible Party violating a claimant’s quasi-property interest is what entitles that claimant to recovery. In this regard, OPA §2702(b)(2)(E) also operates similarly to the consequential loss rule, rather than the pure economic loss rule. Thus, while claimants will not have any traditional proprietary

lessons from the Deepwater Horizon spill are learned.”) (internal citation omitted); David P. Lewis, Note, The Limits of Liability: Can Alaska Oil Spill Victims Recover Pure Economic Loss?, 10 ALASKA L. REV. 87, 136–40 (1993) at 139 (discussing the absence of evidence in the record as to whether Congress intended to abrogate Robins Dry Dock with subsection (E)). Lewis further notes that “[e]ven Senate Majority Leader George Mitchell, a major proponent of OPA and a former federal district court judge, in an article discussing the impact of OPA, omits any mention of Robins or the dispute in the circuits regarding its continued viability.” Id. Marbury v. Madison, 5 U.S. (1 Cranch) 163 (1803) (citing Blackstone’s Commentaries).

501 F.2d 558 (9th Cir. 1974).

Id. at 570.

Id. at 570.


Id. at 97.

Id. at 86.

Id.

A factor of production is an essential asset of the production function that need not be owned.

Miller Indus. v. Caterpillar Tractor Co., 733 F.2d 813, 820 (11th Cir. 1984).
interest in oil spill damaged land or resources, a claimant’s commercial usage of oil spill damaged land or resources is analogous to an equitable easement, a legal concept similar enough to provide the conceptual basis for a fair interpretation of §2702(b)(2)(E).

Oppen also imposed a duty of care founded upon the foreseeability of the harm to commercial fishermen. The recognition that commercial fisherman were foreseeable plaintiffs is crucial. By definition, it means that some specific defendant owed a duty to commercial fisherman not to interfere with the commercial fisherman’s livelihood. As a cause of action, OPA§2702(b)(2)(E) clearly sets a duty for Responsible Parties to refrain from interfering from with the commercial activities of claimants. Thus the relevant question is not whether a duty is owed to claimants who make commercial use of oil spill damaged land or resources, but how far the protection afforded by §2702(b)(2)(E) should extend. As noted by the Second Circuit, the circumlocution whether posed in terms of “foreseeability,” “duty,” “proximate cause,” “remoteness”… seems unavoidable. Nevertheless, by modifying the equitable easement doctrines, all of the benefits of the commercial fisherman exception can be achieved by determining whether a claimant possesses a commercial quasi-property interest. In other words, §2702(b)(2)(E) can be viewed as incorporating the rationale underlying the commercial fisherman exception to specifically examine whether a Responsible Party’s negligently caused oil spill injured a claimant’s easement-like commercial use of oil-spill damage land or resources. Thus, to recover for pure economic losses, §2702(b)(2)(E) should require a claimant to demonstrate a commercial quasi-property interest in the oil-spill damaged land or resources. A test determining whether a claimant’s commercial quasi-property interests were injured is consistent with conventional tort principles of foreseeability and proximate cause. Second, such a determination limits recovery to those claimants whose economic losses directly result from an oil spill. Third, although requiring a case-by-case analysis, a commercial quasi-property rights test comports with the fundamental idea of fairness that innocent plaintiffs should receive compensation and negligent defendants should bear the cost of their tortious acts. Finally, this result would relieve courts of the necessity of manufacturing exceptions.

Part II: Superiority of Commercial Quasi-Property Rights Theory in Determining Economic Loss under OPA§2702(b)(2)(E)

A. Balancing Relational Rights, Duties, and Liability in Interpreting §2702(b)(2)(E)

Liability regimes impose duties and obligations on actors that are best described as “relational” in nature, since they identify both an action that triggers liability and an actor to whom the obligation is owed. The best interpretation of §2702(b)(2)(E), given the OPA’s legislative history and case law is to require demonstration of a damaged commercial quasi-property right in oil spill damaged land or resource. The International News Service case provides the foundation for a quasi-property right. In that

---

116 Mr. Sherrerd Depue stated that “[t]he term “equitable easements “ indicates a class of property rights, analogous to legal easements, but by reason of either informality in their creation, or the absence of privity of contract or estate, not enforceable in a court of law.” Sherrerd Depue, *Equitable Easements*, The American Law Register (1852-1891), Vol. 38, No. 2, New Series Volume 29 (Second Series, Vol. 3) (Feb., 1890), p. 73.

117 “[T]he issues is whether the defendants owed a duty to the plaintiffs, commercial fishermen, to refrain from negligent conduct… which… reasonably and foreseeably could have been anticipated to cause injury to the plaintiff’s business.” *Oppen*, 501 F.2d at 568.

118 *Id.*

119 *Petitions of Kinsman Transit Co.*, 388 F.2d 821, 825 (2d Cir. N.Y. 1968). See also *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 104 (1928) (dissenting opinion): “It is all a question of expediency of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind.”

120 *See, infra*, Part II on Commercial Quasi-Property Rights.

case, the court consciously tailored a relational interest to avoid being in rem. Rather, the right was to operate against a specified class of actors, and only ever upon the occurrence of a specific triggering event. In the context of §2702(b)(2)(E), the claimant’s ability to access land or a resource for a commercial activity preexists the identification of a Responsible Party. Until the Responsible Party causes an oil spill, however, and is identified by relationship, action, and harm, the claimant’s interest is ethereal. Similar to International News Service, a commercial quasi-property right exists in the ether, unless or until a Responsible Party causes an oil spill. Viewed as such, §2702(b)(2)(E) cases become more like consequential loss cases involving equitable protective interests, and less like pure economic loss cases. In cases involving disputed use of property, as distinguished from contested ownership or exclusivity cases, courts have employed the relative hardship doctrine and granted an equitable protective interest to resolve the dispute.

A commercial quasi-property rights theory operates through “relational forbearance.” Through the OPA’s liability framework, Congress arguably sought to replicate the functioning of easement-like entitlements in §2702(b)(2)(E) as relational duties between a Responsible Party and a legitimate claimant. In contrast, traditional property rights are considered meaningful even prior to an infraction. Traditional property rights have long been thought to center around the idea of exclusion, and are often described as entailing the “right to exclude.” A commercial quasi-property right, by contrast, operates by relaxing the exclusionary feature of traditional property rights to operate more like an equitable protective interest, or equitable easement. A commercial quasi-property right deemphasizes the connection between the proprietary interest and the resource; as a result, the resource comes to be devoid of objective exclusionary significance. The exclusionary framework is created through §2702(b)(2)(E)’s liability scheme focusing on the claimant’s interests and considerations implicated by the claimant’s and Responsible Party’s interactions. These interests, in turn, relate to, but do not emanate exclusively from, the resource or land. They derive instead from the nature, context, and consequences of the parties’ interactions and less from the connection between the resource and the right-holder/claimant. As a result, the exclusionary significance of the right exists only between the right-holder/claimant and Responsible Party. A resource, like a public beach, would thus become an “easement-like interest” only within this highly contextual setting. Outside of this context the resource exists without ownership.

122 See Int’l News Serv., 248 U.S. at 236 (“[W]e may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication . . . .”).

123 Id. at 236, 241 (explaining that the “quasi property” right in the news “does not result in . . . the right to monopolize either the gathering or the distribution of the news”).


126 Several years after Silacci v. Abramson, Mehdizadeh vs. Mincer, the Second District Court of Appeal confronted the exclusive prescriptive easement issue again in Hirshfield v. Schwartz, 91 Cal.App.4th 749, 759 (2001). Hirshfield v. Schwartz is significant for two reasons: (1) the Court of Appeal abandons the doctrinally inconsistent “exclusive prescriptive easement” concept; and (2) the Court of Appeal uses the relative hardship doctrine to determine that the defendant neighbor had a right of use but not ownership in what is called an “equitable” easement or equitable protective interest.

127 See Balganesh, infra, note 129, at 1907.

128 See, e.g., J.E. PENNER, THE IDEA OF PROPERTY IN LAW (1997) (contending that “use serves a justificatory role for the [property] right, while exclusion is . . . the formal essence of the right”); Shyamkrishna Balganesh, Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions, 31 HARV. J.L. & PUB. POL’Y 593, 596-600 (2008) (noting the centrality of the right to exclude but explaining that the “right and remedy” have been unlinked.); Thomas W. Merrill, Property and the Right to Exclude, 77 NEB. L. REV.730, 730 (1998) (arguing that the right to exclude is not simply an essential aspect of property; rather, “it is the sine qua non”).

Argued from this perspective, the cause of action embodied in §2702(b)(2)(E) is therefore entirely relational. Thus, commercial fishermen, just as other users of public property, are not just some heretical protected class existing beyond legal principle; they possess a commercial quasi-property right.

Because the environment itself is especially vulnerable, Congress clearly sought to protect those who commercially rely upon it. By treating oil spill affected land and resources as a form of quasi-property and imbued with limited exclusionary significance, the OPA protects commercial users’ interests when they are most likely to be affected — during an oil spill. Courts have already begun to recognize commercial quasi-property rights. For example, the recognition of a quasi-property right in Sekco Energy, Inc. v. M/V Margaret Chouest demonstrates this move. In that case, the U.S. District Court for the Eastern District of Louisiana ruled that a plaintiff had a valid cause of action under §2702(b)(2)(E) against a defendant who allegedly caused an oil discharge. Specifically, the plaintiff owned and operated an oil drilling platform on the Gulf, and the court held that the plaintiff could maintain a cause of action for lost production revenues caused by the spill without alleging physical “injury to [his own] personal or real property.” The court reasoned that the plaintiff’s lost earnings from the platform constituted a “loss of property” within the meaning of OPA’s damages provision even if it did not constitute an “injury” to property, because injury is physical but loss is not. The court implicitly recognized that the plaintiff had lost something, even though the plaintiff lacked ownership or exclusivity.

A commercial quasi-property right would impose a limited duty of forbearance on a Responsible Party in relation to the right-holder/claimant, when the Responsible Party’s oil spill interferes with the claimant’s commercial activity. By emphasizing the circumstances of interference, the focus is on the relationship between the claimant and the Responsible Party. In the process, the normative basis moves away from the boundaries of the land or resource and towards the circumstances necessitating liability. Thus a commercial quasi-property right involves the use of a relational entitlement mechanism to simulate property’s exclusionary framework within the limited setting of when a Responsible Party interferes with a §2702(b)(2)(E) claimant’s quasi-property right to carry on or benefit from a commercial activity using or directly relying on oil spill damaged land or resources.

Using a “bright-line” rule to clarify §2702(b)(2)(E), given that reasonableness tests now abound in property law, would be anachronistic. The relative hardship doctrine is an innovation in reasonableness tests. The relative hardship doctrine is designed to assess whether to grant or deny an equitable protective interest or “equitable easement” to non-owner user of property. Equitable easements are easements granted for long-term use and improvement of land, continuance of which would cause little harm and cessation of which would cause irreparable harm to the user. To create an equitable protective interest, three factors must be present. First, the interest harmed must not be caused by the interest-holder. In other words, she must not be willful or negligent with regard to the claimed losses. Second, the court should grant recovery in favor of the interest-holder if denial will cause significant injury. Third, the injury to the interest-holder, if denied use, must be disproportionate to the cost of compensation. The “relative hardship” doctrine has been applied in cases involving not only physical encroachments on another’s property, but also disputed rights of access. The rise of the relative hardship doctrine

131 Id. at 1015.
132 Id.
133 Id. (“This duty of forbearance is only ever imposed relationally, by reference to the interest-holder rather than the object of the interest. Individuals are directed by the law to avoid interfering with the object of the interest under a particular set of circumstances, defined with a good measure of specificity.”)
134 Id.
136 The three basic tests on which “balancing conveniences” or “relative hardship” are set forth can be found in Christensen v. Tucker, 114 Cal. App. 2d 554 (1952).
137 Id.
138 For example, in Miller v. Johnston, the plaintiff successfully sued to establish a right of ingress and egress to his property over a portion of the defendant’s property. 270 Cal.App.2d 289. Acknowledging that in previous decisions
illustrates the fact that courts protect the security of good faith investment in land by refusing to order the abandoning of valuable property interests. While the most common easement may be for ingress and egress, easements can also be obtained for uses including hunting rights, scenic views, aviation, sidewalk access, and recreational and beach access. It is not a fee interest in the land, but it is a right to an ownership interest. Equitable doctrines have long conferred use-based rights or interests through mechanisms like equitable easements, which rely on a standard rather than strict rules. Moreover, the use-based interests that claimants are likely to seek compensation for will be easement-like in nature, thus providing another basis for using an equitable doctrine to interpret §2702(b)(2)(E) requirements. If entities like commercial fishermen, coastal hotels and their employees, and others are free to conduct their commercial activities and derive their livelihoods from oil spill damaged land or resources, then they should be allowed to recover for the loss or interference with that ability. Use of the relative hardship doctrine also provides a familiar theoretical basis for interpreting §2702(b)(2)(E), because most states already employ the relative hardship doctrine. A reasonableness test derived from the relative hardship doctrine can make the legitimate expectations of section 2702(b)(2) more certain, rather than less. In some cases, it will be clear that some claimants are seeking to recover for reputational or losses that are otherwise unconnected to a Responsible Party’s actions. In a number of cases fairness and justice will favor recovery. Where other tests operate unfairly and inefficiently, a reasonableness test would provide a flexible mechanism to evaluate a claimant’s losses, especially where they involve informal arrangements or use of public property. From one perspective, a reasonableness test could make application of §2702(b)(2)(E) less certain because we have moved from a rule to a standard. Conversely, a reasonableness test can provide greater certainty and stability of a legitimate claimant’s property interests, because reasonable expectations and investments are likely to be protected.

Professor Goldberg suggests that the plaintiffs in In re Taira Lynn Marine Ltd. No. 5, LLC and In re Cleveland Tankers should not recover because they lack exclusivity, despite the fact that Sekco Energy, Inc. v. M/V Margaret Chouest and the commercial fishermen cases suggest that plaintiffs possess some quasi-property interest despite lacking exclusivity. These cases beckon the normative question: applying the test “the courts were dealing with fixed structures which encroached on the property of another,” the appellate court concluded that “[t]here is no difference in principle, only in degree, between a driveway which cuts across a corner of lands of another and so encroaches 24 hours a day, and the transitory passage of vehicles which intermittently invade such lands.” The court thus held that the trial court properly applied the relative hardship test in “adjust[ing] the equitable rights” of the parties by awarding plaintiffs an easement for ingress and egress over the defendant’s property.

---

139 Singer, supra note 135, n.77. Here, Professor Singer notes that some states have codified the relative harm doctrine. See e.g., ARK. CODE ANN. §18-60-213 (2012); N.C. GEN. STAT. §§1-340 to 1-351 (2012).
140 An aviation easement is the right to use the airspace above a specified altitude for aviation purposes. Also known as “aviation easement,” where needed for low-altitude spraying of adjacent agricultural property.
141 An equitable easement is a right without profit, which the owner of land has acquired by contract, or estoppel, to restrict, or regulate, for the benefit of his own property, the use and enjoyment of the land of another. These rights, as well as the remedies for their enforcement, are purely equitable, and, as has been said, owing either to the informality of the agreement, or the relative situation of the parties, cannot be recognized in a court of law. See Whittemey v. Union Ry. Co. (1858), ii Gray, (Mass.) 359.
142 Professor Singer notes the rise of relative hardship doctrine in the context of trespass. See Joseph William Singer, supra note 135 at 1396 (citing Somerville v. Jacobs, 170 S.E.2d 805, 812 (W.Va. 1969)).
143 In re Taira Lynn Marine Ltd. No. 5, LLC, 444 F.3d 371 (5th Cir. 2006) (no recovery under admiralty law or OPA for businesses that suffer economic losses when defendants’ careless release of airborne gases resulted in officials ordering the closure of the sole public access route to the area in which the businesses operated).
144 In re Cleveland Tankers, 791 F. Supp. 669 (E.D. Mich. 1992) (denying recovery for economic loss under admiralty law and OPA for the sinking of tanker that partially blocked a channel that plaintiffs used to transport goods).
145 Goldberg, supra note 20 at 374.
should a §2702(b)(2)(E) possess exclusivity or an integral connection to property before it can recover for losses occasioned by a negligently caused oil spill? The U.S. Supreme Court has asserted that the right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property...”146 Legal scholars have also affirmed the central importance of the right to exclude.147 However, Professor Joseph Singer, in a recent article, noted that recent changes in legal doctrine have, in some cases, defined the scope of the right to exclude through standards rather than rules.148 Despite Professor Goldberg’s acknowledgment that protection of commercial activity, such as commercial fisherman and coastal hotels was a motivating factor underlying Congress’ passing the OPA, he proposes a “bright-line” test to actualize Congress’ intent. Local businesses and commercial activity are often reliant on use and access to oil spill damaged land and resources. To exclude such claimants from recovery because they do not possess the owner-like power of exclusivity would devastate the reasonable expectations of legitimate §2702(b)(2)(E) claimants, whose livelihoods depend on use or access to oil spill damaged land or resources. Denial of compensation based upon the use-right test, a test premised on actual or near exclusivity, ignores the non-absolute nature of property rights.149 While the exact extent to which Congress desired to hold a Responsible Party liable for damages caused by its negligent oil spill under the §2702(b)(2)(E) may be unclear, it is clear that Congress wanted to remedy traditionally uncompensated burdens suffered by individuals and businesses that, in all fairness and justice, should be shared.

The vector of Congressional intent is clear when one contrasts the extent of liability pre- and post-OPA: broadened liability demonstrates an inclusive, rather than exclusive, policy regarding compensation to spill-affected victims. Prudential judgment of political and moral principle in a dynamic economy requires identification of the harms that become incompatible with evolving understandings of a free and democratic society. Use of property, like notions of what is reasonable, shift and adapt with society. Laws that protect through limiting or immunizing new industries from liability should be gradually cast aside as these industries’ understanding of their activities mature. As new statutory causes of action create additional bases of liability, concepts of justice and fairness also require adaptation. Reasonableness tests allow for such adaptation, evaluations of exclusivity or integration do not.

146 Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); see also Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-38 (1982) (determining it was a categorical violation of the takings clause to force a residential landlord to suffer the invasion of her property in an apartment building by the cables and box owned by the cable television company).


149 Professor Singer argues that rules of reason determine the minimum standards for the legal framework of a property law system compatible with the values and norms of a free and democratic society. Professor Singer further argues property rights cannot be absolute, not only because the rights of some may be exercised in ways that conflict with the rights of others, but also because there are many property rights a democracy cannot recognize. Id at 1421; see also Joseph William Singer, Democratic Estates: Property Law in a Free and Democratic Society, 94 CORNELL L. REV. 1009, 1051-53 (2009); Joseph William Singer, Property Law as the Infrastructure of Democracy [The Fourth in the Wolf Family Lecture Series on the American Law of Real Property], in 11-1 POWELL ON REAL PROPERTY (2011); Singer, Subprime, supra note 144, at 155-60, 166-67; Singer, Take for Granted, supra note 147, at 146-52.
B. Evaluating the Spectrum of §2702(b)(2)(E)’s Competing Interpretations

By focusing on what Congress sought to abandon, scholars have perhaps lost sight of what Congress intended to create. In other words, what specific duty does a Responsible Party have towards a §2702(b)(2)(E) claimant? If a claimant can demonstrate a commercial quasi-property right in the damaged land or resource, then the claimant has demonstrated a direct relational nexus between the injury and the negligent act, rather than a derivative claim. In other words, some cognizable and specific interest should have been injured by the Responsible Party’s negligent act. The injury to that interest is what entitles a claimant a right of recovery. It is axiomatic with Hohfeldian correlatives that the existence of a right implies the existence of a duty; the relationship between a §2702(b)(2)(E) claimant and Responsible Party simply uses oil spill damaged land or resources as the nexus.

In a recent article, Professor Zipursky analyzed the concept of relational duties in the context of the infamous Palsgraf v. Long Island Railroad Co. case. Palsgraf involved improbably caused injuries sustained Mrs. Palsgraf during a calamitous day at Long Island Rail Road (LIRR). Mrs. Palsgraf sued the LIRR, claiming her injury resulted from the LIRR’s negligent acts. The trial court and the intermediate appeals court found for Mrs. Palsgraf, and the LIRR appealed the judgment. Chief Judge Cardozo, writing for three other judges, wrote the following:

“[t]here was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station. If the guard had thrown it down knowingly and willfully, he would not have threatened the plaintiff's safety, so far as appearances could warn him… If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended.”

Therefore, without any perception that one’s actions could harm someone, there could be no duty towards that person, and therefore no negligence for which to impose liability. The requirement that the defendant’s conduct must have been negligent relative to the plaintiff is synonymous with stating that the defendant’s conduct must have been a breach of the duty of care owed to her. Thus, this case is often used to convey the idea a plaintiff to must claim more than mere injury; relational duty and foreseeability must also be proven. Thus, the HWR test determines whether the victim was among the class of persons who could foreseeably be harmed, and whether the harm was foreseeable within the class of risks. The first element of the test is met if the defendant owed an injured person a specific duty, because that

---

151 248 N.Y. 339 (N.Y. 1928). Interestingly, Palsgraf was decided around the same time as Robins Dry Dock and have similar theoretical bases.
152 In that case, two of defendant LIRR railroad's employees believed that a passenger carrying a package was falling in his haste to catch and board a moving LIRR train. One of the LIRR’s employees was located on the train, and the other was located on the platform. The employee on the train attempted to pull the passenger into the train and the employee on the platform attempted to push him into the car from behind. The employees’ efforts caused the passenger to drop the package he was holding onto the rails. Unbeknownst to the employees, the newspaper wrapped-package, approximately 15 inches long, contained fireworks. The package subsequently exploded when it hit the rails. The shock from the exploding fireworks reportedly knocked down a set of scales at the other end of the platform, and caused Mrs. Palsgraf to suffer a “nervous disorder.”
153 Palsgraf at 345. The court also stated that whether the guard had acted negligently to the passenger he pushed was irrelevant for her claim, because the only negligence that a person can sue for is a wrongful act that violates their own rights. Mrs. Palsgraf could not sue the guard for pushing the other passenger because that act did not violate a duty to her, as is required for liability under a negligence theory.
154 Since duty is a matter of law to be decided by a judge, a finding that there was no duty was sufficient to overturn the jury’s verdict. In In re Oil Spill, duty was not an issue under the OPA.
155 Id.
156 “The classical pronouncement of a general formula for “duty” is Lord Atkins’ apodictic “neighbour test” in Donoghue v. Stevenson (1932, AC 562 at 580):
injured person could predictably be put at risk of injury by the defendant’s negligent action. This test seeks to determine what a reasonable person should believe to be the logical consequences of his negligent actions. In contrast, a “but-for” analysis retroactively focuses on what actually caused a person’s injuries, rather than legal liability. Civil recourse is available to those who have been wronged by wrongdoers: an individual is only afforded a private right to redress the wrong to her. That is why a defendant’s liability in tort is only liability to one whom he or she has wronged, because there must thus be the right sort of nexus between the duty and breach elements. Thus, the traditional conception of foreseeability in tort law tends to limit liability to the consequences of an act that could reasonably be foreseen within the relationship between a specific defendant and specific plaintiff.

Both Professors Goldberg and Peterson have articulated justifiable methods of interpreting §2702(b)(2)(E)’s “due to” and “results from” language that respect the OPA’s inclusive intent, but Professor Goldberg and Professor Robertson have, respectively, recreated extreme arguments analogous to the majority and dissent in Palsgraf. Professor Goldberg’s use-right test does indeed require a relational duty between the Responsible Party and the §2702(b)(2)(E) claimant. By insisting, however, that a claimant possess nearly exclusive “rights” to use the damaged resource or be in a relatively small class of exclusive users creates a threshold that many claimants who rely upon a resource will likely not be able to meet. In other words, proving commercial use will be remarkably easy, but establishing a right of exclusion to, what is likely, public property will prove prohibitive. Thus, requiring a claimant to prove she possesses a traditionally recognized property right to exclude third parties from the oil spill damaged land or resource would preclude recovery under a strict application of the use-right test. Stated differently, the duty threshold will likely be too high even though certain commercial users, like chandlers, beachfront hotels and their guests, are foreseeable victims of oil spills like Exxon Valdez and Deepwater Horizon, and the almost certain to occur future catastrophic oil spill. While couched in the often confusing language of causation, Professor Goldberg’s “use-right” test actually attempts to define the contours of a commercial quasi-property right, but in requiring a §2702(b)(2)(E) claimant have the right of near or complete exclusion creates a policy paradox in the relational duty owed an appropriate §2702§(b)(2)(E) claimant by a Responsible Party.

On the other end of the spectrum, the logic of Professor Robertson’s heightened “but-for” causation test closely mirrors the dissenting opinion’s logic in Palsgraf, and as a result shares the same

“There must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances … The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplations as being so affected when I am directing my mind to the acts or omissions which are called in question.”

157 Zipursky, supra, note 150.
158 Id.
159 30 Miss. C. L. Rev. 335, 359-367 (Professor Goldberg states that “although it seems likely that OPA was meant primarily to benefit persons with exclusive or near-exclusive rights to use particular property or resources damaged or rendered unavailable by a spill, there is an argument to be made…that liability extends to certain additional claimants, again suggesting that the statute’s economic loss provisions have real bite as compared to liability under common law.”)
160 Chen, supra note 24.
161 While Palsgraf was decided because the court determined that there was no duty to Palsgraf, the three-judge dissent, written by Judge Andrews and joined by Judges Frederick Crane and John F. O’Brien, saw the case as a matter of proximate cause. That dissent argued that Palsgraf’s injury could be immediately traced to the wrong committed by the guard, and the fact of the wrong and the fact of the injury should be enough to find negligence. Regarding the concept of proximate cause, the dissent stated, “What we do mean by the word ‘proximate’ is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of
problem: it ignores the relational duties between the Responsible Party and the §2702(b)(2)(E) claimant, and focuses solely on causation. Professor Robertson’s approach bypasses whether a duty was breached by the Responsible Party to the claimant, and attempts to determine whether the type of harm was in the class of expected harms. By first focusing on whether a relational duty was breached, questions of foreseeability focus *ex ante* on what a defendant should reasonably believe *would/will* happen as a result of its negligent action, and limiting liability to those consequences. By focusing purely on causation, however, questions of foreseeability focus, *ex post*, on what can causally be traced back to a defendant’s negligent conduct, regardless of what the defendant could reasonably predict would occur as a result of its negligent conduct. In other words, Professor Robertson’s test essentially asks: what *could* a defendant believe *would/will* happen as a result of its negligent action? Anything and everything could happen. With hindsight, everything is foreseeable. While Professor Peterson’s interpretation of §2702(b)(2)(E) embraces an inclusive philosophy; however, his heightened “but-for” cause requirement would not only be a departure from any principles of proximate cause,162 but also it would specifically create a disaggregation of the relational duties owed between an appropriate §2702(b)(2)(E) claimant163 and the Responsible Party.

1. **Professor Goldberg’s “Use-Right” Test**

There is obvious uncertainty as to the proper interpretation of what §2702(b)(2)(E) requires a claimant prove in connecting his economic loss to an oil spill, given the apparent incompatibility of the *Robins Dry Dock* rule in application to §2702(b)(2)(E). Professor Goldberg offered one of the strictest articulations of a proximate cause/legal duty standard.164 Professor Goldberg argues that §2702(b)(2)(E) imports a type of proximate cause limitation on recovery for pure economic losses.165 He supports this contention with an in-depth examination of maritime and admiralty law, legislative history of the OPA, and case law.166 Professor Goldberg specifically argues that OPA grants recovery under §2702(b)(2)(E) to claimants who have “a right physically to obtain or use property or resources that are damaged or lost because of an oil spill” (the “use-right” requirement).167 To support his interpretation, Professor Goldberg argues that OPA contains a “two-layer causation requirement.”168 Professor Goldberg’s argument is as follows: a Responsible Party is liable for damages “result[ing] from” an oil discharge169 and “due to injury, destruction, or loss of real property, personal property, or natural resources.”170 In other words, he argues that the language “result from” requires an initial “but-for” causation test, and that “due to” imposes an additional a physical use-right requirement.171 When one compares the legislative history and the wording of §2702(b)(2)(E) against Professor Goldberg’s dual layer use-right test, it becomes clear that the use-right test is premised on the same policy concerns motivating the *Robins Dry Dock* rule, specifically the need to limit recovery to “flow primarily to certain members of the communities most immediately and tangibly affected by a spill.”172 However, it is important to remember that the *Robins Dry Dock* rule is a creature of common law, rather than anything embodied or even referenced, explicitly

---

162 Selby, *supra*, note 20, at 556.
163 See infra, Part II, Section C for explanation what a §2702(b)(2)(E) claimant would need to demonstrate under the commercial quasi-property test to be considered an “appropriate” claimant.
164 See *supra* note 20.
165 Goldberg, *supra* note 20, at 354.
166 Id. at 359 – 368.
167 Id. at 366.
168 See Goldberg, *supra* note 20, at 206.
170 See id. § 2702(b)(2)(D), (E).
171 See Goldberg, *supra* note 20, at 354.
172 Id. at 370.
or implicitly, in the OPA, and it is clear that Congress wanted to distance itself from common law. Trying to wed the two, as Professor Goldberg does, becomes anomalous.

First, Professor Goldberg argues that Congress's aim in enacting §2702(b)(2)(E) was to extend liability along the lines tentatively identified by judicial decisions that have pushed the boundaries of the economic loss rule, but the cases he cites, People Express Airlines, Inc. v. Consolidated Rail Corp. and J'Aire Corp. v. Gregory, do not support his argument. People Express Airlines, Inc. v. Consolidated Rail Corp. is inconsistent with the “use-right” test, and is more akin to a consequential loss case. When viewed as property “damage” because of the plaintiff’s lost access, People Express Airlines, Inc. v. Consolidated Rail Corp. can be easily explained not as an exception to the pure economic loss rule, but as a matter of consequential loss. In People Express Airlines, Inc. v. Consolidated Rail Corp., the New Jersey Supreme Court allowed People Express Airlines to recover for lost profit from Newark Airport terminal resulting from forced evacuation of its business offices, because of the defendant’s negligent release of toxic gases. The court’s straightforward rationale for the plaintiff’s recovery is instructive: the defendant’s negligence caused the plaintiff to lose of access to its airport terminal, and this loss of access directly led to the plaintiff’s economic losses. The New Jersey Supreme Court noted that the single characteristic that distinguishes parties in negligence suits whose claims for economic losses have been regularly denied by American and English courts from those who have recovered economic losses is, with respect to the successful claimants, the fortuitous occurrence of physical harm or property damage, however slight. It is well accepted that a defendant who negligently injures a plaintiff or his property may be liable for all proximately caused harm, including economic losses. Nevertheless, a virtual per se rule barring recovery for economic loss unless the negligent conduct also caused physical harm has evolved throughout this century. The physical harm rule also reflects certain deep-seated concerns that underlie courts’ denial of recovery for purely economic losses occasioned by a defendant’s negligence. Nevertheless, judicial dissatisfaction with the rule of non-recovery for purely economic loss throughout the last several decades has led to numerous exceptions in the general rule, where plaintiffs are reasonably foreseeable, the injury is directly and proximately caused by defendant’s negligence, and liability can be limited fairly, courts have endeavored to create exceptions to allow recovery. In essence, People

---

173 See supra Part I, Section C discussing legislative history of the OPA. In summary, the OPA’s legislative history does not limit recovery to claimants who have use-rights. Professor Goldberg also notes that a previous version of OPA advanced by the House of Representatives explicitly tied recovery for lost earnings to the utilization of property or resources. Goldberg, supra note 20, at 212, 213 (citing H.R. 3027, 101st Cong. § 102(a)(2)(B)(v) (1st Sess. 1989)). The fact that the utilization provision did not make it into the 1990 legislation as readily suggests that Congress considered it unacceptable as it does that Congress had use-rights in mind all along; the two explanations fairly cancel each other out.

174 Goldberg, supra note 20, at 364.

175 The physical harm requirement capriciously showers compensation along the path of physical destruction, regardless of the status or circumstances of individual claimants. Purely economic losses are borne by innocent victims, who may not be able to absorb their losses. People Express Airlines v. Consol. Rail Corp., 495 A.2d at 111 (citing Comment, 88 Harv.L.Rev. 444, 449-50 (1974)).

176 495 A.2d 107 (N.J. 1985)


178 Id.

179 This virtual per se rule barring recovery for economic loss unless the negligent conduct also caused physical harm has evolved throughout this century, based, in part, on Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927) and Cattle v. Stockton Waterworks Co., 10 Q.B. 453 (1875). But see, In re Kinsman Transit Co., 388 F.2d 821, 824 (2d Cir.1968) (after rejecting an inflexible rule of non-recovery, court applied traditional proximate cause analysis to claim for purely economic losses).

180 See e.g. J'Aire Corp. v. Gregory, 598 P.2d 60, 63 (1979); Biakanja v. Irving, 320 P.2d 16 (1958); People Express Airlines, Inc. v. Consolidated Rail Corp, 495 A.2d 107 (1985); Portee v. Jaffee, 417 A.2d 521 (1980); Dillon v. Legg. 441 P.2d 912 (1968) (abandoning zone of danger rule in favor of a foreseeability test to determine whether the plaintiff may recover for mental distress arising from physical harm to another).
Express Airlines, Inc. v. Consolidated Rail Corp. is more like the commercial fisherman exception. Viewing People Express Airlines, Inc. v. Consolidated Rail Corp. as a consequential loss case because of lost access to its terminal aligns the tort elements of duty, foreseeability, and causation. First, defendants should owe a duty of care to take measures to avoid the risk of causing economic damages resulting from lost commercial access to property to particular plaintiffs comprising an identifiable class with respect to whom defendant knows or has reason to know are likely to suffer damages from its conduct. Second, the identifiable class of plaintiffs should be particularly foreseeable in terms of the type of person or entities compromising the class, the certainty or predictability of their presence, the approximate numbers of those in the class, as well as the type of economic activities disrupted. Third, liability should depend not only on the breach of a standard of care, but also on a strong causal relationship between the breach of the duty of care and resultant losses.

Professor Goldberg similarly mis-categorizes the J'Aire Corp. v. Gregory case. While couched in the language of tort, J'Aire is a relaxation of California contract law regarding third-party beneficiaries. To understand whether J'Aire is an exception to the economic loss doctrine in California law requires an examination of its direct predecessor, the 1958 decision Biakanja v. Irving. In Biakanja, the plaintiff sought damages against the defendant for loss of an intangible future interest. Of significance was the fact that the plaintiff was not in contractual privity with the defendant. Since, in the view of the Biakanja court, the “end and aim” of the transaction was to provide for the plaintiff’s brother's estate to pass to the plaintiff, the defendant notary had a legal duty to prepare the will reasonably and prudently. The Biakanja court essentially held that the harm suffered by the plaintiff was economic--the loss of an expectancy--arising from a breach of contract to prepare a will between the plaintiff’s brother and the defendant notary, in essence a third-party beneficiary claim. The court ultimately applied a multifactor analysis to determine whether the defendant owed the plaintiff a duty of care under the particular circumstances of the case.

Twenty years after Biakanja, the California Supreme Court decided the J'Aire Corp. v. Gregory case. In J'Aire Corp. v. Gregory, the California Supreme Court permitted a restaurant operating in leased space in an airport to recover for lost business. The specific nature of the dispute sheds light on the nature of the recovery. The dispute in J'Aire involved a delay in construction. J'Aire sued the contractor for negligence because it suffered loss of business and lost profits during the delay. The defendant demurred successfully at trial. The J'Aire court applied Biakanja. The J'Aire court’s discussion reads

---

1 Biakanja v. Irving, 320 P.2d 16 (1958). Biakanja represents a general liberalization and expansion of tort liability in California that even led to renewed interest in an 1872 statute, codified at Civil Code §1714(a), which does not distinguish between injury to person or property and economic interests. The California Supreme Court in Rowland v. Christian cited §1714(a) as “a civil law” that serves as the foundation of negligence law in California. Rowland v. Christian, 69 Cal. 2d 108, 112 (1968) (superseded by statute on other grounds).

2 Biakanja, 320 P.2d at 18-19 (quoting the “end and aim” language from Glanzer v. Shepard, 135 N.E. 275 (1922)).

3 The Biakanja court did not miss the fact that a notary prepared the will, stating that the notary's conduct was “not only negligent but was also highly improper” because he “engaged in the unauthorized practice of law.” Id. at 601. However, as to actual attorneys, the court soon imposed a tort duty on attorneys to nonclient bequest recipients for negligently drawn wills. Lucas v. Hamm, 56 Cal. 2d 583 (1961); Heyer v. Flaig, 70 Cal. 2d 223 (1969). In addition to citing Biakanja, J'Aire cited to these cases for the proposition that, in the absence of privity, a "special relationship" would allow for the recovery of purely economic damages for the negligent performance of a contract. See J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 804 (1979).

4 The Biakanja court held that liability under circumstances in which the defendant was not in privity of contract with the plaintiff is “a matter of policy” involving the “balancing of various factors.” These factors include: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury suffered; (5) the moral blame attached to the defendant's conduct; and (6) the policy of preventing future harm. Biakanja, 49 Cal. 2d at 650.

5 J'Aire, 598 P.2d at 61, 66.

6 Id.

7 Id.
as a continuation of Biakanja: “[L]iability for negligent conduct may only be imposed where there is a duty of care owed by the defendant to the plaintiff.”\textsuperscript{188} In citing Biakanja, the Court stated: “Where a special relationship exists between the parties, a plaintiff may recover for loss of expected economic advantage through the negligent performance of a contract although the parties were not in contractual privity.”\textsuperscript{189} Thus, in J'Aire and Biakanja, it is clear that plaintiffs were either intended or foreseeable third party beneficiaries to contracts. If the plaintiff's harm is to an expectancy, or if economic losses flow from the expected performance of a party not in privity with the plaintiff, the plaintiff should be limited to whatever contract remedies she has. The plaintiff's harm is more akin to a contractual expectation interest. J'Aire confuses the issue by interjecting the question of duty into the question of the type of harm suffered by the plaintiff. The situations in which the J'Aire exception applies will always be those in which the plaintiff could claim to be a third-party beneficiary on a contract claim, not a tort claim. Therefore, despite Professor Goldberg’s assertion that People Express Airlines, Inc. v. Consolidated Rail Corp. and J'aire Corp. v. Gregory represent California’s anomalous attempts to discard the economic loss rule, People Express Airlines, Inc. v. Consolidated Rail Corp. is more analogous to a consequential loss case and J'aire Corp. v. Gregory is a relaxation of California contract law, not tort law.

Second, Professor Goldberg’s use-right test functions like a “dichotomy paradox.” Suppose, for example, Henry wants to run to a certain telephone pole. Before he can get there, he must get halfway there. Before he can get halfway there, he must get a quarter of the way there. Before traveling a quarter, he must travel one-eighth; before an eighth, one-sixteenth; and so on. This description requires one to complete an infinite number of tasks, which, as the philosopher Zeno maintains, is impossible. Before Henry can reach the telephone pole, he must reach half of the distance to it. Before reaching the last half, he must complete the next quarter of the distance. Reaching the next quarter, he must then cover the next eighth of the distance, then the next sixteenth, and so on. There are, thus, an infinite number of steps that must first be accomplished before he could reach the pole, with no way to establish the size of any “last” step. This argument is called the dichotomy paradox because, like professor Goldberg’s use-right test, it involves repeatedly splitting the distance to a goal into two parts. The paradoxical conclusion then would be that travel over any finite distance can neither be completed nor begun, and so all motion must be an illusion, just like the hope of recovery under the use-right test.

Professor Goldberg’s test requires actual commercial use of oil spill damaged land, and “exclusive or near-exclusive rights to use particular property or resources damaged or rendered unavailable by a spill.”\textsuperscript{190} In this regard, the use-right test could be called the “actual use-exclusivity” test. Under the use-right test, a §2702(b)(2)(E) claimant, similar to one claiming an “exclusive” prescriptive easement, must demonstrate exclusivity. While demonstrating actual use may not prove difficult in applying the use-right test, the second requirement of exclusivity will be all but impossible to satisfy. Herein lies the paradox of the use-right test. Commercial users of oil spill damaged land or resources, like a hotel using a public beach, will rarely, if ever, have the traditional right to exclude. An easement, like the first element in Professor Goldberg’s use-right test, focuses on use. An easement, by contrast, is not an ownership interest. Easements focus on the restricted or specific use of another’s property, but, by definition, do not convey exclusive use. A prescriptive easement is a non-possessory and limited right to a specific use or activity, such as ingress and egress over a road to get to an adjoining property. A successful claimant of a prescriptive easement does not acquire title; rather, he acquires the right to continue a specific historical use of someone else’s property. This right to a specified use is a lesser right than outright ownership. It is not something that is purchased, negotiated, or granted. A prescriptive easement is simply a right to use property; the user does not gain title to the land. An easement, therefore, is merely the right to use someone else’s land for a specific purpose. When a squatter cannot establish all the elements of adverse possession, that squatter may be able to acquire a permanent

\textsuperscript{188} Id.
\textsuperscript{189} Id. at 804.
\textsuperscript{190} Goldberg, supra note 20, at 364.
right to continue a historical use of the occupied land by acquiring a prescriptive easement. To obtain an easement by prescription, then, it is only necessary to show that “the claimant has acted toward the land in question as would an average owner, taking into account the geophysical nature of the land.”

The claimant does not have to make a showing as to exclusive possession. This is because easements are concerned with “use” not “possession.” For example, seasonable use of a rural path did not impair the defendant's claim of easement because the defendant's use of the path was consistent with that use to which others might put it. An exclusive prescriptive easement, by contrast, purports to convey exclusive right to a prescriptive easement.

While determining actual use is appropriate, Professor Goldberg’s requirement of exclusivity, however, renders the use-right test internally inconsistent. Unlike the prescriptive easement analysis, the use-right test must also determine whether the claimant’s “right” to use the property is independent of similar rights in others. As used by Professor Goldberg, the word “exclusive” is, at best, imprecise. If Professor Goldberg defines exclusivity as use of property to the exclusion of all else, it would demand that the claimant establish an easement-like use as well as the kind of exclusion required of those claiming adverse possession or an “exclusive” prescriptive easement. If one is trying to gain ownership of all the rights to a piece of land, then a requirement of the claimant’s exclusivity is reasonable; it results in all others being excluded. An exclusivity requirement of this type, however, makes little sense when applied to §2702(b)(2)(E), because the use made by a claimant will not necessarily be exclusive. Because easements imply use rather than ownership, they cannot exclude, however, the second element in the use-right test requires the claimant to have exclusive or near-exclusive right to use particular property or resources damaged. Most courts, however, interpret exclusivity to mean something different than using property to the exclusion of anyone else. Use does not have to be to the exclusion of others: “it is not necessary that (the claimant) should have been the only one who used or was entitled to use (the land), so long as he used it under a claim of right independently of the other.” In Illinois, for example, exclusivity as a requirement for a prescriptive easement “does not require a showing that only the claimant made use of the way, but that the claimant’s right to use the lane does not depend upon a like right in others.” Similarly, in Montana, the use must be “independent of a like right of way in another.” In Alabama, the claimant's rights must “rest upon its own foundations and not depend upon a like right in any other...” A prescriptive easement can come into existence if the owner passes over the same way is shared by the owner. According to the Restatement (Third), exclusivity is most often used to deny the creation of a prescriptive easement where the use cannot be distinguished from that

---

191 The typical elements of a prescriptive easement are nearly the same as for adverse possession: (1) an open and notorious use of the property for; (2) a continuous period of five years or longer; (3) under a claim of right to the use, in a manner that is contrary to the true owner’s rights. See infra, note 210.
193 Barry J. Kusinitz, Adverse Possession and Easements, 47 RI Bar Jnl. 5 (1999).
194 Id.
195 See e.g. Svoboda v. Johnson, 281 N.W.2d 892 (Neb. 1979).
196 Apley v. Tagert, 584 So. 2d 816, 818 (Ala. 1991) (nor is it material, in this regard, that someone else had an exactly similar easement of passage, nor that another was being established); see also Restatement (Third), Property (Servitudes) 2.17 cmt. g (2000); 7-60 Thompson on Real Property, Thomas Editions § 60.03.
197 Id. at 818 (if use must be exclusive, “this appears to be so in a very limited sense, if at all”).
198 Id. at 937.
201 Apley v. Tagert, 584 So. 2d at 818 (Ala. 1991); see also Belcher v. Belcher, 224 So. 2d 613 (Ala. 1969) (giving example and formulation of rule stated in text: “It is sometimes said that, in order to acquire a right of use by prescription, the use during the prescriptive period must be exclusive, but this appears to be so in a very limited sense, if at all. It means, it has been said, no more than that the claimant's right must rest upon its own foundations and not depend upon a like right in any other person; it is not necessary that he should have been the only one who used or was entitled to use it, so long as he used it under a claim of right independently of others.”).
of the general public, or in cases where one uses rights concurrently, thus creating an inference of permissive use.\textsuperscript{202} In many states exclusivity is not a requirement for establishing an easement by prescription. Thus, that others had used a road in Rhode Island did not defeat a claim of prescription: the claimant need not have been the only one to make use of a road, so long as the use was made independently of others, under a claim of right.\textsuperscript{203} In New York, the elements to find prescription are similar to those for adverse possession except that “demonstration of exclusivity is not essential.”\textsuperscript{204} In Missouri, the adverse use does not need to be exclusive; one seeking such an easement claims only the right to make a certain use of the land and “does not claim to possess the whole title and exclude the owner from it for all purposes.”\textsuperscript{205} A number of other states, including Florida,\textsuperscript{206} Idaho,\textsuperscript{207} Indiana,\textsuperscript{208} Maryland,\textsuperscript{209} Michigan,\textsuperscript{210} Nebraska,\textsuperscript{211} New Jersey,\textsuperscript{212} Ohio,\textsuperscript{213} Texas,\textsuperscript{214} and Virginia\textsuperscript{215} also have held that exclusivity is not required for establishing an easement. In fact, the Fourth Circuit has recognized a similar rule.\textsuperscript{216}

Thus, Professor Goldberg’s test requires a claimant to possess a right of exclusion that many of the most predictable users of oil spill damaged land resources will not have, because they will be using public property. Therefore, Professor Goldberg’s use-right test would strip §2702(b)(2)(E) of most of its inclusive power. In effect, only those with the right to exclude, not just a right of access, can recover. Without a relational right of exclusion, even a claimant who actively relies upon oil damaged land or resources can expect no relational duty of forbearance from a Responsible Party. Expressed in the language of causation, the claimant is clearly foreseeable, but no legal duty exists. Some of the inconsistencies in Professor Goldberg’s approach become clearer when potential classes of claimants lacking the right of exclusion are assessed.\textsuperscript{217} The paradigmatic example of the “ship’s chandler,”\textsuperscript{218}

\textsuperscript{202} Restatement (Third), Property (Servitudes) § 2.17 cmt. g (2000).
\textsuperscript{203} Palisades Sales Corp. v. Walsh, 459 A.2d 933, 937 (R.I. 1983).
\textsuperscript{205} Whittom v. Alexander-Richardson P’ship, 851 S.W.2d 504, 508 (Mo. 1993) (en banc).
\textsuperscript{206} Winthrop v. Wadsworth, 42 So. 2d 541 (Fla. 1949).
\textsuperscript{207} State ex rel Haman v. Fox, 594 P.2d 1093 (Id. 1979) (public cannot acquire prescriptive rights in privately owned property).
\textsuperscript{208} Fort Wayne Nat’l Bank v. Doctor, 272 N.E.2d 876 (Ind. 1971).
\textsuperscript{209} Wilson v. Waters, 64 A.2d 135 (Md. 1949).
\textsuperscript{210} Goodall v. Whitefish Hunting Club, 528 N.W.2d 221 (Mich. App. 1995) (in seeking to establish prescriptive easement, element of adverse use was not satisfied where hunters used private club's road to gain access to land already open to public for hunting purposes).
\textsuperscript{211} Scoville v. Fisher, 149 N.W.2d 339 (Neb. 1967) (to gain easement by prescription use must be exclusive, generally, “the use of a way in common to the public is not ‘exclusive’ within the meaning of that term”).
\textsuperscript{212} Poulos v. Dover Boiler & Place Fabricators, 5 N.J. 580, 76 A.2d 808 (1950); Bioletto v. Sindoni, 39 A.2d 634 (1944).
\textsuperscript{215} Dykes v. Friends of the C.C.C. Rd., 2012 Va. LEXIS 10, at *15 (“[M]ere use by the general public is not evidence of prescriptive use, but of a license by the owner permitting the use, and such evidence will defeat a claim by one individual, by a group, or by the general public asserting a prescriptive easement.”).
\textsuperscript{216} Nature Conservancy v. Machipongo Club, Inc., 419 F. Supp. 390 (E.D. Va. 1976), modified, 571 F.2d 1294 (4th Cir. 1978), reh’g granted, 579 F.2d 873 (4th Cir. 1978), cert. denied, 439 U.S. 1047 (1978) (court recognized rule that “the absence of a claim independent of all others precludes establishment of the necessary exclusiveness required to create a private easement”). Applying the reasoning in the text to profits a prendre, see Sanchez v. Taylor, 377 F.2d 733 (10th Cir. 1967), stating that “the public cannot acquire by custom or common prescription profits a prendre in another's land.”
\textsuperscript{217} See infra, Part II.
illustrates the policy and factual difficulties associated with employing the use-right test. The chandler does not have a specific right to use natural resources damaged in a spill, and therefore, under a strict application of the use-right test, the chandler could not recover lost earnings. Thus, the chandler’s loss, the result of damage to the fisheries caused by oil spill, meets only the “use” element of the use-right test. Professor Goldberg acknowledged the apparent rigidity and inconsistency of his test when he stated that those who “reside in the immediate vicinity of a spill” and whose “commercial activities are very closely bound up with local economies that revolve around the use of resources and property that have been damaged” could have a strong equity and policy argument for recovery under §2702(b)(2)(E). Moreover, if Professor Goldberg acknowledges that his use-right test excludes chandlers, who in the interests of fairness and equity, should recover under §2702(b)(2)(E), then the use-right test cannot be said to advance the policy aims of inclusion underlying the OPA. Moreover, the basis for chandler’s exclusion would become the basis to exclude other claimants whose economic losses stem from their ability to use a resource but lack a traditionally recognized “right” to use that resource.

In essence, Professor Goldberg’s “use-right” test would deny some claimants whose economic losses are direct, while compensating more indirect economic losses. Thus, application of Professor Goldberg’s use-right test results in a dichotomy paradox, because it creates a low burden for satisfying the “use” element, allowing §2702(b)(2)(E) claimant to cover half the distance, but most claimants will never be able to demonstrate a right of exclusivity, thus never reaching their goal.

The internal conflict within a test that requires “use” and “exclusivity” also appears in the “exclusive prescriptive easement” context, and the Silacci v. Abramson, Mehdizadeh vs. Mincer cases illustrate, by analogy, the conceptual flaws a court is likely to encounter in applying a use-exclusivity test. In May 1996, the Sixth District Court of Appeal decided the case of Silacci v Abramson. In that case, Silacci filed suit against his neighbor, Abramson, contending that Abramson encroached upon Silacci’s property. Abramson had been using a portion of Silacci’s property as a back yard garden area for years. Abramson even erected a fence around the disputed portion. The trial court held that Abramson had acquired “an exclusive prescriptive easement” for the fenced-in portion of Silacci’s property. The Court of Appeal, however, reversed the judgment. It explained that an easement is merely the right to use someone else’s land for a specific purpose; it is not ownership. Exclusive use is too much like ownership. A prescriptive easement is one acquired by an adverse use for a certain period of time. But an easement is not ownership, and therefore an “exclusive prescriptive easement” was inherently contradictory because it amounted to giving a portion of Silacci’s land to Abramson without any rights remaining to Silacci, thus perverting the long-recognized distinctions in property law between ownership and use.

Shortly after the Silacci v Abramson case, the Second District Court of Appeal confronted a similar issue in Mehdizadeh vs. Mincer. The trial court, inter alia, awarded Mehdizadeh an exclusive...

---

218 A chandler repairs and services boats, like the fishing boats that work on the Gulf Coast.
219 Selby, supra note 20 at 553.
220 Goldberg, supra note 20, at 375–76.
222 Peterson, supra note 20, at 174. (Here Professor Peterson notes the anomalous treatment of ships’ chandlers under Professor Goldberg’s test)
223 For examples on how Professor Goldberg’s test leads to inconsistent results, see Part II. Arguably, this is why Professor Goldberg’s analysis does not specifically analyze the claimants in his “Universe.”
224 45 Cal. App. 4th 558
225 46 Cal.App.4th 1296
226 In Mehdizadeh, a former owner of Mincer’s property erected a fence with the acquiescence of his then-neighbors, the prior owners of Mehdizadeh’s property. Subsequent to Mincer purchasing the property, Mincer conducted a survey that revealed the boundary between the properties incorrectly excluded ten feet of his property. Mincer then built a new fence along what he believed to be the correct property boundary. Mehdizadeh sued, claiming an exclusive prescriptive easement over the ten-foot strip.
prescriptive easement subject to the same conditions as agreed upon agreed boundary. In reversing the trial court’s decision, the Court of Appeal addressed the prescriptive easement issue. Analogous to application of the use-right test, a court would have to find that the claimant’s use-right excluded everyone from entering or making any use of the same property. Silacci v. Abramson and Mehdizadeh vs. Mincer cast doubt on the viability of the use-right test. Because Professor Goldberg expects a claimant to act as a permitted user of an oil spill damaged resource for which he or she has no proprietary interest and possess exclusivity, the use-right test mixes contradictory property law concepts. Exclusivity is as inconsistent in the easement context as it would be in the context of §2702(b)(2)(E), because that element is a feature of ownership rather than use. No beachfront hotel or commercial fisherman will claim to own or have exclusive possession of a public beach or the ocean, because many others use that property in the exact same way on the exact same basis: it is public property. Neither use, nor right of access constitute exclusivity, and therefore the use-right test, like an exclusive prescriptive easement, is inherently contradictory.

Third, the use-right test is both over-exclusive and under-inclusive. The use-right test would exclude some of the most predictable §2702(b)(2)(E) claimants: those whose commercial activities directly rely on oil spill damaged land and resources, because they lack the traditional right to exclude. Ironically, Professor Goldberg argues that the use-right test should include claimants who clearly lack a right to exclude and who have tenuous connections to oil spill damaged land or resources. After articulating the use-right test, however, Professor Goldberg acknowledged the apparent incompatibility of the OPA’s inclusive policy with the rigidity of the use-right test, by stating that a “generous” reading would allow recovery of economic losses for a restaurant owner, real estate agent, and the furniture store operator whose businesses reside in the immediate vicinity of a spill. One need only examine Professor Goldberg’s list of hypothetical claimants to glean the overly exclusive nature of the use-right test. While the first five of the hypothetical claimants on Professor Goldberg’s list will easily be able to demonstrate actual use, none of them could establish any more than a right of access. Certainly, none of the hypothetical claimants could establish a right to exclude. Thus, even those claimants with established use, including potential claimants envisioned by Congress in enacting the OPA, would be unable to recover under the use-right test. The ships’ chandlers, beachfront hotels, and the barge owner are obvious examples of those who would likely not recover under a strict application of the use-right test. Should courts adopt the use-right test, application of it will, as Professor Goldberg concedes, deny recovery to

---

227 The trial court entered judgment for Mehdizadeh, holding that the “doctrine of agreed boundary” established the boundary line at the original fence, and awarded the ten-foot strip to Mehdizadeh for the restricted purposes of landscaping and recreation, with an easement to Mincer for light, air, and privacy.

228 The Court reiterated the elements of adverse possession and prescriptive easements, and that adverse possession results in ownership, whereas a prescriptive easement results only in the right to use the land of another for a specific purpose. The Court of Appeal concluded that the trial court erroneously granted Mehdizadeh an interest that amounted to adverse possession under the guise of a prescriptive easement, because it excluded everyone, including the Mincers, from entering or making any use of their property. The Court of Appeal acknowledged that the concept of an exclusive easement could exist under certain circumstances.

229 Professor Goldberg acknowledged that these commercial activities are very closely bound up with local economies that revolve around the use of resources and property that have been damaged. Professor Goldberg continued further by stating the following:

And there is some reason to suppose that Congress, acting with the Exxon Valdez spill very much in mind, was especially focused on the adverse economic effects of spills on the residents of shoreline communities physically affected by a spill. We also have seen that the common law tradition has been to allow for marginal expansions of liability to claims that, strictly speaking, fall outside the liability limits set by case law, yet constitute a reasonably well-defined and limited class. Given these considerations, it could conceivably be appropriate to interpret OPA generously to permit these claims. See 30 Miss. C. L. Rev. 335, 375-376.

230 See infra Section D.
many whose economic activities are bound to the local character of a community, but who cannot demonstrate exclusivity.

Of what consequence are the expectations of a claimant’s whose commercial activity builds and is integral to the character of a community affected by an oil spill? The rigidity of the use-right test offers them no hope of recovery under §2702(b)(2)(E). Adoption of the use-right test would fail to honor the commercial-based expectations of actual users of oil spill affected property or resources, because of their inability to demonstrate a right of exclusivity. Because §2702(b)(2)(E) was specifically intended for claimants who lack a recognized proprietary interest in oil spill damaged land or resources, to condition recovery on the claimant’s right to exclude essentially converts the cause of action created by §2702(b)(2)(E) into a law allowing a private taking by a Responsible Party. Professor Goldberg’s concession offers a policy reason why his own test should be relaxed in favor of a test not centered on the right of exclusivity. Ultimately, the logic underlying the use-right test would largely serve to re-import the Robins Dry Dock rule, and exclude claimants that have no traditional property right to exclude third persons, but who clearly rely upon and derive benefits from using oil-spill damaged land and resources. Congress sought to protect these claimants in enacting OPA §2702(b)(2)(E).

2. Professor Peterson’s Heightened “But For” Test

On the other end of the causation spectrum is Professor Peterson’s heightened “but for” test. Professor Peterson’s critique of Professor Goldberg’s “use-right” test is that it is unsupported by the legislative history of the OPA, and that the “use-right” test represents an overly limited construction of OPA’s causation requirements in order to craft an argument with “exclusionary power.” He argues that OPA merely imposes heightened “but-for” causation on parties suing for pure economic loss. Therefore, the relevant counterfactual is not simply, “but for this oil spill, would the loss have occurred?” but rather, “but for the fact that this oil spill caused damages to property and natural resources, would the loss have occurred?” It has been argued that Professor Robertson’s heightened “but-for” causation is fairer to potential claimants than Professor Goldberg’s use-right requirement on policy grounds. For example, a recent article offers the post-Exxon Valdez Benefiel case as a test of the efficacy of Robertson’s heightened “but-for” causation. The alleged injuries to the plaintiff gasoline consumers in Benefiel were losses occasioned by increased prices. It is argued that the losses in Benefiel would not have occurred in the absence of the Exxon Valdez oil spill, but that they probably would have occurred even in the absence of physical damage from the spill. The Benefiel case is somewhat self-serving; it is clear

---

231 The Fifth Amendment to the United States contains important protections against federal confiscation of private property. It states:

No person ......[shall be] deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Const. amend. V, sec. 2

The text of this clause seems to provide applicable protections to those with property interests short of outright ownership. The first prevents the federal government from depriving a person of property without due process of law. It applies to any deprivation of property, not just takings for public purpose. The second prevents the federal government from taking private property for private use, and the third requires payment of just compensation when property is taken for public purposes.

232 Following Professor Goldberg’s report, University of Texas Professor David W. Robertson published a response in the Mississippi College Law Review. Both professors published responses and replies.

233 David W. Robertson, The Oil Pollution Act’s Provisions on Damages for Economic Loss, 30 MISS. C. L. REV. 157, 175 (2011) (Professor Robertson accuses Professor Goldberg of taking an “overly narrow view of the legislative history”).

234 Id.

235 Robertson, supra note 20, at 168–69.

236 See Id. at 169.

237 Selby, supra note 20, at 553.

238 Id. (citing Benefiel v. Exxon Corp., 959 F.2d 805, 806 (9th Cir. 1992)). In that case, the plaintiffs were gasoline consumers who sought to recover for the increased price of gasoline in the wake of the Exxon Valdez oil spill.

239 Id. at 553.
that plaintiffs’ losses were the result of reputational damage rather than as a result of specific damage to property. The Benefiel case illustrates that judicially crafted exceptions can rule out claimants who cannot demonstrate a connection to any specific connection with damaged property or resources. It has been noted that Professor Robertson’s heightened “but-for” requirement would not allow for a nuanced distinction between more and less direct forms of causation, because it would forbid courts from exercising their discretion to exclude claims with only a distant connection to property or resources. Ironically, Professor Robertson’s heightened “but-for” cause requirement would also allow courts to exclude damages, which are directly caused by an oil spill, but result in no physical damage. In essence, the heightened factual cause requirement may allow for exclusion of claims that Professor Goldberg’s stricter use-right test may include.

To demonstrate the problems associated with bypassing an assessment of relational duties and focusing purely on causation, Professor Peterson posits a counterfactual-hypothesis using a theme park that loses money when the flow of visitors to Florida’s unbesmirched Atlantic beaches dwindles because of Macondo-induced “unease about traveling to Florida.” Professor Peterson argues that the appropriate “but for” question to ask whether the missing tourists would have stayed away with the Deepwater Horizon crisis itself having occurred in a “Gulf of Mexico long since so befouled by frequent oil and chemical spills as to have become essentially a dead zone for all purposes save mineral exploration.” Professor Peterson concludes that the losses “resulted from” the crisis, but they were not “due to [any] injury, destruction, or loss” of property or resources, so the claim would fail on the basis of §2702(b)(2)(E)’s factual causation requirement. If the oil spill caused no damage to any of the amusement park’s property interests or expectations, then, as a function of relational duties, no duty owed by the Responsible Party to the amusement park was breached, even if the oil spill were negligently caused. The amusement park example is not simple to resolve under Professor Peterson’s test despite Professor Peterson’s counterfactual-hypothesis. One need look no further than Palsgraf to be reminded that a claimant could simply trace the unbroken line of events that led to the losses and conclude with equal vigor that the losses, in fact, “resulted from” and were “due to” the oil spill. After all, the dissenting opinion and lower courts in the Palsgraf’s case employed a similar “proximate cause” analysis to find for Mrs. Palsgraf. Moreover, cases involving multiple intervening causes would prove unpredictable under Professor Peterson’s test.

Applying Professor Robertson’s heightened “but-for” causation test to Taira presents another illustration of the difficulties of precise application. Taira involved the allision of a barge with the Louisa swing bridge in Louisiana. The allision caused the barge’s cargo, a gaseous combination of propylene and propane, to be released into the atmosphere. Because of the chemical discharge, the Louisiana State Police ordered a mandatory evacuation of all homes and businesses within a certain radius of the release. Numerous business owners brought claims against the defendants for losses arising out of the accident and the subsequent evacuation. Predictably, the United States District Court for the Western District of Louisiana recognized that under existing Supreme Court and Fifth Circuit precedent,}

\[240\] See Robertson, supra note 20, at 173. Professor Peterson endorsed the idea of judicially crafted exceptions for claimants who are attempting to recover losses use to reputational damage. (“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 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.”)

\[241\] Selby, supra note 20, at 554.

\[242\] 30 Miss. C. L. Rev. 217, 222 (Citing Goldberg, supra, note 20, at 13.)

\[243\] \textit{Id.} In this counterfactual hypothesis, Professor Robertson argues that the Macondo has itself brought about no \textquotedblleft injury, destruction, or loss\textquotedblright{} of property or resources, because all of the damage was done long before.

\[244\] \textit{Id.}

\[245\] See \textit{State of La. ex rel Guste v. M/V TESTBANK, ETC.}, 752 F.2d 1019 (5th Cir. 1985) (en banc).

claims for economic loss unaccompanied by physical damage to proprietary interest were not recoverable in maritime tort. The Fifth Circuit rejected the claims of plaintiffs whose frozen seafood spoiled, because law enforcement authorities shut off electricity during the evacuation. Plaintiffs lost materials as a result of the electricity interruption. The court reasoned that the allision “did not physically cause the disruption in electrical power nor did it physically impact [the manufacturer’s] facilities.” Any damage suffered by the plaintiffs was caused by loss of electricity, “not because of contact with the barge, the bridge or the gaseous cargo.” While the Fifth Circuit rejected these claims, the district court argued the claims here were indeed foreseeable. After all, was it not the allusion that caused a predictable, unbroken chain of events leading to the loss of electricity? The district court believed so. In the opinion of the district court, the injuries suffered by the residents and businesses in the geographic area of the allision were just as foreseeable as the injuries suffered by the commercial fishermen in Oppen, because damage to the swing bridge would disrupt the only means of ingress and egress, effectively cutting off all means of transportation to and from the island. Applying the heightened “but-for” causation test, the claimants should easily survive the analysis. The problem, however, is that the same logic the Fifth Circuit used to dismiss these claims could still be used to dismiss them under Professor Robertson’s test. The use of the word “cause” can be qualified and interpreted as meaning directly or indirectly caused. As a result, judges can justifiably qualify the term “cause” to transform issues of fact into imprecise policy determinations of legal liability, effectively manipulating and obscuring the distinctions between duty and causation. Ultimately, the logic underlying the heightened “but-for” causation test would require analysis of numerous hypothetical counterfactuals, which could lead to arbitrary and inconsistent results.

Both the use-right test and the heightened “but-for” causation test fail to strike the proper balance between duty and causation: the use-right test creates a right that many deserving claimants will not be able to meet, while the heightened “but-for” causation test, by focusing twice on causation, ignores any real concept of relational duties and rights. Therefore, application of either test will likely result in unfair and inconsistent results. Somewhere in the middle exist fairer methods of identifying the nexus between economic loss and an oil spill.

3. The Commercial Needs Requirement

Given the clear intent to move away from the Robins Dry Dock rule, the uncontroversial portions of the OPA’s legislative history, and the absence of intent to abandon the harm within the risk (“HWR”) test, Attorneys Susan Molero Vance & Paul N. Vance suggested that that a §2702(b)(2)(E) claimant should have to demonstrate that its “business enterprise was so directly intertwined with the damaged property or resource that the claimant sustained immediate and predictable economic consequences” (hereinafter referred to as the “Vance standard”). Using this standard, Mr. Brendan Selby argued that the most precise interpretation of the nexus required by Congress is that the claimant must be deprived of the benefit of a specific real property, personal property, or natural resource that is reasonably necessary for the production or sale of the plaintiff’s good or service (hereinafter referred to as the “commercial needs

247 State of La. ex rel Guste v. M/V TESTBANK, ETC., 752 F.2d 1019 (5th Cir. 1985) (en banc) (citing Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927); State of La. ex rel Guste v. M/V TESTBANK, ETC., 752 F.2d 1019 (5th Cir. 1985) (en banc)).
248 Id. at 1024. (emphasis added)
249 Id.
250 In considering whether the claimants had sustained physical injury sufficient to survive the Testbank rule, the Fifth Circuit rejected the proposition that the presence of gasoline on property owned by certain claimants was sufficient to constitute property damage because the claimants had not shown that the gas had physically damaged their property or caused personal injury.
251 See, e.g., Selby, supra, note 20; Vance supra, note 20.
252 While this seemingly reasonable standard was offered with little discussion, the authors underlying belief that Congress intended to broadly protect individuals who rely in a fairly direct way on property or resources for their livelihood seems unobjectionable. See Susan Molero Vance & Paul N. Vance, supra note 20 at 133 (2010).
The commercial needs requirement has four elements. First, the damaged property or resource should be identifiable and specific. Second, the specific property or resource need not be directly damaged; the plaintiff need only have been deprived of some economic benefit from it. Third, claimants should be allowed to submit claims based on impairment of either production or sale. Fourth, to be “reasonably necessary” requires that the property or resource must be in some sense integral to (or “directly intertwined with”) the impaired commercial activity.

Indeed, the need for a well-articulated nexus is well justified. First, the legislative history suggests that courts should interpret the requirement that loss was “due to” physical injury using a flexible standard: the spill damaged property or resources that the claimant needed for his or her commercial activity. Second, the most plausible reading of the provision requires a connection between economic loss and specifically identifiable property. Third, in accord with the legislative history, the claimant need not have a proprietary interest in the oil damaged land or resource. While the commercial needs interpretation of the “Vance standard” is well justified and more inclusive than either Professor Goldberg’s use-right test or Professor Robertson’s heightened “but-for” causation test, its fourth element ("reasonably necessary/integral") presents an unnecessarily high and indeterminate hurdle for a §2702(b)(2)(E) claimant to overcome.

First and foremost, requiring claimants to prove that oil spill damaged land or a resource was “reasonably necessary/integral” to the claimant’s commercial activity suffers from operational inexactness. It is argued that, from a fairness perspective, requiring “integration” ensures that claimants with investment-backed expectations in properties or resources may recover, while those without such reliance may not. Mr. Selby derives his use of the term “integral” from Professor Robert J. Rhee’s use of the term “indispensable.” Professor Rhee’s use of the term “indispensable” was derived from assessing the relationship between a commercial fisherman and the sea. Is that the level of connectedness that Mr. Selby desires of all §2702(b)(2)(E) claimants? No. Mr. Selby seeks to lower the hurdle imposed by term “indispensable,” with his use of the term “integral.” Distinguishing one term from the other, however, is much more difficult than suggested, assuming it is even possible. Webster’s dictionary defines the term “integral” as “essential to completeness.” Webster’s dictionary defines “indispensable” as something not subject to being set aside. In other words, the subject lacks no aspect absolutely necessary to its function. To make the problem obvious, Webster’s dictionary lists the terms “integral” and “indispensable” as synonyms. Therefore, replacing one term with the other does little to distinguish the operational import of one term from the other. Viewing “indispensable” and “integral” as synonyms, Mr. Selby’s critique of Professor Goldberg’s “use-right” test immediately becomes applicable to the commercial use requirement:

---

253 See Selby, supra note 20 at 556.
254 Id. at 557 – 563.
255 Id. at 559, n.179.
256 Id.
257 Id.
258 Selby argues, “a property or resource is truly integral to a claimant’s good or service, then the commercial activity in question should be intentionally oriented around that property or resource.” Selby, supra note 102 at 559. (emphasis added)
259 In Professor Rhee’s article, he argues that tort law should protect assets indispensably integrated into the production function, irrespective of property rights or the entrepreneur’s ownership of the assets. Rhee, supra note 110.
260 Id.
263 Id.
An indispensability requirement would, somewhat paradoxically, be both too much like a bright-line rule and too difficult to apply. Is a tourist beach indispensable to a nearby hotel? Or would the uninterrupted accessibility of a beach be indispensable to a real estate agent whose listings are made up primarily of beachfront property?  

Moreover, to the extent that some difference can be discerned, the question then becomes one of degree: how integral is integral? Mr. Selby concedes that attempting to determine whether land or a resource is integrated into a §2702(b)(2)(E) claimant’s commercial activity could lead to gamesmanship, so he proffers that the damaged property or resource be “reasonably necessary” to the claimant’s commercial activities. Mr. Selby acknowledges that one could argue that a standard giving courts fairly wide latitude to admit claims based on their view of what is reasonably necessary may lead to over-inclusion. On the other hand, given the common law tradition of many jurisdictions denying pure economic loss claims, perhaps the more likely scenario is that courts will interpret “reasonable necessity” to mean indispensable, thus developing exclusionary case law for what was meant to be an inclusionary cause of action. At any rate, allowing courts more latitude does not necessarily lead to honest or better results.

Second, the “commercial needs” requirement necessarily requires examining the extent of the commercial activity’s integration with the land or resource; rather, than examining how the claimant commodified the land or resource. To use one of Mr. Selby’s examples, suppose an oil spill of equal magnitude to the Deepwater Horizon crisis occurs. Neither the beachfront hotel, nor any property it owns, sustains damage. The hotel is located near a public beach. As Mr. Selby notes, no economic loss arises from the hotel’s own particular right to obtain or use the nearby public beach and the injury does not interfere with the hotel’s right to use its property as a hotel but, perhaps, only as a profitable hotel. This example should fail both the use-right test and the commercial needs test. It should fail the use-right test for the reasons that Mr. Selby notes, but it should also fail for a more fundamental reason: regardless of whether the hotel can or cannot use the beach, the hotel has no right of exclusivity. It should fail the commercial needs test as well, because a hotel may not have “integrated” a nearby beach as such, but said beach may have been an important, though non-determinative, factor in the hotel’s location. Nevertheless, the local beach may have been incorporated in the hotel’s commercial activities as a perk or lure for its guests, relied upon as a feature by the hotel, but not integral to its operation, especially if there

Selby, supra note 20, at 562.

Mr. Selby acknowledges that the efficacy of his test depends on how strictly one defines indispensable, and that it is preferable to give courts more flexibility from the outset by simply requiring that the Courts may then clarify this standard through the evolution of case law. See Selby, supra note 20, at 562.

Id. Here, Selby acknowledges the argument that a standard giving courts fairly wide latitude to admit claims based on their view of what is reasonably necessary could create the kinds of problems that initially gave rise to the pure economic loss rule, but he claims that providing the structure of requiring demonstrable losses from a specific property, as well as demonstrating the necessity of that property for their commercial activity will provide courts with a good idea as to where to draw the proverbial line. Nevertheless, having a good idea where to draw the line does not remove the likelihood of indeterminate liability.

Id. at 560, n.183 (citing John C.P. Goldberg, Liability for Economic Loss in Connection with the Deepwater Horizon Spill, 30 MISS. C. L. REV. 335, 366 (2011) (Professor Goldberg cited this example as a potential §2702(b)(2)(E) claimants who should be allowed to recover under the “use-right” test, but Selby correctly notes it is the customers who use the beach, and the beach is open to the public.)

Professor Goldberg attempts to narrowly define the “right” element of his “use-right” test to mean having the traditional property right of exclusion. Professor Goldberg argues as follows:

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 amounts to an ownership or lease interest -- stands to recover… Moreover, although it seems likely that OPA was meant primarily to benefit persons with exclusive or near-exclusive rights to use particular property or resources damaged or rendered unavailable by a spill…

Goldberg, supra note 20, at 366-367(emphasis added).
other beaches relatively close by. In essence, it cannot be said that this hotel “reasonably needs” that particular local beach, or any beach at all.

Last, even if the commercial needs requirement were used precisely as designed, it would sacrifice claimants who clearly rely on and have commoditized oil spill damaged land or a resource in favor of claimants with a clearer commercial necessity. While prioritization may ultimately be desirable and quite necessary, excluding claims of those who commercially use a resource runs counter to the legislative intent and plain wording of §2702(b)(2)(E). Stated another way, the commercial needs requirement will have the effect of excluding some legitimate claims, rather than subordinating claimants with less severe losses (i.e. – reduced income) to claimants with more immediate needs (i.e. – total loss of income). A reasonableness test examining whether the claimant actually commercially used or relied on land or a resource would prevent the attrition that a requirement of integration allows.

C. Articulation of a Commercial Quasi-Property Rights Test for interpreting §2702(b)(2)(E)

The foregoing analysis illustrates the policy, analytic, and logistical shortcomings of the extreme positions of the interpretations of §2702(b)(2)(E) represented by Professors Goldberg and Peterson. Each of their tests misses the proper balance between relational duty and causation. A commercial “necessity” requirement also sets too high a hurdle. As noted throughout this Article, many courts and scholars argue that the OPA’s legislative history support the contention that Congress intended there to be a nexus between the economic loss and the damaged property. In litigation such as In re: Oil Spill there are undoubtedly a great number of claims that would inconsistently pass or fail both Professor Goldberg’s “use-right” test and Professor Robertson’s heightened “but for” test, as well as a commercial needs requirement. The best interpretation of §2702(b)(2)(E), given the OPA’s legislative history, case law is to require demonstration of commercial quasi-property right in oil spill damaged land or resource. To make this assessment, a §2702(b)(2)(E) claimant would have to demonstrate reasonable commercial use or reliance on specifically identifiable res. Thus, the commercial quasi-property right test is composed of three elements. First, the claimant must specifically identify the res or property used for the commercial activity. Second, the claimant must demonstrate actual commercial use or commercial reliance on the res. Last, the claimant must demonstrate “reasonable commodification” of the res.

First, a commercial quasi-property right requires identifying the boundaries of the res being endowed with the relational exclusionary significance. Specification derives from the need to tailor the interest involved with a high degree of precision because of the costs associated with over-inclusiveness. Moreover, when the exclusionary signal or directive is mediated entirely through the res, determining its boundaries thus assumes additional functional significance. In relation to tangible resources, defining the res poses few problems.

Second, commercial quasi-property right requires actual commercial use or reliance. This requirement has several benefits. First, it ensures that claimants are not making economic loss claims based on abstract or metaphysical connections to a res. For example, the “land-locked” Florida theme park that sees its profits decline because of a temporary drop in tourism to the Gulf region would fail the commercial quasi-property right, because, among other deficiencies, it could not demonstrate any commercial reliance, despite having a right of access. In addition, determining whether claimants were actually using land or a resource and relying on it for their commercial activity should easily weed out those whose losses are the result of reputational damage, because those claimants neither use, nor rely on the land or a resource. Moreover, commercial reliance does not penalize claimants who actively use but may not “need” or not have “integrated” the land or resource with their commercial activities.

Third, the reasonable commodification element inquires whether the commodification of the res is reasonable given the commercial activity? Commodification refers to the process by which something, which does not have an inherent economic value, is assigned a value and hence how market values can

\[\text{Goldberg, supra note 20, at 347 (proposing the amusement park example).}\]

\[\text{Further deficiencies include inability to specifically identify property that is relies upon commercially, and even if it could such commodification probably would be reasonable.}\]
replace other social values. Commodification describes a modification of relationships, formerly untainted by commerce, into commercial relationships in everyday use. This includes money itself and the natural environment, which are not goods or services, let alone commodities. The reasonable commodification element, derived from the relative hardship doctrine, is composed of three questions. First, the Responsible Party’s oil spill must have interfered with or caused interference with the claimant’s commercial use of or reliance on the res. To qualify as interference, the Responsible Party need not know that it has interfered or caused interference with the claimant’s commercial activity. Second, the Responsible Party’s oil spill must cause substantial injury or loss to the 2702(b)(2)(E) claimant’s commercial activity. Third, the Responsible Party’s oil spill must cause injury disproportionate to the cost of compensating the claimant. The Responsible Party bears the burden prove disproportionate compensation cost.

Ultimately, a determination of whether §2702(b)(2)(E) claimant possesses a commercial quasi-property right would be a faithful interpretation of OPA’s economic loss provisions. It honors Congress’s intent to provide reasonable compensation for a wide range of injuries to those with no traditionally recognized proprietary interest. It is also a fair and pragmatic way of conceptualizing a duty that gives courts structure and predictability, while protecting users of precious resources.

D. Application of the Quasi-Property Right Test to the Goldberg/Peterson Universe of Potential Pure Economic Loss Claimants

To demonstrate the practical utility of the Commercial Quasi-Property Right Test, it will be applied to the “Universe of Potential Pure Economic Loss Claimants” originally developed by Professor Goldberg and modified by Professor Peterson. Professor Goldberg’s “Universe of Potential Pure Economic Loss Claimants,” modified by the addition of claimant #2, is as follows:

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 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

---

272 Peterson, supra, note 20, 170-173. Professor Peterson uses slightly modified list of Professor Goldberg’s list of “Universe of Potential Pure Economic Loss Claimants.” The original list was modified by adding Claimant #2, and by numbering each claim. (Professor Goldberg’s original list can be found at: 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, reprinted in 30 Miss. C. L. Rev. 335, 346 -349 app. (2011).)
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 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.
1. **Claims Included by Section 2702(b)(2)(E)**

Clear classes of compensable claimants are commercial fisherman, beachfront hotel and its employees, and barge owner. First, the commercial fisherman would clearly satisfy the quasi-property right test. The commercial fisherman uses the sea. The sea is, as Professor Rhee argued and other courts have found, indispensable to the commercial activity. This example requires little analysis, and such an interest could be protected as a matter of law. Similarly, ships' chandlers rely on and use the same resources as commercial fisherman; moreover, with them, commercial fisherman would have difficulty carrying their essential businesses. The ships' chandlers' commodification of the sea and surrounding resources is a natural aspect of commercial fishing. So long as they can demonstrate a right of access to oil spill damaged property or resources, they should be allowed to recover.

Second, the beachfront hotel would also recover using the commercial quasi-property right test. As a public beach, all have access. The beachfront hotel can demonstrate how the beach is important to its business, because its customers frequently use it. They can demonstrate actual commercial use or commercial reliance on the *res*. In all likelihood, the beachfront hotel located itself near the beach to take advantage of it as a perk for its guests. It is difficult to imagine that this would not be a reasonable commodification of a nearby public beach. In all likelihood, the farther or more inaccessible the public beach is from a hotel, the more unreasonable the commodification of it will be.

Along similar lines, the beachfront hotel’s employee’s reduction in wages should be recoverable. He has a right of access, and his commercial activity uses and relies on the *res*. In all likelihood, the beachfront hotel’s employee is also specifically identified in OPA’s legislative history as the kind of claimant who has suffered economic loss “due to” property or resource damage or loss.

Third, the barge owner can also specifically identify the *res* or property it uses for the commercial activity in this example. The barge owner clearly possesses a right of access; and actually uses the *res* for commercial activity. The “reasonable commodification” element is clearly met as well, because the barge is similarly situated to the commercial fisherman. This case is analogous to *People Express Airlines, Inc. v. Consolidated Rail Corp.* and the *Oppen* cases where access to property has been restricted or temporarily lost. The fact scenarios in the barge owner example, *People Express Airlines, Inc. v. Consolidated Rail Corp.*, and *Oppen* already present more like consequential loss, rather than economic loss cases when the commercial quasi-property right test is applied.

Fourth, the dockside restaurant located in a Gulf seaport may be able to recover. As a threshold matter, the dockside restaurant would have to prove lost profits, not that its regular customers have not patronized the restaurant. The dockside restaurant has a right of access and, arguably, commercially relies on the *res*. Commercial reliance here could be measured through the quantum and quality of patronage from the oil spill damaged property. The owner should also be able to identify specific oil spill damaged property. Is the commodification of the *res* reasonable given the commercial activity? Many restaurants locate in areas to accommodate specific local populations, without which there would be little purpose in the restaurant operating.

Fifth, real estate agents whose listings are made up primarily of beachfront properties in an area of the Gulf that has been contaminated by the spill should be allowed to recover. Once sold for a loss, the real estate agent should have a clear right of recovery using the commercial quasi-property right test, if it can be established that the oil spill caused the drop in value.

Sixth, the small furniture store seems similarly situated to the dockside restaurant. As a public beach, all have access. The woodworker can demonstrate how the beach is important to its business, because its customers frequently use it. The woodworker may be able to demonstrate actual commercial reliance through the quantum and quality of patronage from the oil spill damaged property. In all likelihood, the woodworker also located her furniture store near the beach to take commercial advantage, whether the commercial activity is a reasonable commodification of the beach, and how the furniture store would demonstrate losses remain open questions.

Seventh, the OPA clearly covers injury caused by substantial threat of a discharge of oil, and official government and scientific reports indicating such a threat should suffice. So long as the beachfront inn
can demonstrate right of access and actual commercial use or reliance on the res, then it should recover similar to the beachfront hotel.

Last, the fireworks store may have difficulty recovering under the commercial quasi-property right test. While it may be able to prove that it has a right of access, it does not actually use any particular Gulf beach. Even if it can be said to rely on a specifically identifiable Gulf beach, it will have difficulty meeting the “reasonable commodification” element given how the fireworks store has supposedly commoditized the beach. It may not be considered reasonable to commercially rely on property 150 miles away from the business.

2. Claims Excluded by Section 2702(b)(2)(E)

Claimants 11-17 will fail to satisfy the elements of the commercial quasi-property right test. As suggested by Professor Peterson, claimants 16 (the boycotted Boise gas station) and 17 (the New York caterer) should be dismissed because, it is unlikely that these claimants could even survive even a “but-for” causation test. Moreover, neither claimant commercially actually uses nor relies on any oil spill damaged land or resources. Furthermore, neither claimant will be able to demonstrate reasonable commoditization of any res affected by an oil spill.

Claimants 11-15, inclusively, the geographically-distant tour boat operator, the geographically-distant theme park, Nevada resort, Connecticut snorkel seller, Arizona restaurant, would also fail the commercial quasi-property right test. There are clear reputational concerns affecting the economic interests of these claimants. First, the tour boat operator’s business, in the hypothetical given, has lost business because of popular misimpressions about the scope of the spill, not because of lost commercial access to the oil spill affected res. Moreover, there has been no reasonable commoditization of any res used by the tour boat operator; there has only been generalized reputation damage to some unidentifiable oil spill affected res.

Second, the amusement park in a land-locked portion of central Florida similarly does not commercially use or rely upon any oil spill affected res. Even though some of its customers combine a trip amusement park with a beach vacation on Florida's Atlantic Coast, the amusement park cannot be said to have reasonably commoditized any beach affected by an oil spill. The loss in business is clearly reputational in nature.

Third, the Nevada resort that regularly hosts an association of Gulf-area fishermen will also not recover under the commercial quasi-property test. The Nevada resort does not use or rely on any oil spill affected res; rather, it relies on the Gulf-area fishermen association. Finally, there has been no commoditization of any oil spill affected res, let alone any reasonable commoditization.

Fourth, the snorkeling importer will also not recover under the commercial quasi-property test. The snorkeling importer resort does not use or rely on any oil spill affected res. One of the fatal problems with the snorkeling importer’s claim will likely be an inability to identify any oil spill affected res from which it derives profits. Similar to the Nevada resort, there has been no commoditizations of any oil spill affected res, let alone any reasonable commoditization.

Fifth, the Arizona seafood restaurant will also fail the commercial quasi-property test. The restaurant, unless it is serving some product unique to the Gulf of Mexico, could not demonstrate commercial use or reliance on any specifically identifiable oil spill affected res, because it could have mitigate its potential losses through other alternatives. Further, it is clear that the reputational fears have caused the losses. The reasonableness of the commoditization would be in doubt as well, because of the seafood restaurant’s ability to avoid its losses.

Peterson, supra note 20, at 173. Here Professor Peterson argues that 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.
Conclusion

This Article proposes a new relational duty to clarify the proper nexus between Responsible Party and a potential claimant in a §2702(b)(2)(E) case. The recent litigation arising from Deepwater Horizon crisis will not be an isolated incident. As deepwater oil drilling increases, so does the likelihood that another catastrophe will occur. The commonality of actors present and morally, if not legally, responsible for the Exxon-Valdez and Deepwater Horizon crises illustrates the need for a strong and clear deterrent to negligently caused oil spills. Related to deterring a Responsible Party’s negligently caused oil spill, Congress, in passing the Oil Pollution Act of 1990, clearly envisioned broad recovery for oil spill affected businesses and commercial activities.

In the In re: Oil Spill case, confusion relating to how to apply the lofty policies underlying §2702(b)(2)(E) led the Court to view these claims as being for pure economic loss. In categorizing these claims as being for recovery of pure economic losses, the Court inevitably doomed many claims to the fate of plaintiffs pursuing maritime common law recovery for economic losses. Thus, following the lead of existing case law, the August 26, 2011 In re: Oil Spill order held that, §2702(b)(2)(E) claimants in the Deepwater Horizon litigation, except commercial fishermen, had no available remedy. The Order, however, found that OPA expanded the scope of compensable claims beyond the pure economic loss rule. The legal conundrum has become how to coherently move beyond the pure economic loss rule, as Congress desired, when common law has been hostile to the kind of recovery covered by §2702(b)(2)(E)?

The best solution is to view §2702(b)(2)(E) as requiring claimants to demonstrate that they have commercial quasi-property right that has been damaged by a Responsible Party’s negligently caused oil spill. Viewing §2702(b)(2)(E) claimants like the beachfront hotel, envisioned in the above analysis, as possessing a commercial quasi-property right brings cases like these more in line with established consequential loss cases, where physical damage causes economic losses. Case law on consequential loss would allow courts a more analogous basis from which to assess the relational duties between the Responsible Party and claimant. In addition, familiar understandings of causation can be imported to allow better analysis of §2702(b)(2)(E) claims.

This Article evaluates three competing interpretations of OPA’s economic loss provision to demonstrate the advantages of the commercial quasi-property right test. As argued above, the use-right test relies upon a claimant’s right physically to obtain or use property or resources that are damaged or lost because of an oil spill. Beyond the ambiguity in one its core concepts, the term “right,” such a test would inconsistently prohibit recovery for economic loss, and is inconsistent with the plain text of the §2702(b)(2)(E), which does not require any recognized proprietary interest. On the other end of the spectrum, is the heightened “but-for” test. While focused on the cause of the claimant’s economic loss, this test would operate unpredictably and without clear regard for the relational duties necessary for coherent application of tort principles, similar to the dissenting opinion in the Palsgraf case. Somewhere between the Professor Goldberg’s “use-right” test and Professor Robertson’s the heightened “but-for” test is Mr. Selby’s commercial use requirement. More workable and fairer than these other proposed tests, this test still relies on the backdrop of the economic loss rule, even though it is derived from Professor Rhee’s production theory, which categorizes the commercial fishermen exception as akin to consequential loss cases. The implication of mismatching the concepts underlying Professor Rhee’s production theory with Mr. Selby’s commercial use requirement prevents a coherent application of the commercial use requirement test, because the commercial use requirement draws on the common law of pure economic loss. Importing an integration requirement makes sense for commercial fishermen, as there is no substitute. However, imposing a requirement of integration on dissimilar commercial activities, even one supposedly softened by the element of “reasonably necessary” imposes a high standard not supported by the plain language of §2702(b)(2)(E) or the OPA’s legislative history.

Finally, this Article suggests that §2702(b)(2)(E) loss claimants show that the Responsible Party’s oil spill deprived them of the commercial quasi-property right to real property, personal property, or a natural resource. A commercial quasi-property right test focuses on the relational duties between the

274 Goldberg, supra, note 20, at 366.
Responsible Party and potential claimant. Furthermore, such a test could draw on established case law, would require that §2702(b)(2)(E) loss claimants show that the Responsible Party’s oil spill deprived them of the commercial quasi-property right to real property, personal property, or a natural resource.

Accepting modern economic realities that many reasonable commercial interests develop around areas like the Gulf of Mexico, the fact that deepwater drilling is likely to increase, and that catastrophes like the Exxon Valdez and Deepwater Horizon crises will reoccur was the motivation for Congress passing the OPA. Section 2702(b)(2)(E) offers courts the opportunity to contextualize and harmonize the commercial fishermen exception case law with oil spill related consequential loss case law, while firmly developing new case law for commercial loss claimants. A commercial quasi-property right would produce equitable compensation and deterrence in large-scale litigations like the Deepwater Horizon MDL, and should lead courts to considering suitable §2702(b)(2)(E) claimants as possessing a right analogous to a property interest insofar as the Responsible Party’s negligent oil spill damaged a claimant’s reasonable commercial use or reliance on property or resources. In these cases, unrecognized at common law, courts should protect reasonable commercial activities using or relying on property or resources, regardless of actual ownership to actualize the policies underlying the OPA.