OPA and Economic Loss: A Reply to Professor Robertson

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The Oil Pollution Act ("OPA") authorizes claims for pure economic loss—claims for lost profits that do not result from personal injury to the claimant or damage to property owned by the claimant. The question is: Which claims? The statute specifies that "any claimant" may obtain compensation for economic loss from a party responsible for an oil spill, but only if the loss is "due to . . . injury, destruction, or loss of real property, personal property, or natural resources" that "result[s] from" a discharge of oil.[1] The report that I prepared ("the Report") for the Gulf Coast Claims Facility ("GCCF") maintains that this language is best understood to authorize recovery for any person who suffers economic loss because an oil spill has interfered with his or her ability to use property or resources that he or she has a particular right to put to commercial use.[2] For example, commercial fishermen who are prevented by a spill from fishing, and thereby lose revenue or wages, stand to recover from a party responsible for the spill—these are losses "due to . . . injury, destruction, or loss of . . . natural resources" that "result from" a spill.[3]

The Report's analysis of OPA has now earned the scrutiny of Professor Robertson, one of our nation's leading admiralty law scholars. In his view, the Report is deeply flawed—wrong generally and wrong in most of its particulars. Readers can judge for themselves, but I stand by it. None of the major objections raised by Professor Robertson are sound. In addition, although he claims to offer a more principled and more faithful 'reading of OPA, it is neither.

I. Preliminaries

Before turning to the merits, I will respond briefly to Professor Robertson's efforts to impeach the Report and its author. I also wish to acknowledge a minor error in the Report. I am grateful to Professor Robertson for pointing it out, though he vastly overstates its significance.

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* Professor, Harvard Law School. Thanks to Erin Bachman and the Mississippi College Law Review for inviting this response and, once again, to Deepa Alagesan, Morgan Goodspeed, Andrew Kaufman, Kostya Lantsman, and Benjamin Mundel for very helpful research assistance. Any remaining errors are mine.

1. 33 U.S.C. § 2702 (2011).

2. John C.P. Goldberg, Liability for Economic Loss in Connection with the Deepwater Horizon Spill 7 (Nov. 22, 2010), http://www.gulfcoastclaimsfacility.com/Goldberg.Memorandum.of.Law.2010.pdf, *reprinted in* 30 Miss. C. L. Rev. 335 app. (2011).

3. *See* 33 U.S.C. § 2702.

A. The Report is Not A Litigation Document

The tone of Professor Robertson's critique demonstrates that he is, in this instance, writing as much as a litigation consultant as an academic.[4] Thus, he wastes no time attempting to impeach the Report on grounds of bias. Specifically, he insinuates that I was hired by Kenneth Feinberg, Administrator of the GCCF, to provide "assistance" to Mr. Feinberg's "quest" [for] "legal principles that might justify the exclusion of [certain] economic loss claimants."[5]

I was indeed retained by Mr. Feinberg. Additionally, the federal judge overseeing the multi-district litigation that has arisen out of the spill has ruled that Mr. Feinberg cannot claim to be "fully independent" of BP."[6] It is nonetheless false to suggest that I was charged with the task of identifying grounds for limiting payouts by the GCCF. I was asked to prepare a memorandum interpreting the scope of liability for economic loss under OPA, as well as federal admiralty law and state tort law. At no time did Mr. Feinberg assert or imply that my job was to construe the law in a manner that would assist him in finding ways to exclude claims. If the best interpretation of OPA entailed a limitless domain of economic loss liability, then that is the domain that the Report would have described.

A moment's reflection on the context in which the Report was prepared and issued reveals that the occasion did not call for an advocacy document. Mr. Feinberg wanted to know—as much as one can know prior to a definitive judicial resolution—the prospects facing different categories of economic loss claimants. He would hardly have benefited from receiving a skewed report. Given the high stakes and the degree of scrutiny that the Report was destined to receive, a result-oriented analysis would rapidly have been exposed as such and would have undermined Mr. Feinberg's efforts to convince claimants that the Fund presents a reasonable alternative to litigation. The Report's approach to the problem of economic loss liability is academic, not adversarial. Its analysis and conclusions should be engaged on the merits, not attacked indirectly through allegations of bias.[7]

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4. David Robertson, *The Oil Pollution Act's Provisions on Damages for Economic Loss*, 30 MISS. C.L. REV. 157, 157 n.* (2011) (acknowledging that Professor Robertson has been retained as a consultant to plaintiffs' lawyers suing BP). Although Professor Robertson suggests that I have tailored my views of OPA to help the GCCF achieve its purported goals, I would like to make clear that I make no such claim about Professor Robertson. I believe that his critique reflects his sincere views as to the best interpretation of OPA, just as the Report reflects mine. Here I am merely noting the strident tone of his critique, including its eagerness to engage in the sort of impeachment tactics that are characteristic of aggressive litigation and less characteristic of academic discourse.

5. Robertson, *supra* note 4, at 163. This insinuation goes along with Professor Robertson's assertion that the Report is the work of a "conjurer" who has deliberately employed trickery to bestow plausibility on a blatant misreading of the law. *See infra* text accompanying notes 8–10.

6. Transfer Order at 8, *In re*: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179 (E.D. La. Feb. 2, 2011), *available at* http://www.laed.uscourts.gov/OilSpill/Orders/222011OrderonRecDoc912.pdf.

7. Lest the foregoing remarks be misconstrued, I should make clear that I am not claiming for myself some special capacity for impartiality or objectivity, nor some sort of invincibility to error. (As to the latter, *see infra* text accompanying note 11.) I mean only to stress that the Report, contrary to

B. *Of Conjuring*

Professor Robertson ascribes to the Report a litany of interpretive errors. Among other things, it is said to insert words into OPA that the statute does not contain, to misuse legislative history, to misstate OPA's common law background, and to ignore the policy concerns that undergird OPA. One might have thought that an effort at statutory interpretation this fantastically inept would wear its falsity on its sleeve—these alleged errors are hardly subtle—and yet Professor Robertson concludes with an odd concession. The Report's analysis, he says, carries an "impressive plausibility."[8] So, now we have a puzzle. How can an exercise in statutory interpretation that is so miserably wrongheaded manage to achieve plausibility? The answer provided is that the Report employs the tricks of a "conjurer" and a "magician."[9] It is only my alleged invocation of these dark arts that permits an embarrassingly deficient bit of statutory interpretation to appear credible.

Criticisms of this sort are insidious because they are structured to resist refutation.[10] Perhaps the best I can do under these circumstances is to invoke Ockham's Razor—the idea that, as between a convoluted and a simple explanation, the simple one is usually better. In this instance, the thing being explained is the Report's apparent plausibility. Here are two possible explanations. The first is Professor Robertson's; the second is mine.

> (1) The Report's interpretation of OPA is utterly implausible but appears to be plausible because of the author's use of magic tricks.
>
> (2) The Report's interpretation of OPA appears to be plausible because it is plausible.

Ockham's Razor, not to mention common sense, favors the adoption of the second explanation.

C. *Erratum*

Professor Robertson identifies an error in footnote 42 of the Report.[11] The footnote correctly states that Section 2704(c)(1) of OPA uses the phrase "proximately caused," and that this usage stands in contrast to Section 2702(b)(2)(E), which, in specifying terms of liability for economic loss,

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Professor Robertson's suggestion, cannot fairly be characterized as a litigator's brief on behalf of GCCF or BP.

8. Robertson, *supra* note 4, at 202.

9. *Id.* at 196, 199 n.207.

10. Were I to offer a seemingly plausible rebuttal to Professor Robertson's charges, the plausibility of that rebuttal could be dismissed as just another bit of conjuring.

11. Robertson, *supra* note 4, at 186–87.

does not use that phrase.[12] However, the footnote then erroneously asserts that Section 2704(c)(1) invokes the language of proximate cause in defining circumstances under which an otherwise responsible party can avoid liability.[13] Section 2704(c)(1) does not specify grounds for liability avoidance, rather it identifies circumstances in which a responsible party, because of its own fault in contributing to a spill, is denied the benefit of the liability caps identified in Section 2704(a). Here, the Report mistakenly conflates Section 2704(c)(1) with a different OPA provision, Section 2703(a).[14] Section 2703(a) does define circumstances—for example, an act of God—that permits a responsible party to avoid liability, but it does *not* use the phrase "proximately caused." Instead, it employs yet another variant on causal language. It says that there will be no liability for a spill "*caused solely by*" an act of God" and certain other intervening events.[15]

Having confessed error, I reject entirely Professor Robertson's effort to make a mountain out of a molehill. He says that the conflation of Sections 2704(c)(1) and 2703(a) "robs . . . the remainder of [the] footnote of intelligibility."[16] It doesn't. To see that this is so, one need only substitute for the erroneous second sentence of footnote 42 the following accurate sentence: "It is true that another OPA provision—Section 2704(c)(1)—employs the phrase "proximately caused" in specifying the circumstances in which a responsible party loses the benefit of otherwise applicable liability caps." Making this change takes away nothing from the ensuing and principal point, which is that OPA's explicit articulation of a two-layer causation requirement for claims of pure economic loss defeats an inference that might otherwise be drawn from the presence of "proximate cause" language in Section 2704(c)(1) and its absence in the statute's economic loss provisions. Were OPA worded differently—i.e., were it not *expressly* to connect recovery for economic loss to injury to property or resources resulting from a spill—a canon of construction drawn from the Supreme Court's *Russello* decision might permit an inference about the breadth of economic loss liability from the fact that Section 2702(b)(2)(E) lacks "proximate cause" language, whereas another nearby provision—Section 2704(c)(1)—contains it. But, there is no occasion for such an inference because Sections 2702(a) and 2702(b)(2)(E) together set an express limitation on liability beyond proof of an actual causal connection between an oil spill and economic loss.[17]

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12. GOLDBERG, *supra* note 2, at 20 n.42; *see* 33 U.S.C. § 2704(c)(1) (stating that a responsible party cannot obtain the benefit of liability caps for a spill "proximately caused by," among other things, that party's "gross negligence or willful misconduct").

13. GOLDBERG, *supra* note 2, at 20 n.42.

14. *Id.* at 20 n.42; *see* 33 U.S.C. § 2703(a) (stating that no liability will attach to a spill that is proven to have been "caused solely by an act of God, an act of war, [or] an act or omission of [certain] third part[ies]").

15. 33 U.S.C. § 2703(a) (emphasis added).

16. Robertson, *supra* note 4, at 186.

17. Congress used multiple variants of causation language in several adjacent OPA provisions. *See* 33 U.S.C. § 2702(a) ("result from"); 33 U.S.C. § 2702(b)(2)(B) ("resulting from"); 33 U.S.C. § 2702(b)(2)(D), (E) ("due to"); 33 U.S.C. § 2703(a) ("caused solely by"); 33 U.S.C. § 2703(b) ("caused

II. Interpreting OPA's Economic Loss Provisions

A. *OPA's Approach to Economic Loss Liability*

As noted previously, OPA specifies that damages for economic loss are recoverable if those losses are "due to . . . . . .injury, destruction, or loss of real property, personal property, or natural resources" that "result[s] from" an oil spill.[18] Professor Robertson maintains that the Report's fundamental error resides in its insistence that the words "due to" must be construed to mean "proximately caused by." This, he suggests, violates ordinary English usage.[19] The ordinary meaning of the phrase "due to," he says, is "[actually] caused by," not "proximately caused by."[20]

It is not obvious that Professor Robertson can claim the advantage of closer adherence to ordinary usage. As H.L.A. Hart and Tony Honoré pointed out long ago, standard English phrases like "due to" and "caused by" quite often commingle notions of actual causation with limiting principles of the sort that courts often invoke under the heading of "proximate cause."[21] Imagine a newscast reporting that a plane crash was "due to" pilot error. To focus on pilot error is to single out, in the context of an inquiry into responsibility, a particularly salient precipitating event from an infinite set of causal antecedents. Hence we would think it odd if the newscast asserted that the crash was "due to" the Wright Brothers' efforts to develop powered flight, even though those efforts presumably also count as an actual cause of the crash. In law and ordinary conversation, when the concern is to attribute responsibility, the phrase "due to" tends to isolate normatively significant necessary conditions, and in that respect carries with it proximate-cause-like refinements.

Irrespective of the force of the foregoing observation, Professor Robertson's objection fails for a more basic reason. It is a red herring. The

by"); 33 U.S.C. § 2704(c)(1) ("proximately caused by"). For this reason alone, it is unrealistic to treat the appearance of one or another of these different phrases as in-and-of-itself reflecting a carefully considered policy choice. Instead, one must construe these phrases in the context of the sections and clauses in which they appear, which is exactly what the Report does. Indeed, as discussed below, and contrary to Professor Robertson's suggestion, the Report's analysis does not hinge on a claim that the proper way to read OPA is to substitute the phrase "proximately caused by" for the phrase "due to" in Section 2702(b)(2)(E). *See infra* text accompanying notes 18–37.

In a related argument, Professor Robertson maintains that the Report's reading of Section 2702(b)(2)(E)'s "due to" clause as limiting recovery for economic loss to interferences with use-rights is defeated by the more explicit recognition of a use-right limitation in a nearby provision, namely Section 2702(b)(2)(C), which authorizes recovery for "loss of subsistence use of natural resources." Robertson, *supra* note 4, at 183–84. There seems little basis for drawing this inference from this contrast. Indeed, as noted in the Report and below, there is evidence that Congress understood these provisions to parallel one another precisely by virtue of responding to interferences with use-rights. *See* Goldberg, *supra* note 2, at 34 (observing that this parallel is explicitly drawn in the 1990 Senate Report on OPA); *see also infra* text accompanying note 42 (discussing the possible significance of the excision from prior bills a threshold level of interference with use-rights).

18. 33 U.S.C. § 2702.

19. Robertson, *supra* note 4, at 168.

20. *Id.*

21. H.L.A. Hart & Tony Honoré, Causation in the Law 68 (2d ed. 1985) (noting that "the various causal notions employed for the purposes of explanation, attribution of responsibility, or the assessment of contributions to the course of history carry with them implicit limits . . . ").

Report does not claim that the words "due to" in Section 2702(b)(2)(E) must be interpreted to mean "proximately caused by." Rather, the Report's claim is that OPA's test for economic loss liability, *taken as a whole*, sets something akin to a proximate cause limitation on liability.

As noted in the Report, OPA could have been written so as to authorize recovery by any claimant for all economic losses resulting from a discharge of oil. But, it was not. Instead, it authorizes recovery of damages by any claimant for economic loss that "*result*[*s*] *from*" "*a discharge of oil*" *and* that is "*due to the injury*, *destruction*, *or loss of . . . property or natural resources*."[22] Professor Robertson quietly concedes that the interpreter is required to give some meaning to both requirements,[23] and the latter requirement makes clear that economic loss, to be recoverable, must be linked in some way to the occurrence of property or resource loss or damage.

The Report entertains two possible renditions of this link. The first posits that the connection is established as soon as an oil spill results in *any* property or resource damage or loss—any at all. Once this first bit of damage or loss happens, we are off to the races and anyone who can prove having suffered economic loss because of the spill can recover. Such a reading is untenable because it effectively reads the "due to" clause out of the statute.[24] The Report then maintains that it is vastly more plausible to suppose that Congress meant the "due to" clause to authorize liability for economic loss on terms that track, and perhaps extend beyond, the most expansive versions of such liability found in admiralty law and state tort law—namely, economic loss predicated on a loss of, or injury to, property or resources that the claimant had a right to use, but neither owned nor leased.[25] Again, this is not a claim about the meaning of the phrase "due to." It is a claim about the meaning of OPA's two-layer causation requirement.

Professor Robertson purports to identify a third reading of OPA's economic loss provisions, one supposedly situated between the two just described.[26] On this reading, OPA would permit recovery for economic loss for any instance in which property or resource damage or loss resulting from a spill functions as a necessary condition for the occurrence of the economic loss. To grasp this reading, we can consider how it applies to the hypothetical oil spill discussed in the Report, in which a company ("Oil Co.") is posited to be responsible for "a large discharge of oil in the Gulf region" and is sued by sixteen imagined claimants.[27] Professor Robertson's

22. 33 U.S.C. § 2702.

23. Robertson, *supra* note 4, at 197 n.198.

24. GOLDBERG, *supra* note 2, at 19 ("[I]t would be exceedingly odd to suppose that Congress meant to build the statute's liability provisions for economic loss around the theoretical but vanishingly small probability of a spill that causes economic loss while causing no harm to, or loss of, property or resources.").

25. *Id.* at 20.

26. Robertson, *supra* note 4, at 199–201.

27. GOLDBERG, *supra* note 2, at 12–14.

proffered reading of OPA invites the following inquiry with respect to each claim.[28] Assume, counterfactually, that the Oil Co. spill did not generate any loss or damage to property or natural resources. Now ask, would the claimant in question still have suffered economic loss? If the answer to this question is "no," then the economic loss is "due to" the property damage or loss and is recoverable. If the answer is "yes," then the economic loss is *not* "due to" the property loss or damage and is not recoverable.

For example, hypothesized claimant C, a commercial fisherman who is idled by the Oil Co. spill, can readily satisfy this test. Had there been no property and resource damage or loss, there would have been no loss of fish. Because this damage or loss was necessary for the occurrence of C's economic loss, C's lost profits were "due to" damage to, or loss of, property or resources. By the same reasoning, W, a local shop owner who relies on fishermen as customers will be able to recover. In contrast, Professor Robertson suggests that G, the owner of a franchised Oil Co. gas station in Idaho who loses business because of a boycott prompted by the spill, (probably) will not recover.[29] Although the spill itself served as a necessary condition for G's economic losses—no spill, no boycott, no losses—the damage to or loss of property and resources did not. (Even absent such loss or damage, Professor Robertson says, the spill itself would have generated a boycott and attendant losses.)[30] And L, the caterer who loses profits because of budget cutbacks at Oil Co.'s New York headquarters, also (probably) will not recover. According to Professor Robertson, it is likely that Oil Co. would have cut back on its use of catering simply because of the spill's freestanding "reputational effects."[31]

Professor Robertson's proposed alternative reading of OPA's economic loss provisions is untenable. In fact, it turns out to be but a variant on the interpretation already exposed as inadequate by the Report. Here we must again pay close attention to OPA's language, and in particular Section 2702(b)(2)(E)'s reference to recovery for economic losses due to the destruction or loss of property *or natural resources*. Keeping this last sub-clause in mind, let us revisit the imagined claims of G and L. Under Professor Robertson's reading of OPA, each can recover from Oil Co. if each can show that profits would not have been lost had the spill caused no destruction or loss of property and no destruction or loss of natural resources. Professor Robertson supposes that neither G nor L will be able to make this showing, but he is wrong about his own test. Again, it instructs us to imagine, counterfactually, a spill causing *no* damage to, or loss of, property *or* natural resources. What manner of spill is this? The answer, of course, is a spill with a very modest impact, for only a very modest spill is

28. Robertson, *supra* note 4, at 173.
29. *Id.*
30. *Id.*
31. *Id.*

one that will result in no loss of, and no damage to, natural resources including clean water and animal and plant life onshore or offshore.[32] And yet a profoundly uneventful spill of this sort is just the sort of spill that is highly *unlikel*y to cause the sort of freestanding "reputational loss" that would induce a boycott of a local gas station far removed from the scene of the spill, or a cutback in Oil Co.'s use of catering services at its corporate headquarters.[33]

Once we take seriously OPA's actual language and plug it into Professor Robertson's proposed framework, Section 2702(b)(2)(E)'s "due to" clause collapses into Section 2702(a)'s "result from" clause. Insofar as G, L, and perhaps any other claimant will be in a position to prove *any* economic losses caused by a spill, they will be in a position to establish that these losses were actually caused by damage to, or loss of, property or natural resources. Overwhelmingly—perhaps exclusively—the instances in which there will be no liability for economic loss will be those instances in which there is no economic loss at all. Conversely, a spill that does enough damage to property or resources to cause any economic loss at all will be a spill that generates liability for *all* such loss.[34]

The same point can be made by consideration of a different scenario. Suppose that a discharge of oil from one of Oil Co.'s wells happens to destroy particularly valuable property, and that, as a result, Congress and the President enact onerous new regulations on drilling. (We can even suppose that the legislation includes findings making clear that the property damage is what spurred Congress to action.) As a result, other oil companies experience substantially lower profits from their drilling operations than they would have earned in the absence of such regulations. On Professor Robertson's reading of OPA, these other companies ought to be able to recover from Oil Co.;: 'its spill resulted in property damage without which their

32. As noted in the Report, "natural resources" is a defined term in OPA that includes 'land" and "water" generically. GOLDBERG, *supra* note 2, at 19.

33. It is vital to recognize that, under the terms of Professor Robertson's test, G and L should be denied recovery only if their losses are attributable to reputational effects *that operate independently of property or resource loss or damage* resulting from the spill. By contrast, if the occurrence of property or resource damage or loss is necessary to bring about the reputational harm that in turn induces the boycott or the reduction in Oil Co.'s demand for catering, then G's and L's losses would be "due to" (i.e., actually caused by) the property or resource loss or damage, and hence recoverable under his interpretation of OPA.

34. At a minimum, Professor Robertson's approach asks a great deal, and probably too much, of the judicial system by inviting endless case-by-case speculations as to which economic losses might have been incurred had a given spill not been accompanied by property or resource loss or damage. Because he refuses to see principled limits in OPA's economic loss provisions, Professor Robertson can only identify evidentiary grounds for denying economic loss claims. Thus, the most he can say about the claims of G and L is that they "probably" will fail because G and L probably will not be able to prove satisfactorily that they would have suffered economic loss had Oil Co.'s spill not resulted in loss of, or damage to, property or resources. Robertson, *supra* note 4, at 173. Of course civil litigation routinely requires factfinders to make counterfactual judgments about, say, whether a plaintiff's physical injury would have occurred if a product had been designed differently, or a doctor had acted with greater care. Still, there are serious process concerns with respect to theories of liability that consistently invite highly speculative counterfactual inquiries. It counts against his reading of OPA that it would generate a vast amount of litigation of this sort.

losses would not have occurred. One might be inclined to think that Congress's intervention—its decision to regulate—'breaks' the causal chain between the property damage, on the one hand, and the economic losses, on the other. But to reason this way is to invoke a proximate-cause-like idea, and Professor Robertson is adamant that OPA's economic loss provisions have no place for any such idea.[35]

As Professor Robertson ultimately concedes,[36] the Report's interpretation of the text of OPA's economic loss provisions is entirely plausible. His proposed alternative is not. To read the statute to require only an actual causal link between injury to property or resources, on the one hand, and economic loss, on the other, is effectively to read Section 2702(b)(2)(E) out of the statute. It is also to attribute implausibly to Congress a desire to extend economic loss liability to any person who can produce evidence suggesting a probable connection between an oil spill and those losses, no matter how remote, indirect, or haphazard the connection between the loss and the spill.

B. Legislative History, Case Law, and Policy Considerations

Although it relies primarily on OPA's text, the Report also consults standard secondary materials, including legislative history, case law, and possible policy considerations. Professor Robertson insists that the Report is woefully deficient in its handling of each of these interpretive resources. In keeping with the rest of his critique, these criticisms are stated in hyperbolic terms, yet consistently fall flat.

With respect to legislative history,[37] Professor Robertson claims that the Report ignores "general statements indicative of congressional intent to authorize recovery of 'a broad class of damages.'"[38] It does not. Indeed, the Report emphasizes that the Act was intended to provide compensation for a wide range of injuries, including a wide range of economic

35. By contrast, the Report's interpretation, which treats OPA as incorporating proximate cause-like limitations on liability for economic loss, allows for the possibility that such claims will be denied. Indeed, it seems perfectly intuitive to distinguish for these purposes a denial of physical access to resources or property that is part of an emergency response to a spill and a denial that results from officials' forward-looking regulatory decisions.

36. Robertson, *supra* note 4, at 202.

37. It is worth observing at the outset of this discussion that OPA's legislative history is quite extensive. OPA's enactment took place only after fifteen years of drafting and debate. The initial bill was drafted separately in the Public Works and the Merchant Marine Committees in the House. These committees resolved their differences by working with the Ways and Means Committee. Then, the Act incorporated provisions from other proposed bills addressing Prince William Sound and the Trans-Alaskan Pipeline. The Senate bill also went through many drafts and multiple committees. Then, the Conference Committee resolved the differences between the two bills. The legislative history takes up more than 150 pages in the Congressional Record. It should be no surprise that one can find, in this history, stray statements pointing in various directions. The Report for its part attempted to rely only on legislative history expressing relatively broad consensus on relatively specific matters, such as the desire to enable commercial fishermen to recover for losses due to their inability to fish because of a spill.

38. Robertson, *supra* note 4, at 174 n.58.

loss claims unrelated to any injury to one's person or property. Nothing in the Report is inconsistent with this general language.

Robertson also argues the Report is flawed because it would deny recovery to chandlers—those whose business is to supply bait, tackle, and maintenance services to vessels—even though OPA's legislative history suggests that Congress "pretty clearly wanted to include [them]."[39] Let us grant for purposes of argument that chandlers would be precluded from recovery under the Report's reading of OPA.[40] The only directly relevant evidence of Congressional intent with respect to chandlers offered by Professor Robertson is a single statement by Representative Schneider that "bait and tackle store owners" stand to recover for economic loss under OPA.[41] Representative Schneider's statement did not arise during debates on OPA but rather occurred months after the House passed its bill—it was added to the congressional record after the fact. At most, this is evidence of how one representative interpreted the pre-conference bill. There is no evidence that any other member of Congress agreed with this interpretation, nor any evidence that anyone even knew that this was Schneider's interpretation before they voted on the bill.[42] The existence of a stray bit of legislative history possibly pointing in a different direction than an interpretation that is overwhelmingly supported by a statute's text cannot count against that interpretation. No reading of OPA's text can hope to be entirely consistent with every statement that can be found in its sprawling history.[43]

According to Professor Robertson, the Report's emphasis on interference with use-rights as a condition for recovery for economic loss is also undermined by the fact that early versions of OPA included language that, more so than Section 2702(b)(2)(E), explicitly tied recovery for economic loss to interferences with such rights. For example, in a 1989 House Bill, the relevant provision would have allowed recovery for:

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39. *Id.* at 175.

40. In fact, chandlers would seem to fall into the gray area occupied by hypothesized claimants R, A, and W. GOLDBERG, *supra* note 2, at 41. The suggestion in the Report is that these claimants cannot prevail if OPA's economic loss provisions are strictly applied, but could conceivably recover if a court were to read those provisions in a manner that placed very great weight on the apparent aspiration behind OPA to respond to the economic dislocation suffered by businesses in those localities most directly affected by oil spills. Whether general statements of legislative purpose are enough to support a marginal expansion of liability is in part a question of how best to undertake statutory construction.

41. Robertson, *supra* note 4, at 174 n.58.

42. *Cf.* Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history."); *In re* Kelly, 841 F.2d 908, 912 n.3 (9th Cir. 1988) ("Stray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted on the bill.").

43. Nor does it count against the Report's interpretation that one can find a few general statements from individual legislators to the effect that OPA would enable all persons injured by an oil spill to recover damages from a responsible party. *See* Robertson, *supra* note 4, at 174 n.58 (quoting statements of this sort). Not even Professor Robertson supposes that OPA's damages provisions can be stretched to enable recovery by a resident of Maine who suffers serious emotional distress after viewing images of the spill on his or her computer.

> *Damages equal to the loss of profits or impairment of earning capacity . . . due to the injury, destruction, or loss of real property, personal property, or natural resources*[,] . . . [*which*] *shall be recoverable by any claimant* who derives at least 25 percent of his or her earnings from the activities which utilize such property or natural resources, or, if such activities are seasonal in nature, 25 percent of his or her earnings during the applicable season.[44]

Of course Congress eventually enacted only the italicized portion of this draft provision. Robertson concedes that "no explanation has been found" for this change.[45] Nonetheless, he boldly infers that it stands for the wholesale rejection of any use-right limitation on liability for economic loss. In fact, the deletion as readily or more readily supports the Report's interpretation, for it suggests that legislators *all along had use-rights in mind*, but simply decided against setting a threshold damage requirement for claims of interference with such rights.

Robertson also points to a passage in the House Conference Report on OPA which states as follows: "Subsection (b)(2)(E) provides that any claimant may recover for loss of profits or impairment of earning capacity resulting from [the statutory term is "due to"] injury to property or natural resources."[46] This passage, he maintains, provides an "authoritative statement by Congress that '"resulting from'" and '"due to'" are synonyms."[47] His belief that this passage counts against the analysis of OPA provided in the Report to the GCCF trades on the misunderstanding already discussed above. To reiterate: The Report's analysis does not rest on a claim about the meaning of the words "due to," taken in isolation. It instead rests on the double-layered causation requirement established by the interaction of Sections 2702(a) and 2702(b)(2)(E). Nothing in this bit of legislative history suggests that the "due to" clause of Section 2702(b)(2)(E) is to be understood as *redundant with* Section 2702(a)'s "result from" clause. Quite the opposite, the statement takes for granted the separateness of the "due to" requirement even as it suggests that the phrases "resulting from" and "due to" do not carry dramatically different meanings.

Turning now from legislative history to case law, it is worth noting that the Report to the GCCF invokes judicial decisions predominantly in support of three propositions. First, it cites federal and state decisions to establish the admiralty and state-tort-law backdrop to OPA, and in particular the widely adopted rule that pure economic loss is not recoverable. Professor Robertson claims that the Report massively understates the extent to which certain decisions, such as the New Jersey Supreme Court's *People*

44. H.R. 3027, 101st Cong. § 102(a)(2)(B)(v) (1st Sess. 1989) (emphasis added).

45. Robertson, *supra* note 4, at 185.

46. *Id.* at 188.

47. *Id.*

Express decision,[48] have cut back on the pure economic loss rule. The sources cited in the Report indicate otherwise.[49]

Second, the Report discusses some federal court decisions interpreting two of OPA's statutory forbearers: CERCLA and TAPAA. These decisions are cited for a proposition that is modest but important—namely, that courts examining closely analogous statutory provisions have read something akin to proximate cause limitations into *even unadorned causation requirements*, which in turn strengthens the case for reading OPA's double-layered causation requirement as specifying a comparable set of limitations. For example, TAPAA states simply that a party responsible for oil released from certain kinds of vessels is subject to strict liability for "all damages . . . sustained by any person . . . as the result of discharge[ ] of oil from such vessel,"[50] yet the Ninth Circuit Court of Appeals in the *Benefiel* decision interpreted this open-ended language to contain an implicit proximate-cause-like limitation.[51]

One would have thought that Professor Robertson would forthrightly criticize *Benefiel* for reading liability limitations into TAPAA, but he does not.[52] Rather, he seems to endorse *Benefiel*'s dismissal of claims alleging that the *Exxon Valdez* oil spill had caused consumers economic loss in the form of higher gasoline prices.[53] It is difficult to see how Professor Robertson can embrace the Ninth Circuit's rejection of these claims as "ridiculous," yet then turn around and criticize the Report's analysis of OPA.[54] Perhaps he takes the view that *Benefiel* was rightly decided because the plaintiffs failed to produce any evidence of an actual causal connection between the *Valdez* spill and higher gas prices. But, this is an untenable reading of the decision. *Benefiel* affirmed the grant of a motion to dismiss for failure to state a claim.[55] The plaintiffs had no opportunity to prove causation, and the Ninth Circuit did not rely and could not have relied on the absence of proof of actual causation as a ground for its decision.[56] Instead,

48. People Express Airlines, Inc. v. Consol. Rail Corp., 495 A.2d 107, 118 (N.J. 1985).

49. *See* GOLDBERG, *supra* note 2, at 26–30 nn.57–71. To take but one example, the Report cites an article by Professor Robert Rabin, a judicious scholar who is hardly ill-disposed toward relaxation of traditional limited duty and proximate cause limitations, stating that *People Express* "stands as a lonely outpost." *Id.* at 30, n.69.

50. 43 U.S.C. § 1653(c)(1) (2011).

51. Benefiel v. Exxon Corp., 959 F.2d 805, 807 (9th Cir. 1992).

52. Professor Robertson half-heartedly invokes against *Benefiel* dictum from the *Glacier Bay* decision issued by the federal district of Alaska, which declined to read any form of proximate cause limitations into TAPAA. Robertson, *supra* note 4, at 178 (citing *In re* Glacier Bay, 746 F. Supp. 1379, 1386 (D. Alaska 1990)). But, this dictum was subsequently contradicted and therefore rejected in *Benefiel*, which was decided by the Court of Appeals that sits in review of the decisions of the Alaska district court. The fact that a legal database has chosen not to characterize *Benefiel* as having overruled *Glacier Bay* is of no moment. A lawyer appearing in court within the Ninth Circuit could not properly cite *Glacier Bay* for the proposition that TAPAA contains no proximate cause limitations.

53. *Id.*

54. *Id.* The term "ridiculous" is Professor Robertson's, not the court's.

55. *Benefiel*, 959 F.2d at 808.

56. *Id.* at 807–08 (affirming dismissal on the ground that, under the theory of liability articulated in the plaintiffs' complaint, the spill could not count as a proximate or legal cause of plaintiffs' alleged losses).

Professor Robertson's acceptance of *Benefiel* can only rest on a recognition that the court was right to interpret TAPAA to contain proximate cause-like limitations on liability.[57] And if it is proper to read such limitations into TAPAA—which requires on its face only that the loss in question be "the result of" a discharge of oil from a vessel—then surely it is proper to interpret OPA's facially narrower, two-layered causation requirement to set limits on liability for economic loss beyond proof of actual causation.[58]

Third, the Report very briefly reviews what it acknowledges to be a sparse set of cases applying OPA's damages provisions. Professor Robertson erroneously implies that the Report relies heavily on the Fifth Circuit's decision in *In re Taira Lynn Marine Ltd.*,[59] and then he criticizes the Report because that decision "does not seem particularly instructive" on" the issue of economic loss.[60] This is an argumentative shell-game. *Taira Lynn* is indeed not particularly instructive in this context, which is precisely why the Report places little reliance on it. It is first cited as one among several cases in a "see also" string-citation.[61] It is then mentioned in passing as arguably having adopted a view of OPA liability that is in some ways less generous to economic loss claimants than the view adopted in the Report.[62]

Finally, turning to policy considerations, Professor Robertson critiques the Report on two grounds. First, he asserts that the Report's interpretation of OPA runs afoul of the fact that "the OPA Congress intended to rip the *Robins/Testbank* rule out of the law of OPA cases, root and branch."[63] This argument is question-begging. Of course Congress abolished as a requirement for economic loss claims proof that the loss was parasitic on damage to the claimant's property. The question remains: What liability regime did Congress put in its place? Professor Robertson seems to suppose that OPA's elimination of the categorical bar to recovery for pure economic loss found in admiralty and tort law entails the elimination of *any* limitations on liability for economic loss. This is a *non-sequitur*. That one *may* recover for economic loss caused by an oil spill even absent damage to one's property does not entail that one *is always entitled to* recover for such loss and in fact the relevant statutory language rejects any such entailment.

Professor Robertson also criticizes the Report's approach for offering an account of the statute that draws an unmotivated and unprincipled line between those who can recover under OPA for economic loss and those who cannot. And yet, the recognition of claims based on interferences with

57. Robertson, *supra* note 4, at 178–79.

58. At this juncture in his analysis, Professor Robertson appears to rely entirely on legislative history, arguing that OPA's legislative history warrants reading OPA more broadly than TAPAA notwithstanding that OPA's plain language with respect to liability for economic loss is narrower than TAPAA's. *Id.* Whatever the best reading of OPA's legislative history, *see supra* text accompanying notes 37–47, it cannot support an interpretation that ignores OPA's text.

59. 444 F.3d 371 (5th Cir. 2006).

60. Robertson, *supra* note 4, at 191.

61. GOLDBERG, *supra* note 2, at 26 n.58.

62. *Id.* at 34–35, 40.

63. Robertson, *supra* note 4, at 180.

use-rights is hardly odd or exotic. Ever since the common law first recognized actions for nuisance, it has identified use-rights in property as a class of rights worthy of protection apart from the rights not to have one's property physically damaged or physically invaded by the wrongful conduct of another. In any event, as indicated in the Report, the question is not whether OPA is optimally designed to realize certain goals or principles. The question is whether the lines generated by an otherwise compelling interpretation of the statute are so irrational as to call that interpretation into question. As the Report explains, its interpretation of OPA identifies lines that are not only intelligible but entirely reasonable.[64]

III. Conclusion

The Deepwater Horizon Spill was a cataclysmic event that has had, and presumably will continue to have, dramatic physical and economic consequences for the Gulf States and beyond. OPA was enacted by Congress to deal with this kind of event. However, the statute does so on certain terms, and those are the terms that courts adjudicating claims brought under it are bound to honor. Conceivably, Congress could have enacted a statute that allows anyone who can demonstrate economic loss resulting from an oil spill to recover from a party responsible for the spill. OPA is not that statute. It allows recovery only by those whose economic losses are due to damage or loss of property or resources resulting from a spill. The best reading of this statutory language entails recovery for those who, because of a spill, suffer an interference with their rights to use particular property or resources for commercial purposes.

64. Goldberg, *supra* note 2, at 36–38.