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Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part IV)*

CRAIG H. ALLEN**

VII
A TAILORED APPROACH TO PREEMPTION ANALYSIS FOR REGULATIONS GOVERNING MERCHANT VESSEL SAFETY AND VESSEL-SOURCE POLLUTION PREVENTION

The defining feature of merchant vessel safety and vessel-source pollution prevention regulation in the 21st century will be the increasingly dominant role of international standards, developed by the member nations of the International Maritime Organization (IMO) and binding on the United States by treaty. The prominent role of international standards calls for a critical review of the national approach to maritime preemption analysis; one that is grounded on the text and structure of the Constitution yet recognizes the unique and pervasive role of international law in contemporary maritime regulation.

*Editor’s Note: This is the fourth part of a four part article. Part I appeared in the July 1998 issue and examined the constitutional allocation of federal and state powers relevant to the regulation of merchant vessel safety and vessel-source pollution prevention. Part II appeared in the October 1998 issue and examined the principal international agreements and U.S. statutes that are relevant in a preemption analysis. Part III appeared in the January 1999 issue and examined the problems associated with the traditional approach to maritime preemption analysis. In this final part, Professor Allen proposes a new approach to maritime preemption analysis.

As this final part was being set by the printer, the U.S. Supreme Court granted certiorari in Intertanko v. Locke, a decision by the Ninth Circuit that is analyzed in both the third and fourth parts of this article. See United States v. Locke, 67 U.S.L.W. 3671 (U.S. Sept. 10, 1999) (Nos. 98-1701 and 98-1706).

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A. Principles Underlying the Proposed Approach

The operative principle of preemption is supremacy of federal law on subjects over which the executive and legislative branches of the federal government have been delegated constitutional authority.\textsuperscript{1051} The approach that follows rests on a conviction that the purposes and objectives behind the conventions, statutes, and regulations that make up the federal law on merchant vessel safety and vessel-source pollution prevention will be undermined by state or local laws that disrupt uniformity or deny foreign vessels the benefits of reciprocity.

1. The Constitutional Basis for Maritime Preemption Analysis

Preemption analysis begins with the text of the Constitution.\textsuperscript{1052} To "form a more perfect Union," Article VI of the Constitution provides that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding. \ldots \textsuperscript{1053}

Some have suggested that in deciding whether federal law displaces state laws on the same subject the courts should weigh the respective federal and state interests.\textsuperscript{1054} However, Article VI does not contemplate such a balancing test.\textsuperscript{1055} Whatever may be the merits of an "interests" analysis in horizontal choice of law decisions,\textsuperscript{1056} the Court decided long ago that

\begin{itemize}
  \item \textsuperscript{1051}See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405–06 (1819) (holding that the federal government "though limited in its powers, is supreme within its sphere of action").
  \item \textsuperscript{1052}In addition to the text of the Constitution, the courts will look to the Constitution’s structure, the relevant historical materials, and the “basic principles of our democratic system.” U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 806 (1995).
  \item \textsuperscript{1053}U.S. Const. art. VI, cl. 2.
  \item \textsuperscript{1054}See J. Nowak & R. Rotunda, Constitutional Law § 9.1, at 320 (5th ed. 1995) (concluding that "[o]f necessity, the nature of the problem of discovering congressional intent has resulted in judicial ad hoc balancing. \ldots Where there are no indicia of congressional intent the Court may have to balance the state and federal interests, to achieve this end"); Wolfson, Preemption and Federalism: The Missing Link, 16 Hastings Const. L.Q. 69 (1988) (suggesting an approach to preemption that balances federal and state powers, rather than a categorical approach such as the "occupation of the field" test).
  \item \textsuperscript{1055}See Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta, 458 U.S. 141, 153 (1982) ("[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.") (quoting Free v. Bland, 369 U.S. 663, 666 (1962)).
  \item \textsuperscript{1056}This article adopts the vertical-horizontal conflict of law classification to distinguish between conflicts involving two or more sovereigns ("horizontal" choice of law) and those involving a choice among governments within a hierarchy ("vertical" choice of law).
\end{itemize}
Article VI requires that state law yield when in conflict with federal law. Any weighing of the respective federal and state interests is properly made by the legislative and executive branches of the federal government when they exercise their constitutional authority to enact federal law.

2. Maritime Preemption Analysis Turns on More than Just Congressional Intent

When it abandoned the Varnville-Rice per se "no coincidence" rule, the Supreme Court thereafter held that the touchstone for supremacy of federal law is the purpose or intent of Congress. However, because federal law includes more than just statutes, the courts’ preemption analysis must also give effect to the intent underlying the nation’s treaties and federal regulations.

State law may be displaced by federal law expressly, by implication, or when the state law conflicts with federal law. The distinctions are neither rigid nor clear. Express preemption challenges to state laws may require construction of a treaty, federal statute, or regulation (sometimes all three), to determine the domain of the preempted field. Implied field preemption generally presents a more difficult task for the courts in their search for Congress’ and the President’s intent. Implied preemption occurs when the scheme of federal regulation is “sufficiently comprehensive to make reasonable the inference that Congress ‘left no room’ for supplementary regulation,” or “the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.” A federal purpose to displace state law on a subject may be expressed in the text and statutory structure of one or more federal statutes. Federal intent may also be found in treaties and customary international law binding on the U.S. and in regulations promulgated by federal agencies charged with implementing federal statutes or international agreements. Similarly, careful evaluation of each component of the relevant federal

1057 See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210–11 (1824) (rejecting New York’s argument that conflicting federal and state laws should be viewed “like equal opposing powers”).
1058 See supra Part III at notes 760–64.
1060 English v. General Elec. Co., 496 U.S. 72, 79 n.5 (1990) ("[b]y referring to these three categories, we should not be taken to mean that they are rigidly distinct. Indeed, field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress’ intent (either express or implied) to exclude state regulation.").
1061 Presidential or executive branch agency intent is important where the relevant “federal” law is a treaty or international agreement or an agency regulation.
regime, including its international law components and federal regulations, is necessary to determine the pervasiveness of the scheme.\textsuperscript{1063}

3. The Prominence of International Law in Merchant Vessel Safety and Vessel-Source Pollution Prevention

This article urges a fresh perspective on maritime preemption analysis; one that acknowledges the growing importance of international law in prescribing merchant vessel standards and enforcement mechanisms. Marine transportation, like commercial aviation, is quintessentially transnational. To enhance public order in maritime trade and transportation, the member nations of the IMO have negotiated a number of conventions that promote national interests while protecting the global marine environment.\textsuperscript{1064} The President and the Congress, exercising the federal treaty power, have bound the nation to the IMO conventions on merchant vessel safety and pollution prevention,\textsuperscript{1065} and have concluded a number of bilateral agreements promoting friendship, commerce, and navigation.\textsuperscript{1066} The IMO regulatory conventions both prescribe international standards and define the limits on each party in enforcing the standards against vessels flying the flag of another party.\textsuperscript{1067}

If the U.S. is to continue to serve a leading role in the development and implementation of international maritime conventions, the preemption doctrine employed by the courts in the U.S. must recognize that the IMO-sponsored conventions adopted by the U.S., like all treaties made under authority of the nation, bind the entire nation, including the state and local governments. As Justice Kennedy observed while writing for the Court in *Sky Reefer*:

If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such a manner as to violate international agreements.\textsuperscript{1068}

\textsuperscript{1063}Id. at 714 ("[t]he question whether the regulation of an entire field has been reserved by the Federal Government is, essentially, a question of ascertaining the intent underlying the federal scheme.").
\textsuperscript{1065}See supra Part II at § IV.C.
\textsuperscript{1066}See supra Part II at note 454.
\textsuperscript{1067}See supra Part II at § IV.C.
The Ninth Circuit’s finding in *Intertanko v. Locke*\(^\text{1069}\) that international conventions set only “minimum” standards, and that individual state and local governments within the nation are free to depart from the conventions’ standards, may result in the very kind of violation against which Justice Kennedy warned.\(^\text{1070}\) Under the Supremacy Clause, the IMO regulatory conventions are the supreme law of the land. State law “must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement.”\(^\text{1071}\) Thoughtful commentators have pointed out that state law practices often tend to escape international law scrutiny.\(^\text{1072}\) The extent to which the preemptive effect of an international agreement turns on whether the agreement is self-executing or, if executory, has been implemented by the elected branches of the federal government, is debatable.\(^\text{1073}\) That debate is largely irrelevant in the context of this article, however, owing to the reciprocity statutes and other legislation that expressly confer on the executive branch the discretion to accept a foreign vessel’s compliance with the IMO convention standards as satisfying the conditions for U.S. port entry.\(^\text{1074}\) The relevant inquiry in a preemption analysis involving an international convention is not, as the Ninth Circuit seemed to believe,\(^\text{1075}\) whether “strict” international uniformity is wise as a matter of policy. That is a question for Congress and the President. When the federal government has exercised its authority on behalf of the nation as a whole, a state “cannot refuse to give foreign nationals their treaty rights because of fear that valid international agreements might possibly not work

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\(^\text{1070}\) See supra Part III at note 979 and accompanying text.


\(^\text{1073}\) See id. at 330 (concluding that “Congressional approval of international law (either through the treaty process or through statutory enactment) is both a necessary and a sufficient condition for invalidation of state law on the grounds of inconsistency with international law.”). In its appeal in *Intertanko v. Locke*, the U.S. took the position that the preemptive force of a treaty does not depend on whether it is self-executing or executory. See Brief for Intervenor-Appellant, United States, International Ass’n of Indep. Tanker Owners (Intertanko) v. Locke, at 28 (9th Cir. No. 97–35010) (arguing that “[w]hether a treaty is self-executing is relevant to whether it has certain affirmative domestic legal effects (such as authorizing enforcement in court by private parties or imposing legal obligations on government officials), but that question is irrelevant to whether the treaty has the negative effect of preempting state law.”).

\(^\text{1074}\) See, e.g., 46 U.S.C. §§ 3303 and 3711.

If a treaty, together with any other related federal law, occupies the regulatory field in which a challenged state law falls, the state law is preempted. Similarly, if the state law conflicts with the relevant treaty, the state law is displaced.

In evaluating the preemptive effect of the IMO regulatory conventions, the courts must not overlook the conventions’ quid pro quo approach to standard setting. One of the most compelling incentives for many nations to agree to the IMO standards is the understanding that if they do agree, and vessels flying their flag meet those standards, the vessels’ compliance generally satisfies the requirements on that subject for entry to the ports and waters of the other parties to the convention. With respect to foreign vessels flying the flag of a party, the international conventions on marine safety and pollution prevention are not merely “model acts” that the parties are free to adopt and later modify to suit their national, state, and local interests. Although it is true that the conventions set the minimum standards that each party must prescribe and enforce against vessels flying its flag, they set the standards that each party may enforce on vessels flying the flag of any other party to the convention, unless the party enters an appropriate exception or reservation to the convention.

4. Rejecting the Presumption against Preemption of State Law on Merchant Vessel Safety and Vessel-Source Pollution Prevention

The approach advocated in this article rejects, as inapposite, the presumption against preemption in challenges to state regulations governing mer-

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1077 Cf. Bodansky, Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond, 18 Ecology L.Q. 720, 726 (1991) (concluding that development of the international regime in large part “has resulted from a desire by maritime states to forestall unilateral state regulation”).
1078 See supra Part II at note 402 and accompanying text (describing national obligation under the LOS Convention to ensure vessels flying the nation’s flag meet standards that are at least as strict as the generally accepted international standards designed to promote marine safety and prevent pollution).
1079 That this reflects the understanding of the U.S. government is apparent from the U.S. approach to the double-hull tanker amendment to article I/13F and I/13G of the MARPOL Convention, discussed in Part II of the article. Had the U.S. understood the convention to permit the parties to unilaterally prescribe requirements applicable to foreign tankers that exceeded the MARPOL standard without entering an appropriate reservation, no such action by the U.S. would have been necessary. See supra Part II at note 543 and accompanying text. Although it is true that Congress gave the Secretary discretion to prescribe standards that exceed relevant international standards in 46 U.S.C. § 3703(a), MARPOL regulation I/13F and I/13G is the only international standard the U.S. has rejected, and the national government did so by entering an express reservation statement with the IMO. See supra Part III at note 997 (research and conclusions by NRC). Moreover, the Coast Guard has recently determined that international standards have now “caught up” to the U.S. domestic standards, obviating unilateral action by the U.S. See U.S. Dep’t of Transp., Unified Agenda, Nov. 29, 1996, 61 Fed. Reg. 62,111 (1996).
chant vessel safety and vessel-source pollution prevention. The presumption arose in Rice v. Santa Fe Elevator Corp., which involved a challenge to Illinois' regulation of grain warehouses within the state. It is clear from that case that the states had historically regulated grain warehouses and that the federal government did not intervene in the regulatory field until 1916. The original federal statute at issue in the challenge was enacted in 1916 and included an express state law saving clause. A 1931 amendment somewhat ambiguously made the power, authority, and jurisdiction of the Secretary of Agriculture over federal license holders "exclusive." The challengers argued that the 1931 amendment effected a complete occupation of the field, thus preempting state regulation even on warehouse subjects for which no federal law applied. In assessing the effect of the federal laws, the Court observed that Congress may pursue one of three governing approaches to commerce regulations. First, it may, if it chooses, take unto itself all regulatory authority. Alternatively, it may choose to share the task with the states. Finally, it may adopt as policy the state scheme of regulation. Writing for the Court, Justice Douglas then posited that "[t]he question in each case is what the purpose of Congress was." In ascertaining Congress' purpose or intent with respect to the regulation of warehouses—a subject historically regulated by the states—the Court announced its "assumption" that Congress did not intend to supersede the state's police powers, "unless that was the clear and manifest purpose of Congress."

The presumption against preemption announced in Rice is inappropriate in the era of international standards, where the "federal" law on the subject matter often originates in a treaty. Treaties necessarily bind the entire nation

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1080See supra Part I at note 229 and accompanying text.
1081331 U.S. 218 (1947).
1082Id. at 238 (Frankfurter, J., dissenting).
1083Id. at 222-23 ("nothing in this Act shall be construed to conflict with, or to authorize any conflict with, or in any way to impair or limit the effect or operation of the laws of any State relating to warehouses [or] warehousemen") (quoting United States Warehouse Act, 39 Stat. 486, § 29 (1916)).
1084Id. at 224 (quoting 46 Stat. 1463 (1931)).
1085Id. at 230.
1086The Court cited two of its earlier cases to support its assertion that the state traditionally occupied the field of warehouse regulation: Munn v. Illinois, 94 U.S. (4 Otto) 113 (1876) (upholding state regulation of grain warehouse rates), and Davies Warehouse Co. v. Bowles, 321 U.S. 144, 148–49 (1944). Similarly, in Jones v. Rath Packing Co., 430 U.S. 520, 525 (1977), the Court cited an earlier case as authority for the assertion that the field of meat packing regulation was traditionally occupied by the states. Later cases tended to invoke the presumption without first verifying the predicate of historical state regulation.
1087Id. (citing Napier v. Atlantic Coast Line R. Co., 272 U.S. 605, 611 (1926), and Allen-Bradley Local 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740, 749 (1942)).
in the absence of a limiting reservation by the federal government.\textsuperscript{1088} Any presumption that the states are free to legislate within a field covered by a treaty binding on the U.S. is therefore inconsistent with the nature of international law instruments.\textsuperscript{1089} The presumption is also counterfactual and inconsistent with Congress' historical view. As early as 1972, Congress acknowledged the "long history of preemption in maritime safety matters" founded on the need for "uniformity applicable to vessels moving in interstate commerce."\textsuperscript{1090} The Supreme Court has even articulated a presumption that vessels engaged in foreign commerce will be regulated by the federal government.\textsuperscript{1091} Indeed, under the Court's dormant Commerce Clause cases, the states were constitutionally barred from regulating subjects in interstate or foreign commerce that were national or which required uniform national rules.\textsuperscript{1092} Finally, when the Supreme Court has already ruled that a state is preempted from legislating upon a particular subject, as the Court has done in a challenge to Washington state's tanker regulations in \textit{Ray v. Atlantic Richfield Co.},\textsuperscript{1093} any presumption against preemption of state law on that same subject ignores the effect of precedent.

Eliminating the presumption against preemption in maritime preemption cases will not only level the field in the courts' approach to international law and give effect to the Court's precedents, doing so will also obviate the need to define the states' "police powers" and determine which are "historic" and therefore benefit from the presumption. Thoughtful scholars have highlighted the fact that the concept of state "police powers" is at best undefined and perhaps even indeterminate.\textsuperscript{1094} Moreover, the Court has never articulated a test for determining which of those arguably indeterminate powers are "historic." A careful analysis of the history of merchant vessel safety and pollution prevention regulation in the U.S. is unlikely to lead to the conclusion that the states "historically" regulated merchant vessel construction, design, manning, and equipment or the licensing and training of merchants.

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\textsuperscript{1088}See supra Part I at note 352 and accompanying text (discussing reservations); see also supra Part III at note 736 and accompanying text.

\textsuperscript{1089}See Brilmayer, supra note 1072, at 333 ("If judicial modesty is motivated by separation of powers concerns, then the determinative factor should be the attitude of the federal elected branches toward the states' international law violations. And it seems plausible to presume that unless they have otherwise explicitly so provided, the federal elected branches would not want states to have that freedom.").


\textsuperscript{1091}See Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 449, 1979 AMC 881 (1979) ("vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by national legislation.") (quoting Railroad Co. v. Maryland, 88 U.S. (21 Wall.) 456, 470 (1875)); cf. The Federalist No. 11 (Hamilton), supra Part I at note 20.

\textsuperscript{1092}See supra Part III at § VI.A.2 (discussing the rule in \textit{Cooley v. Board of Wardens}).

\textsuperscript{1093}435 U.S. 151, 1978 AMC 527 (1978).

\textsuperscript{1094}See, e.g., Ely, supra Part I at note 111; Frankfurter, supra Part I at note 112.
mariners other than state harbor pilots. It is therefore not the case that the federal government has displaced the states from a historical regulatory role in these subjects.\textsuperscript{1095}

5. Resolving Regulatory "Overlaps" that Substitute State or Local Government Judgments for those of the Federal Government

The Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment.\textsuperscript{1096}

Under the proposed approach (discussed more fully in § VII.B.4.d below), state or local government regulations applicable to vessels that hold federal certificates—particularly state laws that overlap with the federal regime—would be closely scrutinized, as instructed by the Supreme Court in \textit{Ray v. Atlantic Richfield Co.}\textsuperscript{1097} Overlapping state or local laws would be upheld only when federal law expressly or impliedly authorizes the states to enact requirements that differ from or are stricter than those prescribed by the federal law.\textsuperscript{1098} Although saving provisions for more stringent state standards are common in federal laws governing pollution discharges and waste disposal,\textsuperscript{1099} Congress rarely includes them in vessel safety and pollution prevention statutes,\textsuperscript{1100} and has never entered a state law saving exception or reservation to an IMO regulatory convention.\textsuperscript{1101} Moreover, Congress has delegated to the Secretary of Transportation the discretion to accept compliance with the IMO regulatory conventions in satisfaction of U.S. port entry requirements.\textsuperscript{1102}

When federal and state governments have both exercised their lawmaking powers on a subject which the Constitution commits to concurrent jurisdiction, the preemption doctrine must address the validity of state laws that are designed to fill gaps in the federal legal regime and state laws that overlap

\textsuperscript{1095}See supra Part II at note 567 (identifying sources that describe the 160-year-old federal program of merchant vessel safety and pollution prevention).

\textsuperscript{1096}\textit{Ray}, 435 U.S. at 165.

\textsuperscript{1097}Id. at 164–66.

\textsuperscript{1098}See id. at 165 (noting that the "federal scheme thus aims precisely at the same ends as does" the state act).

\textsuperscript{1099}See, e.g., 33 U.S.C. § 1370 (CWA saving clause for more stringent state standards or limitations respecting the discharge of pollutants or control or abatement of pollution); 42 U.S.C. § 6929 (authorizing more stringent state standards for waste disposal); 42 U.S.C. § 7416 (authorizing more stringent state standards for air pollutant emissions). But see Natural Resources Defense Council, Inc. v. EPA, 859 F.2d 156 (D.C. Cir. 1988) (state CWA authority to regulate point source discharges does not carry with it the authority to regulate the point source itself).

\textsuperscript{1100}There is some dispute over whether OPA 90 § 1018 provides such authority. See infra § VII.B.4.e.

\textsuperscript{1101}See supra notes 1064 and 1078 and Part III at note 997 (discussing the limited exceptions entered by the U.S. to IMO regulatory conventions).

\textsuperscript{1102}See 46 U.S.C. §§ 3303, 3711, and 9101.
with the federal regime. Article VI itself provides little guidance. The Court's analysis of the validity of interstitial and overlapping state laws applicable to federally licensed and inspected vessels is set out in Gibbons v. Ogden,\textsuperscript{1103} Huron Portland Cement Co. v. City of Detroit,\textsuperscript{1104} Douglas v. Seacoast Products, Inc.,\textsuperscript{1105} and Ray v. Atlantic Richfield Co.\textsuperscript{1106} Those cases demonstrate that when the object of the state regulation is a vessel licensed and inspected by the federal government to engage in a particular activity in U.S. waters, the Court has never upheld overlapping state laws.

Gibbons, discussed in Part I of this article, examined the extent to which a state may restrict the operation of a federally enrolled and licensed vessel in state waters.\textsuperscript{1107} In Huron, the Court upheld the application of a city smoke abatement ordinance to federally licensed and inspected vessels only after finding that there was no overlap between the federal and local laws.\textsuperscript{1108} In Douglas, the Court examined the text and prior judicial treatment of the federal vessel enrollment and licensing act (there was no legislative history).\textsuperscript{1109} The Court noted that its decision in Gibbons might be read to suggest that the federal act "ousts all state regulatory authority over federally licensed vessels," but that later decisions had not extended the federal domain that far. Instead, Gibbons was read as permitting states to impose on federally licensed vessels "reasonable, nondiscriminatory conservation and environmental protection measures otherwise in their police powers."\textsuperscript{1110} Neither Douglas nor Gibbons addressed whether federal statutes other than the enrollment and licensing act further restricted the reach of state regulation,\textsuperscript{1111} and in Huron the Court did not reach the issue.\textsuperscript{1112} None of the cases directly addresses the extent of state regulatory control over vessels that do not hold federal licenses.\textsuperscript{1113}

In Ray, the Court affirmed its allegiance to Douglas and Huron, holding

\textsuperscript{1103}22 U.S. (9 Wheat.) 1 (1824).
\textsuperscript{1104}362 U.S. 440, 1960 AMC 1549 (1960).
\textsuperscript{1106}435 U.S. 151, 1978 AMC 527 (1978).
\textsuperscript{1107}See supra Part I at notes 133-49.
\textsuperscript{1108}362 U.S. at 445–46. The majority concluded that because the federal and city laws aimed at different purposes, there was no overlap.
\textsuperscript{1109}431 U.S. at 274–75.
\textsuperscript{1110}Id. at 277.
\textsuperscript{1111}The majority did conclude, and Justices Rehnquist and Powell agreed, that the Submerged Lands Act did not countermand the preemptive effect of the federal licensing acts. 431 U.S. at 289 (Rehnquist and Powell, JJ., concurring in part and dissenting in part).
\textsuperscript{1112}362 U.S. at 442 n.1.
\textsuperscript{1113}Neither Gibbons nor Douglas directly addresses state regulatory authority over foreign vessels. To the extent that a federal tank vessel holds a certificate of compliance from the Coast Guard issued under the authority of 46 U.S.C. § 3711, the certificate should be equivalent in effect to the license examined in Gibbons and Douglas. See Douglas, 431 U.S. at 280–81 (discussing the rights conferred by enrollment and license).
that the states may constitutionally apply reasonable, non-discriminatory conservation and environmental protection measures to federally licensed vessels.\textsuperscript{1114} But the Court was quick to point out that in none of the cases upholding state conservation and environmental protection measures did the state law address the "same object" as federal law.\textsuperscript{1115} At first glance, the \textit{Ray} decision may look like the position the dissenters took in \textit{California v. Zook}.\textsuperscript{1116} However, the state regulations in \textit{Zook} were identical to those prescribed by the ICC; the state did not impose additional or more stringent standards. The regulated vessels in \textit{Ray} were presumed to hold all required federal licenses to operate, yet the state purported to add additional requirements as a condition of operating in state waters.

When state statutes address a subject that is comprehensively regulated by federal statutes, regulations, and treaty obligations, as is the subject of merchant vessel safety and pollution prevention, any court reviewing those state laws in a preemption challenge should be guided by \textit{Ray}. Unless the governing federal law prescribes only "minimum"\textsuperscript{1117} standards or otherwise provides state authority to issue different or more stringent standards,\textsuperscript{1118} the overlapping state regulation is displaced.\textsuperscript{1119} Any other approach would deny the supremacy of the federal law.

Section 1018 of the Oil Pollution Act of 1990 was construed by one court as authority for overlapping state regulation of merchant vessel safety and pollution prevention,\textsuperscript{1120} but history, precedent, and legislative intent are to

\textsuperscript{1114}435 U.S. at 164 (citations omitted).
\textsuperscript{1115}Id. (citations omitted).
\textsuperscript{1116}336 U.S. 725, 749 (1949) (Burton, Douglas, and Jackson, JJ., dissenting) ("[o]nce Congress has lawfully exercised its legislative supremacy in one of its allotted fields and has not accompanied that exercise with an indication of its consent to share it with the states, the burden of overcoming the supremacy of the federal law in that field is upon any state seeking to do so.").
\textsuperscript{1117}See, e.g., \textit{Florida Lime & Avocado Growers, Inc. v. Paul}, 373 U.S. 132, 147–48 (1963) (distinguishing the Court’s earlier decision in \textit{Campbell v. Hussey}, 368 U.S. 297 (1961), because the federal law in \textit{Campbell} prescribed uniform standards, while the federal law at issue in \textit{Florida Lime} prescribed only minimum standards). In \textit{Ray}, the Supreme Court rejected the state of Washington’s argument (based on \textit{Florida Lime}) that Title II of the federal PWSA set only minimum standards that the states were free to exceed. 435 U.S. at 168 n.19.
\textsuperscript{1118}Even in \textit{Chevron U.S.A., Inc. v. Hammond}, the Ninth Circuit recognized the need to identify congressional authorization for overlapping state ballast water discharge laws. Though the court’s resort to the CWA is questionable, the decision does not disturb the general rule against overlapping state laws in the absence of congressional authorization. See supra Part III at § VI.C.1.
\textsuperscript{1119}The state can not avoid preemption by arguing that the federal CDEM standards are merely minima. The Court in \textit{Ray} rejected that argument where the federal statute evidenced a congressional intent that the standards would be promulgated and enforced at the national level, and that vessels meeting those standards would be privileged to navigate in U.S. waters. 435 U.S. at 168 n.19.
the contrary. The relevant language of § 1018 is identical to the saving clause in the Clean Water Act (CWA) and several other statutes, none of which has ever been construed to authorize state regulation of merchant vessel safety and pollution prevention. In Ray, the Supreme Court rejected the state of Washington's argument that the CWA, with its state law saving clause, authorized the state to enact stricter state requirements for tankers. Finally, the OPA 90 Conference Committee Report makes clear that the Act was not intended to disturb the Supreme Court's decision in Ray.

6. New Directions for Agency Preemption Determinations

Federal agencies regularly prepare "federalism" statements which examine the preemptive effect of the regulations they promulgate. The Court's decisions in United States v. Shimer, Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., and City of New York v. FCC, as well as Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., demonstrate the importance of agency regulations in preemption analysis.

Agency federalism statements may enter into the courts' preemption analysis in several respects. First, they may serve as direct evidence of an intent to preempt. The Supreme Court has "held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes." Congress need not expressly confer on a federal agency authority to issue regulations that preempt state laws for the agency's regulations to have such a preemptive effect. The agency's decision to preempt state regulation is to be upheld unless it is clear that Congress would not have sanctioned a

1121 OPA 90 § 1018 is analyzed supra Part II at § V.D.2.b. The question whether § 1018 authorizes regulatory "overlap" is discussed supra Part III at § VI.C.2.b.
1122 See supra Part II at notes 691-700 and accompanying text.
1123 435 U.S. at 178 n.28 (rejecting state's argument that the CWA, the Coastal Zone Management Act, or the Deepwater Ports Act demonstrates congressional intent for coexistent state regulation of tankers).
1124 See supra Part II at note 710 and accompanying text.
1125 See supra Part III at note 810 and accompanying text.
1132 City of New York v. FCC, 486 U.S. at 64 (holding that "a pre-emptive regulation's force does not depend on express congressional authorization to displace state law."); Fidelity, 458 U.S. at 154; see also Project: The Role of Preemption in Administrative Law, 45 Admin. L. Rev. 107 (1993).
preemption of state authority in the subject area regulated by the agency.\textsuperscript{1133} In general, where "Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily."\textsuperscript{1134} If the agency's "choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."\textsuperscript{1135}

Second, an agency's reasonable interpretation of an ambiguous statute for which Congress has delegated to the agency enforcement responsibility is entitled to deference.\textsuperscript{1136} Section 1018 of OPA 90 provides that nothing in the Act precludes the states from imposing additional liability or requirements with respect to the discharge of oil or removal of such oil.\textsuperscript{1137} As with § 360k of the Medical Devices Amendments of 1976 the Court examined in \textit{Medtronic, Inc. v. Lohr}, in § 1018 of OPA 90 Congress failed to define the term "requirement."\textsuperscript{1138} A majority of the Court in \textit{Medtronic} gave "substantial weight" to the implementing agency's interpretation of the relevant statute.\textsuperscript{1139} Yet the Ninth Circuit gave no deference to the Coast Guard's preemption conclusions when the court set about construing § 1018 in \textit{Intertanko v. Locke}.\textsuperscript{1140}

Deference to agency conclusions is particularly appropriate in the interpretation of a maritime convention provision where the agency providing the interpretation represented the nation at the IMO when the convention was

\textsuperscript{1133}Fidelity, 458 U.S. at 153–54; see also Medtronic, Inc. v. Lohr, 518 U.S. 470, 496–97 (1996) (holding that an agency's interpretation of the preemptive effect of its regulations is entitled to deference where Congress has delegated authority to the agency, the agency's interpretation is not contrary to a statute, and agency expertise is important to determining preemption). But see also id. at 512 ("where the language of the statute is clear, resort to the agency's interpretation is improper.") (O'Connor, J., concurring in part and dissenting in part) (citation omitted).

\textsuperscript{1134}Shimer, 367 U.S. at 381–82.

\textsuperscript{1135}Fidelity, 458 U.S. at 154.


\textsuperscript{1137}33 U.S.C. § 2718(a).

\textsuperscript{1138}Medtronic, 518 U.S. at 481–82 (discussing a similar legislative construction exercise in Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992), in which it referred to "requirements" many times "linked with language suggesting that its focus is device-specific enactments of positive law by legislative or administrative bodies, not the application of general rules of common law by judges and juries.").

\textsuperscript{1139}See Medtronic, 518 U.S. at 496 (Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer concurring in Part V); see also Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 610 (1991) (agreeing with the submission in the amicus brief of the U.S. expressing the views of the EPA, the agency charged with enforcing the Act).

\textsuperscript{1140}See supra Part III at § VI.C.2.b(3).
under development. Agencies will also generally be the best source of current information on a treaty's status and provisions. Standards set by IMO conventions are subject to frequent amendment, and the agencies that represent the U.S. to the IMO and serve on its specialized subject matter committees will generally be in the best position to assess the effect of state laws on the current international regime binding on the U.S.

Two other aspects of agency federalism conclusions may be relevant in a preemption analysis. The Court has concluded that federal agencies are "uniquely qualified" to provide the executive branch’s views on whether a state regulation is likely to frustrate the purposes and objectives of the federal regulatory scheme. Where Congress has given an agency discretion to accept compliance with international standards, or in determining the extent to which requirements for U.S. flag vessels should be harmonized with international standards, the agency’s purposes and objectives may be undermined by state actions that destroy an objective to pursue international uniformity. Finally, agencies such as the Department of State will generally be the source of the executive branch’s views on the foreign affairs and foreign commerce implications of the state regulation. Those views are generally dispositive.

Agencies must, however, give careful attention to their preemption analyses. Moreover, when an agency decides to preempt state and local laws it should expressly declare its intent in the final rule and define the preempted domain. Where the agency has declined to formally announce its intent to preempt state regulation at the time it promulgates the federal rules, the courts are likely to conclude that the agency did not intend that effect. The Coast Guard’s silence on whether it intended that its tanker ballast water regulations would preempt state regulation may help explain the result in

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1141The Coast Guard, NOAA, Department of Defense, and Department of State represent the U.S. at the IMO. See supra Part I at note 74.
1142See Medtronic, 518 U.S. at 496 (federal agency to which Congress has delegated authority to implement an act is "uniquely qualified to determine whether a particular form of state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' and therefore, whether it should be pre-empted."); see also San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959) (deferring to an agency's determination that state regulation would interfere with the national policy).
1143See, e.g., supra Part III at note 785 and accompanying text (describing the State Department’s views on the need for international uniformity in vessel standards).
1144As Justice Jackson observed in Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.: "[w]hether a state action undermines the foreign affairs of the nation is generally a question for the President and Congress, whose judgments are binding on the judiciary." 333 U.S. 103, 111 (1948); see also O’Connor, supra Part I at note 376, at 36–37.
1145See Tribe, supra Part I at note 204, at 501–02 n.1 (discussing the Supreme Court’s analysis of agency preemption in Hillsborough).
**Chevron U.S.A., Inc. v. Hammond.**\(^{1146}\) Regrettably, no comprehensive guidelines are presently available to assist federal agencies in assessing the federalism implications of their regulations. In developing such guidelines, it should be borne in mind that the agency’s preemption decisions will be more useful to state governments, the courts, and others seeking to determine the agency’s intent if the rulemaking notices published in the Federal Register included the agencies’ classification of the subject matter of the regulation (see § VII.B.1 below), a complete list of the relevant statutes and treaties that provide the authority for the rule or are relevant to the agency’s preemption analysis (see § VII.B.2), the agency’s conclusions regarding field preemption (see § VII.B.4), and a statement of the agency’s purposes and objectives in promulgating the rule (see § VII.B.5). When the agency’s enabling statutes require the agency to consult with the affected states before promulgating regulations (as does the Ports and Waterways Safety Act\(^{1147}\)), the agency should invite state comments on preemption questions during the rulemaking process and add a section to the federalism statement in the final rule outlining the results of its consultation with states.

**B. Elements of the Proposed Approach**

Merchant vessels entering U.S. ports and waterways are potentially subject to three or more legal regimes: the flag State regime, the U.S. federal regime (in its capacity as a port State), and any regime established by state and local governments with jurisdiction over the port or the navigable waterways the vessel must transit en route to or from the port. Merchant mariners serving aboard the vessel may be subject to yet another regime if their nationality differs from the flag of the vessel.\(^{1148}\) The relationship between the flag State and port State legal regimes and their respective prescriptive and enforcement jurisdiction is governed by public international law—primarily the LOS Convention, the IMO regulatory conventions, and any relevant FCN treaty, but also including provisions for international comity. The relationship between the state and local government regime and the federal regime, including its international law components, is the subject of this analysis.

The proposed approach to maritime preemption analysis follows the Supreme Court’s decision in *Ray v. Atlantic Richfield Co.*,\(^{1149}\) both because *Ray* is the Court’s last decision in a maritime regulatory preemption

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\(^{1146}\) See Part III at note 890.

\(^{1147}\) See 33 U.S.C. § 1231(b)(2); 46 U.S.C. § 3703(c)(2).

\(^{1148}\) Restatement, supra Part I at note 19, at § 402(2).

challenge to state law and in recognition of the fact that when Congress enacted the Oil Pollution Act of 1990, the Conference Committee singled out Ray as a decision Congress did not intend to disturb in enacting the legislation. At the same time, however, the proposal is responsive to the fact that the international and federal legal seascape has matured significantly since Ray was decided. Any contemporary application of Ray must therefore consider the many international and federal developments that have occurred since 1978.

1. Step One: Classify the Subject Matter of the Inquiry

Courts have long recognized that the subject matter of the laws under consideration often shapes the preemption analysis. Classification may provide guidance on the relevance of earlier preemption decisions. For example, a case such as Askew v. American Waterways Operators, Inc., which addressed state laws prescribing liability for oil spill damages at a time when no international convention addressed the subject, may be of little help in determining whether a state law prescribing English language competency requirements for tank ship officers is preempted by federal statutes or the IMO conventions. Correctly classifying the subject matter affected by the state laws under challenge is also critical to a determination of the domain of the relevant federal laws in the second step in the proposed approach.

Should the courts continue to apply a presumption against preemption of

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1150 See supra Part II at note 689 and accompanying text.
1151 When the Court issued its decision in Ray, the 1973 MARPOL Convention, its 1978 Protocol, and the 1978 SOLAS Protocol were not yet in force; the STCW Convention was just being negotiated (and was to be substantially amended in 1995); and the ISM Code was not yet even under discussion. The pervasiveness of international standards has grown substantially in the two decades since the Ray decision came down. See supra Part II at § IV.C.
1152 Hines v. Davidowitz, 312 U.S. 52, 67–68 (1941) (in conducting our analysis of whether the state law frustrates the federal purpose "it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority."); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 139, 141–42 (1963) (distinguishing food quality cases from cases involving interstate carriers because the latter is a "field of paramount federal concern"); Hillsborough County, Fla. v. Automated Med. Laboratories, Inc., 471 U.S. 714, 718 (1985) (expressing reluctance to infer preemption of local health and safety regulations); see also Tribe, supra Part I at note 204, §§ 6–7 to 6–20, at 417–68 (distinguishing among physical commodities, transportation, natural resources, and other subjects).
1154 In Askew, the Court did not reach the question whether the federal water pollution act's state law saving clause would permit the state to impose oil spill response equipment requirements, after noting that such a requirement might be subject to a preemption challenge after the Coast Guard promulgated its regulations on the subject. See Askew, 411 U.S. at 336–37 ("[r]esolution of this question, as well as the question whether such regulations will conflict with Coast Guard regulations . . . should await a concrete dispute.").
a state’s historic police powers, the state regulation’s classification will be useful in determining whether the states have “traditionally” legislated on the subject. Finally, classification will be useful in determining whether the subject matter is one for which Congress has prescribed a program of “cooperative federalism.” Where Congress has prescribed a program of cooperative federalism, the courts are less likely to find that a state law frustrates the purposes of the relevant federal law. By contrast, when Congress has adopted a program of international cooperation, which promotes uniformity in standards and reciprocity, the court is more likely to find that states which prescribe differing standards or deny foreign vessels the reciprocity benefits provided by the conventions and U.S. implementing statutes frustrate the purposes of the federal regime.

This article envisions a subject matter classification that distinguishes among regulations governing: (1) merchant vessel construction, design, equipment, and manning (CDEM); (2) merchant mariner certification and training; (3) vessel navigation and other on-board operations; (4) port and waterways operations and management; and, (5) vessel discharge prohibitions and pollution liability laws. This taxonomy is consistent with the U.N. Convention on the Law of the Sea and the principal IMO conventions. It is also consistent with the Court’s analysis in Ray and Askew and with the structure of federal statutes and regulations in Titles 33 and 46 of the U.S. Code and Code of Federal Regulations. The proposed scheme does not address other relevant subjects, the most important being control over siting decisions for waterfront facilities and oil terminals.

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1155 See supra Part III at § VI.A (generally describing cooperative federalism approaches under the CWA and CZMA); 16 U.S.C. § 1452(1) (prescribing cooperative federal-state approach to management of “land and waters resources” in the coastal zone).


1157 See, e.g., Ray, 435 U.S. at 168 (holding that states may not impose standards that are stricter than those Congress has “accepted as a result of international accord.”).


1159 See supra Part II at § IV.A; Bodansky, supra note 1077 (suggesting a classification that distinguishes discharge standards, CDEM standards, and navigation regulations). The LOS Convention imposes specific limits on the jurisdiction of a coastal State to impose CDEM standards, other than those prescribed by international law. See, e.g., LOS Convention, supra Part II at note 384, at art. 21(2) (limiting coastal State jurisdiction over CDEM of foreign vessels in innocent passage to generally accepted international standards). Coastal States may, however, establish stricter discharge and liability standards (subject to any voluntary limitations assumed by other treaties, such as the MARPOL Convention). Id., art. 21(1)(f). The LOS Convention taxonomy was selected in the proposed approach to maritime preemption analysis because the convention has been widely adopted and dovetails nicely with the IMO sponsored conventions and their allocation between flag State and port State jurisdiction and responsibility.

1159 Ray provides the elements for analysis of vessel design, construction, equipment, and operations requirements. See supra Part II at notes 630–42 and accompanying text. Askew addressed only liability for oil discharges. See supra Part II at note 658 and accompanying text.

1160 See DuBey, Control of Oil Transport in the Coastal Zone, 56 Or. L. Rev. 593 (1977). In Pacific
2. Step Two: Determine the Domain of the Existing Federal Regime Applicable to the Subject Matter(s)

The modern federal regulatory regime for merchant vessels is pervasive. Its international, statutory, and agency-promulgated components reach nearly every aspect of a vessel’s design, construction, equipment, and manning, as well as the licensing, qualification, and training requirements for seafarers, port and vessel operations, and vessel-source pollution.\textsuperscript{1161} Too often, preemption analyses neglect to consider the breadth, detail, and purposes of the international law sources that constitute an increasingly important component of the “federal law” of merchant vessel regulation in the U.S. The proposed preemption approach calls for a thorough inventory of the relevant international law components, including the IMO conventions and any relevant treaties of friendship, commerce, and navigation, to determine what standards they set, whether they evidence an intent to establish international uniformity, and their reciprocity provisions.

At the same time, the proposed approach rejects the categorical approach to federal statutory analysis adopted by the Ninth Circuit in \textit{Intertanko v. Locke},\textsuperscript{1162} which sweeps virtually all subjects other than vessel design into an “operations” subject matter category and focuses on a single act to ascertain the “overarching” federal intent with respect to tank vessel regulation in the U.S.\textsuperscript{1163} The approach calls instead for an inventory of all federal laws that apply to the subject matter of the state law under challenge to determine the standards they set and their purposes and objectives.\textsuperscript{1164}

Only after conducting a complete inventory of the standards prescribed by all relevant federal laws will the court be able to assess whether the federal scheme is sufficiently "pervasive" to warrant an inference that federal law occupies the field. The legislative and executive purposes and objectives underlying each of the federal laws identified in this step will also be a key factor in both the field and conflict preemption steps below.

\textsuperscript{1161} Even vessel air pollutant emissions from marine diesel engines are now coming under direct federal regulation. See Control of Emissions of Air Pollution from New CI Marine Engines, 63 Fed. Reg. 68,508 (EPA 1998).

\textsuperscript{1162} See supra Part III at § VI.C.2.

\textsuperscript{1163} Id. The court ignored the purposes and objectives behind the Ports and Waterways Safety Act and the IMO conventions after concluding that a single act—OPA 90—reflected Congress' "full" purposes on the subject tanker regulation. See \textit{Intertanko}, 148 F.3d at 1062. See also supra Part III at § VI.C.1, which discusses the same court’s same approach in \textit{Chevron U.S.A., Inc. v. Hammond}.

\textsuperscript{1164} One of the last maritime cases to attempt to comprehensively survey the domain of federal laws relevant to a preemption analysis was Kelly v. Washington, 302 U.S. 1, 4–8, 1937 AMC 1490 (1937). This is not to suggest that it is the courts’ task to consider preemption grounds not raised by the parties.
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3. Step Three: Identify Commerce Clause “Purposes and Objectives” for Later Conflict Preemption Analysis

The chorus of criticism for the dormant Commerce Clause doctrine grows louder each year. Whatever may be the merits of the doctrine generally, with the possible exception of the doctrine’s “discrimination against commerce” strand, it is now largely irrelevant in maritime preemption cases owing to the maturity of the federal legal regime. Once Congress and the President have exercised the federal commerce powers on a subject, by statute, international agreement, or regulation, the commerce power is no longer “dormant,” and a dormant Commerce Clause analysis is inappropriate. Thereafter, any state action is properly scrutinized under an Article VI preemption analysis, not under the Commerce Clause.

The proposed approach rejects the balancing test occasionally employed to weigh the putative state benefits against the burden the state law imposes on commerce. The balancing test lacks textual support and is poorly suited to vertical choice of law analyses. However, because both Congress and the states have relied on the check provided by the

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1165 See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine, 520 U.S. 564, 619 (1997) (Thomas and Scalia, JJ., and Rehnquist, C.J., dissenting) (citing, among other objections, the fact that the doctrine “surely invites us, if not compels us, to function more as legislators than as judges.”) (citation omitted).

1166 Id. at 577 (reasoning that avoiding “economic balkanization” and the retaliatory acts of other states that may follow “is one of the central purposes of our negative Commerce Clause jurisprudence.”) (citations omitted).

1167 So long as states like Washington enact laws which may be found to have a discriminatory impact on foreign vessels or seamen (such as by imposing English language competency requirements and requirements for state-approved training programs), there will be a need for scrutiny under the discrimination against foreign or interstate commerce strand.

1168 See Wardair Canada, Inc. v. Florida Dep’t of Revenue, 477 U.S. 1, 12 (1986) (“the dormant Commerce Clause, in both its interstate and foreign incarnations, only operates where the Federal Government has not spoken to ensure that the essential attributes of nationhood will not be jeopardized by States acting as independent economic actors.”).

1169 This article does not address challenges under the Equal Protection, Due Process, or Privileges and Immunities Clauses.

1170 See Camps Newfound/Owatonna, 520 U.S. at 609 (Thomas and Scalia, JJ., and Rehnquist, C.J., dissenting).

1171 The balancing approach is inappropriate in vertical choice of law analysis because there is no scale in which the balancing process can take place. There is no way to say with assurance in a particular case that the federal interest asserted is more or less important than the interest in preserving uniformity of result with the state court. Even if there were such a scale, the weights to be put in it must be whatever the judges say they are.

C. Wright, Law of Federal Courts 404 (5th ed. 1994); see also Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (“This process is ordinarily called ‘balancing,’ but the scale analogy is not really appropriate, since the interest on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy”) (citation omitted).

1172 The state of Alaska conceded that its regulations governing placement of ballast water in a
balancing test, it cannot be rejected without careful consideration of the federal commerce related purposes and objectives in any related Article VI preemption analysis. The courts must therefore ensure that any legislative or executive branch purpose to promote national or international uniformity or to obtain reciprocal treatment for U.S. interests engaged in foreign commerce is protected under the "frustration of purpose" step in the conflict preemption analysis.  

The "national versus local" test adopted by the Supreme Court in *Cooley v. Board of Wardens* 1174 to determine the states' legislative competence over interstate and foreign commerce is similarly inappropriate in a mature federal maritime regulatory regime. The *Cooley* rule suffers the same definitional shortcomings as the "maritime-but-local" test occasionally invoked in admiralty choice of law. 1175 At the same time, it is important to recognize that *Cooley* has long served as a key blueprint in the Court's maritime federalism architecture, providing a judicial check on state legislation on subjects that are national or require a uniform national rule. 1176

As recently as 1978, the Supreme Court, in *Ray*, reaffirmed its earlier conclusion in *Kelly v. Washington* that ship design and construction are matters for national attention "which could not properly be left to the diverse action of the States." 1177 The Court in *Ray* also applied the *Cooley* rule in assessing the validity of a state requirement for escort tugs. 1178 In fact, most of the Supreme Court's maritime Article VI preemption decisions were written against the *Cooley* backdrop. It would not be overly bold to suggest, therefore, that Congress may have legislated over the last century and a half under the reasonable presumption that the states were barred by the Court's dormant Commerce Clause precedents from legislating on subjects that were "national." Any failure by Congress to expressly preempt state law on such subjects should not, therefore, be construed as evidence that Congress intended to permit state regulation in a field subject to federal control.

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1173 See infra § VII.B.5 (describing conflict preemption approach).
1175 See Robertson, supra Part I at note 17, at 341 (observing that the words have no meaning, much like "traditional police powers of the states").
1176 For example, in *California v. Zook*, 336 U.S. 725 (1949), in which a bare majority of the Supreme Court first rejected the *Varnville-Rice* per se "no-coincidence" rule (discussed supra Part III at notes 762–64), the Court treated the "familiar" *Cooley* rule of uniformity versus locality as one of the three prongs of the federal preemption doctrine. Id. at 728. One can only speculate whether the majority would have rejected the *Varnville-Rice* rule if *Cooley* had not at the time operated as a limit on state legislative authority.
1177 435 U.S. at 166 n.15.
1178 Id. at 179.
4. Step Four: Field Preemption Analysis

When federal law occupies a regulatory field, overlapping state laws are preempted without regard to whether they actually conflict with the federal scheme.\textsuperscript{1179} The challenge often lies in determining just what "field" is occupied by the federal regime.\textsuperscript{1180} Federal intent to preempt state action may be express or implied by the federal laws' structure and purpose.\textsuperscript{1181} With few exceptions, Congress has not expressly preempted the states from regulating merchant vessel safety and vessel-source pollution prevention. Thus, the principal focus of this section will be on implied preemption.

a. Principles of Implied Field Preemption

In preemption analysis the courts look to federal law as a whole and to the federal law's object and policy.\textsuperscript{1182} Evidence of federal intent to occupy the field may be found in treaties, statutes, and regulations. The Court has long stressed that the touchstone for preemption analysis is whether Congress (or the President) intended that federal law would be exclusive.\textsuperscript{1183} However, the Court has never held that federal law preempts state action only when Congress expressly states such an intent.\textsuperscript{1184} Congressional intent to exclusively occupy a field may be evidenced in several ways:

The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it... Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject... Likewise, the object sought to be obtained

\textsuperscript{1179}Hines v. Davidowitz, 312 U.S. 52, 66–67 (1941) ("where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation... states, cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail, or complement, the federal law, or enforce additional or auxiliary regulations.").

\textsuperscript{1180}See id. at 78–79 (Stone, J., dissenting) ("Every act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution.") (emphasis added).

\textsuperscript{1181}Jones v. Rath Packing Co., 430 U.S. 519 (1977) (a conclusion that state law is preempted "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.").

\textsuperscript{1182}Gade v. National Solid Wastes Mgt. Ass'n, 505 U.S. 88, 98 (1992) ("[o]ur ultimate task in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole. Looking to 'the provisions of the whole law, and to its object and policy...'") (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987)).


\textsuperscript{1184}Of course, nothing in Article VI requires Congress to express an intent to preempt state law as a condition of federal supremacy.
by the federal law and the character of obligations imposed by it may reveal
the same purpose.\footnote{Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).}

Although the courts rarely conclude that a federal interest is so dominant that
the federal system will be presumed to preclude enforcement of state laws on
the same subject,\footnote{See Hines v. Davidowitz, 312 U.S. 52 (1941).} the Supreme Court has established a presumption that
vessels engaged in foreign commerce will be regulated by the federal
government.\footnote{See Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 449, 1979 AMC 881 (1979)
("vehicles of commerce by water being instruments of intercommunication with other nations, the
regulation of them is assumed by national legislation.") (quoting Railroad Co. v. Maryland, 88 U.S. (21
Wall.) 456, 470 (1875)).}

The \textit{Rice} test quoted above recognizes that an "intent" to preempt state
law need not be express, and in fact may not even be the intent of a single
Congress. The legislative and executive branches may build a "pervasive"
scheme of federal regulation over a period of years, even decades. Perva-
siveness of the federal regime is seldom a sufficient condition for a finding
of implied field preemption; however, the Court's historic unwillingness to
infer that Congress intended to leave a regulatory vacuum in the legal regime
would hardly be asserted that when Congress set up its elaborate regulations as to steam vessels, it
deprieved the state of the exercise of its protective power as to vessels not propelled by steam.").}

Even where no "gaps" appear in the national regulatory scheme, the courts may be
reluctant to find that the field is occupied to the exclusion of state or local
government regulations adapted to true "local peculiarities"\footnote{See Ray v. Atlantic Richfield Co., 435 U.S. 151, 175, 1978 AMC 527 (1978) (distinguishing
between vessel operation rules adapted to "local peculiarities" and those which represent a contrary
judgment).} in the absence of proof of an actual conflict.

The Supreme Court has identified other specific indicia of congressional
intent to displace state laws, two of which are particularly relevant to
maritime preemption analysis. When Congress has imposed a mandatory
duty on an agency to regulate a subject matter the court may infer that
Congress intended that federal law would occupy the field.\footnote{Cf. Ray, 435 U.S. at 162–63; City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638–39 (1973).} An intent to
preempt state authority may also be inferred where federal law provides that
the activity which is the subject of the state law under challenge may occur
"only by federal permission, subject to federal inspection, in the hands of
federally certified personnel and under an intricate system of federal
commands." When coupled with Congress' recognition of the long history of preemption in maritime safety matters and the need for uniformity applicable to vessels moving in interstate commerce, these precedents provide a useful starting point for analyzing the preemptive intent of the merchant vessel safety and pollution prevention treaties, statutes, and regulations.

b. Field Occupation by International Conventions

Field preemption analysis involving subjects for which international agreements provide the governing standards necessarily presents a specialized inquiry owing to the established rule that such treaties bind the entire nation. The Ninth Circuit's approach to international law in Intertanko v. Locke, in which it treated its earlier conclusion in Chevron U.S.A., Inc. v. Hammond that international law merely prescribes minimum standards as if it were a rule of law rather than an individualized (and, I believe, incorrect) finding, charts an unwise and legally unsupported course for maritime preemption analysts. Unlike federal statutes or regulations, which may or may not entail an intent to displace state laws on the same subject, international agreements impose a national obligation absent an appropriate exception or reservation.

The reporters for the Restatement (Third) of the Foreign Relations Law of the United States take the position that all international agreements to which the U.S. is a party preempt state authority on the same subject as a matter of law. The limited saving clauses of the principal IMO regulatory conventions evidence a design by the drafters to limit the jurisdiction of the parties to prescribe standards that differ from those adopted in the conven-

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1193 See supra § VII.A.2.
1194 See supra Part III at § VI.C.3.e and particularly note 978. Such sweeping statements about "international treaties" demonstrate a fundamental misunderstanding of the inquiry. Each treaty must be examined individually to determine the intended effect of the standards it prescribes. A given treaty might prescribe minimum standards for the parties to apply to vessels flying their flag, yet preclude higher standards for foreign vessels calling on their ports. The effect of the standards might also vary according to the waters in which the vessel is located (internal waters, territorial seas, and exclusive economic zones). Finally, no analysis would be complete without also examining any preemption or saving clauses in the treaty or reservations entered by the U.S. in ratifying the treaty.
1195 Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party throughout its territory. See Vienna Convention on the Law of Treaties, supra Part I at note 221, at art. 29; Restatement, supra Part I at note 19, at § 102(3), cmt. f and introductory note to pt. III.
1196 See Restatement, supra Part I at note 19, at § 115 cmt. e (observing that the matter has not been adjudicated).
A court may reasonably conclude that Congress and the President intended, when they bound the nation to the IMO regulatory conventions and delegated port State control authority to the Coast Guard, to displace state law on the subjects covered by the conventions. Should the court adopt that conclusion, state and local government prescriptive jurisdiction on those subjects covered by the convention is displaced. A state may not attempt to add to or take from the force and effect of a treaty. More particularly, as the Supreme Court in Ray made clear, states may not impose vessel standards that are stricter than those Congress has “accepted as a result of international accord.”

**c. Finishing the Ray v. Atlantic Richfield Co. Analysis**

In both *Chevron U.S.A., Inc. v. Hammond* and *Intertanko v. Locke*, the Ninth Circuit treated *Ray v. Atlantic Richfield Co.* as if it was an exhaustive analysis of the preemptive effect of the Ports and Waterways Safety Act (PWSA). In neither case did the circuit court examine the congressional intent factors that persuaded the Supreme Court that Title II occupied the field of tank vessel design and construction to determine whether those factors supported a finding that Title II also occupies the field for the other subjects it addresses, including vessel manning, personnel qualifications, operations, cargo handling, ballasting, and equipment.
In *Ray*, the Court first noted an overlap between Title I and Title II of the PWSA, then held that state regulation of merchant vessel equipment requirements and vessel safety standards are preempted by Title I of the Act. In reaching its conclusion on Title I preemption the Court relied in part on the Act’s legislative history, which revealed that the House changed the wording of the original bill because the earlier version did “not make it absolutely clear that the Coast Guard regulation of vessels preempts state action in this field.” The Court next concluded that the field of tank vessel construction and design standards is fully occupied by Title II of the PWSA. In reaching its conclusion that Title II occupied the field, the Court relied on the statutory structure of the Act. The structural features the Court cited include: (1) a requirement that the Secretary establish rules and regulations as may be necessary with respect to the design, construction, and operation of tankers; (2) a requirement that the Secretary, in establishing the required rules, consider factors prescribed by the Act and consult with certain state and other government officials; (3) a requirement that the Secretary inspect covered vessels to verify their compliance with the Act and the Secretary’s rules, and that the Secretary issue certificates or endorsements to qualified vessels documenting their compliance; (4) authority for the Secretary to exercise his or her discretion to accept, in lieu of inspection, a foreign vessel’s certificates of inspection “recognized under law or treaty by the United States”; (5) a provision that “such endorsement shall serve as a permit for such vessel to operate”; and, (6) a prohibition on any vessel carrying on the covered trade without the required inspection certificate or endorsement. The Court concluded that the statutory pattern of Title II “shows that Congress, insofar as design characteristics is concerned, has entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States.” That statutory pattern revealed that Congress “intended uniform national standards for the design and construction of tankers that
would foreclose the imposition of different or more stringent state requirements."\(^{1211}\)

The Supreme Court's conclusion that Title II fully occupies the field is buttressed by the Court's precedents holding that an intent to preempt state authority may be inferred where federal law provides that the activity which is the subject of the state law under challenge may occur only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under a system of federal commands.\(^{1212}\) Or, as the Court put it in *Ray*, "[t]he Supremacy Clause dictates that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment."\(^{1213}\) Until such time as the Secretary exercises his or her Title I authority, states remain free to enforce "local laws" addressed to a purpose other than those embodied in the federal laws,\(^{1214}\) but they may not prescribe requirements on vessels operating in state waters that are different from or more stringent than the federal standards.

(2) Applying the Court's Reasoning to the Remaining Title II Subjects

Although it was unnecessary in *Ray* for the Court to determine the preemptive effect of Title II on subjects other than those challenged in the Washington Tanker Act, the Court's reasoning extends equally to tank vessel equipment, operations, personnel qualifications, and manning standards.\(^{1215}\) The statute from which the Court in *Ray* took its guiding "pattern" also requires the Secretary to establish requirements for tanker manning and operations.\(^{1216}\) Congress' purpose in Title II was to require the Secretary to

\(^{1211}\) Id.


\(^{1213}\) *Ray*, 435 U.S. at 165.

\(^{1214}\) Id. at 164 (citing *Huron Portland Cement Co. v. City of Detroit* and *Kelly v. Washington*).

\(^{1215}\) "Manning" regulations refer to the legal requirements prescribing the number and grade or rating of officers and crewmembers a vessel must carry. See, e.g., SOLAS Convention, supra Part II at note 420, at ch. V., reg. 13; Int'l Maritime Organization Res. A.481(XII) (Nov. 19, 1981), reprinted in 6D Benedict on Admiralty, Doc. No. 14–7 (7th rev. ed. 1997); 46 U.S.C. ch. 8101–8301 (master and officer requirements for U.S. vessels) and ch. 87 (unlicensed personnel requirements for U.S. vessels). Manning regulations must be distinguished from the regulations prescribing the requirements for an individual to qualify to hold a license or merchant mariner document. A Manning regulation might require a vessel to carry a chief engineer. A license qualification regulation would prescribe the age, medical standards, experience, and testing requirements a person must meet to hold a license as a chief engineer. See, e.g., STCW Convention, supra Part II at note 388 (passim); 46 U.S.C. § 7101.

\(^{1216}\) See 46 U.S.C. § 3703(a). Tanker "operation" is not defined under Title II of the PWSA; however, it is apparent that the term overlaps to some extent with the Secretary's authority to prescribe "vessel operating requirements" under Title I of the PTSA. The Court in *Ray* provided some guidance when it distinguished between state regulations "based on water depth . . . or other local peculiarities," which would be analyzed under Title I, and those more akin to design judgments made by "federal authorities in pursuit of uniform national and international goals," which would be analyzed under Title II. *Ray*, 435
establish a body of regulations broad enough to serve as a measure of a tank vessel's fitness to transport oil in U.S. waters. The Court expressly identified the tanker safety regulations in 33 C.F.R. part 157 and 46 C.F.R. parts 30–40 as the relevant Title II regulations under consideration. The Court also noted that the Title II rules the Secretary was required to establish included operations rules and rules “to insure that adequately trained personnel are in charge of tankers.” The manning requirements for U.S. merchant vessels are prescribed by the Coast Guard and noted on the vessel's certificate of inspection. A vessel may not lawfully operate in U.S. waters unless it has on board the personnel complement called for in those manning requirements and each such individual holds the appropriate license or merchant mariner's document.

Thus, had the Ninth Circuit completed the statutory analysis begun by the Supreme Court in Ray, the court would have discovered that the Ray reasoning compels the conclusion that Title II of the PWSA occupies the field for each of the subjects listed. Accordingly, unless § 1018 of OPA 90 later “de-occupied” the PWSA Title II subject matter field, as defined by the holding and reasoning in Ray, state laws prescribing standards on those subjects are displaced.

(3) The PWSA Structure is Carried Forward into the Crew Qualifications and Training Provisions in Title IV of OPA 90

State and local governments have historically prescribed standards for harbor, river, and port pilots, but they have not otherwise regulated merchant mariner license qualification or training standards. In OPA 90, Congress directed the Secretary of Transportation to evaluate the merchant mariner training and qualification standards for foreign nations that issue documents for tanker officers and crewmembers. The U.S. had signed the STCW Convention at the time OPA 90 was enacted, but the Senate had
not yet given its advice and consent to ratification.\textsuperscript{1224} The Secretary was directed by Congress to ensure that the mariner qualification and training standards for each issuing nation are "at least equivalent to United States law or international standards adopted by the United States."\textsuperscript{1225} OPA 90's legislative history makes it clear that Congress intended that the Secretary would look to the STCW Convention in setting the standards.\textsuperscript{1226} Congress delegated to the Secretary authority to deny entry to vessels whose crews do not hold certificates meeting the OPA 90 § 4106 standards.\textsuperscript{1227} As with Title II of the PWSA, Congress made no provision in § 4106 for state regulation of mariner qualification or training requirements, or for the states to prescribe requirements that were different from those accepted by the Secretary under authority of § 4106. When the U.S. ratified the 1978 STCW Convention in 1991\textsuperscript{1228} (the year after OPA 90 was enacted) it entered no reservations to preserve the authority of state or local governments within the U.S. to prescribe standards that are more stringent than the standards prescribed by the Convention.\textsuperscript{1229} The U.S., like all parties to the Convention, has agreed that in its port State control capacity it will accept valid certificates issued by another party.\textsuperscript{1230}

d. Gaps and Overlaps

Part I of this article\textsuperscript{1231} suggested that for purposes of preemption analysis, state regulations can be grouped into three categories:\textsuperscript{1232} (1) state regulations that adopt the requirement or standard set by federal law and provide that the federal requirement is also enforceable under state law (a "duplicate" state enforcement rule);\textsuperscript{1233} (2) state regulations that address a subject for which no federal rule or standard exists ("interstitial" state

\textsuperscript{1225}OPA 90 § 4106(a) and (b), 104 Stat. 513–14, codified at 46 U.S.C. § 9101.
\textsuperscript{1226}See supra Part II at note 565 and Part III at note 1014.
\textsuperscript{1227}Id.
\textsuperscript{1229}See supra Part II at note 388, at art. X.
\textsuperscript{1230}See 6D Benedict on Admiralty, Doc. No. 14–1 (7th rev. ed. 1997) (listing parties that have ratified the agreements and any reservations or declarations).
\textsuperscript{1231}See supra Part I at notes 122–24 and accompanying text.
\textsuperscript{1232}A fourth category, not addressed in this article, includes state laws that impose liability for a regulated activity's conduct or consequences without attempting to directly regulate the activity. See, e.g., Lewis v. Brunswick Corp., 107 F.3d 1494 (11th Cir. 1997), cert. dismissed, 118 S. Ct. 1793 (1998) (construing express preemption clause in the Federal Boat Safety Act, 46 U.S.C. § 4306).
and, (3) state regulations that address a subject already regulated by federal law, but prescribe a standard that is different from the federal standard ("overlapping" state regulations). Duplicate state enforcement regimes applicable to federally licensed or inspected vessels may give rise to preemption challenges if the state purports to deny a federal license holder the opportunity to carry on the licensed activity in state waters. Interstitial and overlapping state regulations raise fundamentally different questions.

(1) Neither a Subject Matter nor a Purpose Test

Part III of this article highlighted inconsistencies in the Supreme Court's analytic frame of reference in preemption cases, focusing alternatively on the "field," "subject matter," "object" and "purpose" of the respective federal and state laws, to determine whether the challenged state law fell within or beyond the federally occupied field. More recently, the Court has held that principles of field preemption apply against any state law relating to the "issue" of the federal standard. On occasion, the Court has also held that the test for field preemption is not whether the laws overlap in their subject or purpose, but whether the state law interferes with "federal

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1234See, e.g., Kelly v. Washington, 302 U.S. 1, 1937 AMC 1490 (1937) (upholding state regulation of motor tugs, where such tugs were not regulated by the federal government).
1236See Douglas v. Seacoast Products, Inc., 431 U.S. 265, 280–81, 1977 AMC 566 (1977) (holding that Gibbons v. Ogden established the principle that a vessel's federal license implies a grant of the right to navigate in state waters and to carry on the activities listed in the license); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) ("That no State may completely exclude federally licensed commerce is indisputable").
1237See Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 624–25, 1978 AMC 1058, 1064–65 (1978) ("[T]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.").
1238See supra Part III at § VI.A.3.
superintendence of the field," or Congress’ intent that regulatory decisions be made by a single decisionmaker.

Resolution of the subject matter-purpose frames of reference controversy must ultimately turn on the intent of Congress and the President in establishing the relevant federal law scheme. Examination of the text, structure, and legislative history of the federal laws may reveal that Congress and the President intended that federal statutes or international conventions would exclusively govern the regulation of a particular subject matter, such as vessel construction, design, equipment, and manning (CDEM) standards. Another federal regime might reveal an intent to address a particular goal or purpose, like water quality, regardless of the source of the emissions. The contentious cases are likely to be those in which the relevant federal regime includes both subject matter and purpose statutory schemes, one of which permits overlapping state requirements while the other precludes them.

Within the field of merchant vessel safety and vessel-source oil pollution prevention, the subject matter-purpose distinction will be largely academic because the subject of and purposes behind the treaties, statutes, and regulations that constitute the modern federal regime are so broad. Congress’ purpose in enacting the PWSA/PTSA was to enhance port and vessel safety and prevent marine pollution. The recently enacted ISM Code provisions aim to promote safety and improve compliance with environmental protection regulations. A similar purpose underlies the principal IMO regulatory conventions. State regulations, such as those challenged in Inter-

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1240 Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 139, 142 (1963) ("[t]he test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."). Federal superintendence as a basis for a finding of field preemption is closely related to implied field preemption where the regulated activity can occur “only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands.” City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 634 (1973); see also Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 614 (1991) (suggesting that such a regime implies field preemption). Federal superintendence of the field may also be a “purpose or objective” of the federal regime which should be considered in the conflict preemption step.

1241 Ray, 435 U.S. at 177.

1242 The Ninth Circuit concluded that Chevron U.S.A., Inc. v. Hammond presented such a case. See supra Part III at § VI.C.1. In his dissent from the Court’s denial of certiorari in the case Justice White disagreed. See supra Part III at note 857 and accompanying text.

1243 At present, there is no evidence that Congress intended the federal regime for vessel-source air emissions or for controlling the release of aquatic nuisance species through ballast water discharges to be exclusive. See supra Part II at note 505 (describing development of MARPOL Annex VI); 16 U.S.C. § 4725 (saving state authority over control of aquatic nuisance species).

1244 See supra Part II at note 590; Ray, 435 U.S. at 161 (the “twin goals” of the PWSA are vessel safety and protecting the marine environment).

1245 See supra Part II at note 490.

1246 See, e.g., STCW Convention, supra Part II at note 388, at Preamble (“Desiring to promote safety of life and property at sea and the protection of the marine environment. . . .”).
tanko v. Locke, which are couched as oil spill "prevention" rules, thus overlap both the subject matter and purpose of the federal regime. If the federal and state purposes are the same, and the federal and state laws are directed at the same subject matter, the question is to what extent the states are free to legislate different or more stringent standards than the federal regime or to impose additional or more severe sanctions for violations than those provided by the federal regime.

(2) Interstitial State Laws

Congress and the President may, through treaties, statutes, and regulations, occupy a field without necessarily filling it with federal regulation. "In such cases, any state or local action, however consistent in detail with relevant federal statutes, is held invalid—not because of a 'dormant' federal power thought to be constitutionally exclusive but rather because the federal legislative scheme announces, or is best understood as implying, a congressional purpose to 'occupy the field.'" The Court is reluctant to infer field preemption, however, if the result is to deny state competency to fill a true "gap" in the federal regime with an interstitial state law. Under such circumstances, the Court is likely to resolve the preemption question by reference to the conflict preemption test.

(3) Overlapping State Laws

In contrast to interstitial state laws governing maritime subjects, such as the state motor tug regulations under challenge in Kelly v. Washington, overlapping state regulations that prescribe standards that are different from

1247The state "best achievable protection" regulations for tankers challenged in Intertanko are listed supra Part III at note 925.
1248That is, Congress may, through what Professor Tribe characterizes as a "hybrid" of Supremacy Clause preemption and the dormant Commerce Clause, expressly or implicitly leave a regulatory vacuum. Tribe, supra Part I at note 204, § 6–25, at 479.
1249Id. (citing Note, Pre-emption as a Preferential Ground: A New Canon of Construction, 12 Stan. L. Rev. 208 (1959)) (emphasis in original).
1250To say that a state law fills a "gap" in the federal regime, and is therefore interstitial, is to state the conclusion that federal law does not completely occupy the relevant field.
1251The Court summarizes its approach in the canon that:
the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state. Kelly v. Washington, 302 U.S. 1, 12, 1937 AMC 1490 (1937) (quoting Savage v. Jones, 225 U.S. 501 (1912)) (emphasis added).
1252302 U.S. 1, 1937 AMC 1490 (1937).
or stricter than the standards prescribed by federal law, such as the Alaskan ban on ballast water discharges challenged in *Chevron U.S.A., Inc. v. Hammond*, override the federal judgment within the boundaries of the state. Such divergent state standards are generally motivated by one of two goals: the perceived need to promulgate local rules adapted to the "peculiarities of local waters," or a desire to implement a contrary state judgment regarding the desired risk management regime for all of the state’s waters.

The distinction between gaps and overlaps occasionally turns on subtle aspects of the relevant federal and state laws. In *Pacific Gas & Electric (PG&E)*, Justice White explained that if the federal government occupies a given field or an identifiable portion of it, the test of preemption is "whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act." Applying this test, the Court in *PG&E* concluded that federal law completely occupied the field of nuclear power plant safety. Accordingly, the state of California was preempted from regulating the construction or operation of a nuclear power plant—even for a non-safety purpose. The Court distinguished the question of the state’s authority to authorize or withhold authorization of the construction of new plants within the state. The state could not ban the construction of nuclear plants out of safety concerns. To do so would conflict with the federal Nuclear Regulatory Commission’s judgment. If, however, the state’s ban on new construction were grounded on a rationale other than safety, the

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1254The difference is highlighted in *Ray*, where the Court distinguished between state judgments on the “matter of safety and environmental protection generally” and those based on “water depth . . . or other local peculiarities.” 435 U.S. at 175.
1256Id. at 212–13 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947)) (emphasis added).
1257Id. at 216.
1258Id. at 212 (dictum).
1259Id. at 213 (“a state judgment that nuclear power is not safe enough to be further developed would conflict directly with the countervailing judgment of the NRC”). Two concurring justices labeled the conclusion dictum and “wrong.” See id. at 223–34 (Blackmun and Stevens, JJ., concurring in part and concurring in the judgment); see also Tribe, supra Part I at note 204, § 6–28, at 507 n.32 (explaining that in *Ray*, “the state imposed its stringent requirements ‘on the ground that [certain ships’] design characteristics constitute an undue hazard,’ a concern held by the Court to fall squarely within the field occupied by the federal government.”).
1260The Court was reluctant to scrutinize closely the state’s claimed legislative purpose. *PG&E*, 461 U.S. at 216 (“inquiry into legislative motive is often unsatisfactory.”) (citing United States v. O’Brien, 391 U.S. 367, 383 (1968)). Earlier, in *Southern Pacific Co. v. Arizona*, the Court was more willing to closely examine the state’s purpose. 325 U.S. 761, 780 (1945) (reasoning that state conflicts are “not to
state's action would lie outside of the federally occupied field. The Court's fine distinction between safety and non-safety purposes is best explained by the fact that denying the state's authority to regulate the economics of whether plants should be built at all would result in a gap in the regulatory subject matter because the NRC had no authority to decide such questions. Thus, the California legislation did not represent a substitution of judgment.

Ray v. Atlantic Richfield Co. provides the method for analyzing regulatory overlaps involving merchant vessels holding federal licenses and inspection certificates entitling the vessel to operate in a particular trade. After setting out its conclusions on implied preemption on vessel safety and equipment standards under 33 U.S.C. § 1222, field preemption under Title II of the PWSA, and preemption once the Secretary acted pursuant to his authority under Title I of the Act, the Court in Ray identified an implied "no overlap" rule for vessels holding federal certificates. Such vessels, the Court held, must conform to reasonable, nondiscriminatory state conservation and environmental protection measures; however, both Ray and the Court's earlier decision in Huron Portland Cement Co. v. City of Detroit recognized that state rules that "overlap" with federal law are invalid. Under Huron and Ray, in the absence of later Congressional action to permit overlapping state regulation on merchant vessel safety and vessel-source pollution prevention, such state regulations are preempted under Article VI.

be avoided by "simply invoking the convenient apologetics of the police power." (quoting Kansas City S. Ry. Co. v. Kaw Valley Drainage Dist., 233 U.S. 75, 79 (1914)). The Court noted that the fact that the state purpose left it outside the occupied field would not immunize it from a conflict preemption analysis if, for example, it frustrated a federal purpose. PG&E, 461 U.S. at 216 n.28.

See id. at 207–08 ("It is almost inconceivable that Congress would have left a regulatory vacuum; the only reasonable inference is that Congress intended the States to continue to make" judgments regarding the economic aspects of nuclear power plants). The Court quoted a state law saving clause in the Atomic Energy Act in support of its conclusion. See 42 U.S.C. § 2018.

In contrast to the Supreme Court's decision in PG&E, the Ninth Circuit's decision in Chevron U.S.A., Inc. v. Hammond presents an overlap involving a contrary state judgment. Both the federal and state statutes affected the same subject matter (vessel on-board operations) and purpose (pollution prevention). The state rejected the federal rule, which permitted a vessel to discharge "clean" ballast water. 726 F.2d 483, 1984 AMC 1027 (9th Cir. 1984), cert. denied sub nom. Chevron U.S.A., Inc. v. Sheffield, 471 U.S. 1140, 1985 AMC 2395 (1985).

See also Tribe, supra Part I at note 204, § 6-28, at 506–07 & n.32 (citing the Huron "no overlap" rationale and concluding that "whether federal licensing operates to preempt state regulation will ordinarily depend on the respective aims of the state and federal schemes").

See, e.g., Ray, 435 U.S. at 164 (quoting Huron, 362 U.S. at 446). The conclusion appears in Part IV of the Ray opinion, in which Justices Stevens and Powell joined the four-member plurality.
Any preemption decision must of course take account of the fact that the body of federal law is developing, taking in new subjects and purposes. Professor Tribe, for example, suggests that the Washington tanker law in *Ray* could have been viewed simply as a marine pollution prevention regime, and therefore treated like the gap-filling ordinance in *Huron*. But he overlooks a key distinction between *Huron* and *Ray*. The federal domain examined for preemptive effect in *Huron* included the marine boiler inspection statutes in effect in 1960 and the enrollment and license statutes first examined in *Gibbons v. Ogden*. The congressional purpose of the inspection statutes, the Court concluded, was seagoing safety of ships and their passengers and crews. The "sole purpose" of the Detroit ordinance was the elimination of air pollution. The Court concluded "there is no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance." The Court did not reach the question whether the city's inspection laws or its requirement that any vessel operating combustion machinery in the city obtain a permit were preempted because there was no evidence the city had attempted to enforce those laws. The preemption analysis in *Ray*—nearly two decades after *Huron*—turned on a greatly expanded federal regime, which by then included the Ports and Waterways Safety Act of 1972. The purpose of the PWSA (even before it was amended in 1978 by the Port and Tanker Safety Act) extends well beyond the "seagoing safety of vessels" domain examined in *Huron*, and includes the vessel-source pollution prevention purpose of the Washington statute. Even using the majority's approach in *Huron*, which measured overlap by

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1269 Tribe, supra Part I at note 204, § 6–28, at 507 n.32. ("The Court's distinction between *Atlantic Richfield* and *Huron Portland Cement* illustrates the difficulty of searching for the relevant state purpose, since it would seem that the State of Washington, by regulating only oil tankers rather than ships generally, was concerned not with 'the seagoing safety of vessels,' the federally occupied field, but with the effects of oil spills on the shores and communities of Puget Sound, in a manner closely analogous to Detroit's non-preempted objective in *Huron Portland Cement*.")


1271 Id. at 446–47.

1272 Id. at 445.

1273 Id. at 446.

1274 Id. at 442 n.1.

1275 See supra Part II at § V.C.1.
purpose rather than just subject matter, the Court in *Ray* recognized that the state tanker laws overlapped with the federal regime.

Two final qualifications to the analysis of interstitial and overlapping state laws are necessary. First, interstitial state laws that lie outside the field occupied by federal maritime laws must still be scrutinized under a conflict preemption analysis. Such laws may frustrate the purposes and objectives of the federal reciprocity statutes or statutes which have as one of their purposes uniformity, even though they do not fully occupy the field. Second, the validity of overlapping state laws may be affected by relevant preemption, non-preemption, or saving clauses.

e. Determining the Domain of Saving and Preemption Clauses

The national government is free to determine the preemptive effect of federal law through saving or preemption clauses in statutes or regulations, by negotiating appropriate terms in treaties, or by entering reservations at the time of ratification of a multilateral convention. Preemption and non-preemption clauses, if used, help establish the domain occupied by federal law. They are also relevant to the question whether the state law frustrates the purposes or objectives of the federal law. Like express preemption clauses, federal statutory provisions that "save" state regulatory authority often require the court to determine the domain of their coverage.

In *Intertanko v. Locke*, the state regulations being challenged overlapped federal standards in many respects, in effect substituting the state's judgment for that of the federal government expressed in its treaties, statutes, and regulations. Under the Supreme Court's rulings in *Huron* and *Ray* discussed in the preceding section, such overlapping state regulations are preempted unless state authority for overlapping regulations is provided by a saving clause. The U.S. joined Intertanko in petitioning the Supreme Court

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1276 See Vienna Convention on the Law of Treaties, supra Part I at note 221, at art. 29 ("[u]nless a different intention appears from the treaty, or is otherwise established, a treaty is binding upon each party in respect of its entire territory."). Under article 19 of the Vienna Convention a nation may, by reservation, limit the territorial effect of a treaty, as the United Kingdom elected to do in ratifying the SOLAS Convention. See SOLAS Convention, 6D Benedict on Admiralty, Doc. No. 14–1 (7th rev. ed. 1998) (citing U.K. reservation against application to its territories). Reservations are not appropriate if expressly prohibited by the convention or if "incompatible with the object and purpose of the treaty." Vienna Convention on the Law of Treaties, supra Part I at note 221, at art. 19; Restatement, supra Part I at note 19, at § 313.


1278 Generally, saving clauses are strictly construed. See 1A Sutherland, supra note 216, § 20.22, at 110 (citations omitted).

128 See supra Part III at § VI.C.2 and note 936.
for certiorari in the case. Should the Court grant the petition, it will be called upon to determine the domain of § 1018 and whether Congress intended that § 1018 would authorize the states to impose overlapping vessel requirements. Specific questions the Court may face include: (1) whether, as Judge Graber suggests in dissent, there is any suggestion in the text of § 1018 of OPA 90 or its legislative history that Congress intended to confer on the states new authority over merchant vessel safety and vessel source pollution prevention, and that the federal judgment that a vessel is safe to navigate U.S. waters would no longer prevail over a contrary state judgment; (2) the importance of the structure of OPA 90, the placement of § 1018 in Title I, the distinct origins and evolution of Title I and Title IV, and the fact that Congress included additional saving clauses that would be superfluous if § 1018 were intended to apply to the entire Act; (3) the inference to be drawn from the fact that the compromise bill agreed to by the Conference Committee deleted the only saving clause that directly discussed state regulation of tank vessel safety; (4) the importance of the fact that the operative language of § 1018 is virtually identical to state law saving clauses in the CWA, CERCLA, and DWPA, none of which has ever been construed to provide authority for states to engage in the regulation of subjects other than liability or response; (5) whether the limited saving clause in § 1018 (liability and requirements relating to the discharge or substantial threat of discharge) implies that laws on any subjects other than such liability and requirements are impliedly preempted; and, (6) whether § 1018 pre-

1280 *Intertanko*, 159 F.3d 1220, 1225, 1999 AMC 729 (9th Cir. 1998) (Graber, J., dissenting from denial of rehearing en banc).


1282 Ray v. Atlantic Richfield Co., 435 U.S. 151, 165, 1978 AMC 527 (1978); see also *PG & E*, 461 U.S. at 212 (state preempted from regulating the construction or operation of nuclear power plants—even for a non-safety purpose, because it would contradict safety judgment of the NRC) (dictum).

1283 *Intertanko*, 159 F.3d at 1222–23 (Graber, J., dissenting from denial of rehearing en banc).

1284 See supra Part II at note 688 (describing the decision of the Conference Committee to delete § 310).

1285 See supra Part II at notes 946–57. This question asks whether it is reasonable to conclude, as the Ninth Circuit did, that simply because other titles of OPA 90 address oil spill prevention, the words “discharge or substantial threat of discharge” mean something different in OPA 90 than they did in the CWA and CERCLA. See Natural Resources Defense Council, Inc. v. EPA, 859 F.2d 156 (D.C. Cir. 1988) (state CWA authority to regulate point source discharges does not carry with it the authority to regulate the point source itself).

1286 Cf. Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 612–13 (1991) (reasoning that when Congress expressly limits state regulatory authority, it implies that the states are free to legislate on subjects outside the limitation provision).
cludes the Coast Guard from issuing regulations that preempt state authority, where the agency’s rules are promulgated under the authority of OPA 90 itself, other statutes enacted before OPA 90 (the PWSA/PTSA or the remaining chapters of Title 33 and 46 of the U.S. Code), or statutes or treaties enacted after OPA 90 (the ISM Code, ratification of the STCW Convention, and the 1995 STCW Convention changes).1287

Several considerations will likely guide the Court’s decision if the petition is granted. In examining the preemptive effect of ambiguous federal legislation, the Court will consider the law’s text and its legislative history.1288 The text and legislative history of § 1018 and precedents relevant to its interpretation were analyzed in Parts II and III of this article.1289 That earlier discussion highlights the fact that the Conference Committee Report makes clear that the Supreme Court’s decision in Ray was not to be disturbed by OPA 90.1290 OPA 90 may thus be seen as a legislative ratification of the Court’s rulings in Ray, conferring on the decision a status beyond that which stare decisis would otherwise provide, rather than as a statement of intent to undo the “statutory scheme” that informed the Court’s decision in Ray. In determining the preemptive effect of § 1018, the Court must also determine whether Congress intended to relieve the states of the preemptive effects of all of the IMO conventions, as the Ninth Circuit believed.1291 In reconciling the relationship between statutes and treaties, the Court will attempt to construe the federal statute consistently with U.S. treaty obligations, absent clear congressional intent to supersede those treaties.1292 Finally, the Court will likely consider the Coast Guard’s constructions of the relevant post-OPA 90 regulatory regime if the Court determines, as did Judge Graber,1293 that § 1018 is ambiguous.1294

1287 Intertanko, 159 F.3d at 1225–26, (Graber, J., dissenting from denial of rehearing en banc).
1288 Mortier, 501 U.S. at 610 (examining committee reports).
1289 See supra Part II at § V.D.2.b and Part III at § VI.C.2.b.
1290 See supra Part II at note 689 (citing Conference Report).
1291 Intertanko, 148 F.3d 1053, 1063, 1998 AMC 2113 (9th Cir.), reh’g and reh’g en banc denied with dissenting opinion, 159 F.3d 1220, 1999 AMC 729 (9th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3671 (U.S. Apr. 23, 1999) (No. 98–1706). The court reasoned that to reach any other conclusion, “we would have to read § 1018 to provide that the Act permits state tanker regulations only when the field in question is not subject to international regulation.” Id. Of course, § 1018 does not affirmatively “permit” state regulation (as would a non-preemption clause that begins with domain-defining language like “Notwithstanding any other law . . .”), it merely saves state law against preemption by “this Act” (i.e., OPA 90). Neither the text nor the structure of the Act supports the Ninth Circuit’s construction that would extend its effect in derogation of the nation’s treaties.
1292 Weinberger v. Rossi, 456 U.S. 25, 32 (1981) (“It has been a maxim of statutory construction since the decision in Murray v. The Charming Betsy . . . that ‘an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains’”); see also Brilmayer, supra note 1072, at 332–41 (analyzing the rule of The Charming Betsy in the context of preemption of state laws).
1293 Intertanko, 159 F.3d at 1222 (Graber, J., dissenting from denial of rehearing en banc).
1294 Mortier, 501 U.S. at 610 & n.4 (examining the opinion of the EPA as amicus). In its rulemaking
5. Step Five: Conflict Preemption Analysis

Even where Congress has limited the domain occupied exclusively by federal law, a state statute that lies beyond the occupied field is void to the extent that it actually conflicts with federal law. A state law conflicts with federal law if compliance with both the federal and state regulations is a physical impossibility, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Conflicts involving physical impossibility are rare. Therefore, this section will focus on the frustration of federal purpose test.

The frustration of federal purpose test proceeds in two steps. First, all of the relevant purposes and objectives of the federal laws are identified. Second, the court determines the extent to which state action interferes with the realization of those objectives. When the relevant federal law is found in more than one statute, treaty, or regulation, the court must look not to the purposes and objectives of any single act, but instead to Congress' overarching purposes and objectives in the relevant legislative field.

In this vertical conflict of law analysis, there is no judicial balancing of the respective federal and state interests to determine which is more compelling. If state action stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, the state law must yield. To guard against any tendency to overlook or to selectively ignore relevant federal purposes or the federal primacy in foreign affairs and foreign commerce, the proposed approach suggests four relevant “purposes and objectives” inquiries.

the Coast Guard concluded that “vessel design, construction, equipment and manning standards fall within the exclusive province of the Federal Government.” See supra Part III at note 821 and accompanying text. The agency’s 1997 decision cited Ray v. Atlantic Richfield Co., the decision singled out by the Conference Report on OPA 90.

See Ray v. Atlantic Richfield Co., 435 U.S. 156, 158, 1978 AMC 527 (1978); Savage v. Jones, 225 U.S. 510, 533 (1912) (dictum). Thus, if the Court concludes that OPA 90 § 1018 limits the preemptive domain, and permits concurrent state regulation of some subjects (i.e., some of the “field” is not occupied), state regulation on those subjects will nevertheless be preempted if in actual conflict with federal law.


Id. (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)) (quotation marks omitted).

The Court generally gives little weight to broad objectives. See Commonwealth Edison Co. v. Montana, 453 U.S. 609, 634 (1981) (holding that state law which arguably frustrates “general expressions of ‘national policy’” encouraging production of coal are not, for that reason alone, superseded); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 133 (1978) (rejecting preemption challenge to state law based on claim that the state law frustrated a national policy favoring free competition). The Constitutional basis for the Court’s refusal to consider all relevant federal purposes is not clear.

See supra notes 1055 and 1093.

a. Statutory Purposes and Objectives

In examining the relevant federal laws to determine whether the challenged state action stands as an obstacle to the accomplishment or execution of the federal laws' full purposes and objectives, courts must avoid the narrow perspective evident in the Ninth Circuit's conclusion in Intertanko v. Locke. In Intertanko, the circuit court reasoned that only the purposes and objectives of a single act, the Oil Pollution Act of 1990, need be analyzed, and that the purposes and objective of the remaining body of federal treaties, statutes, and regulations promulgated before and after OPA 90 were irrelevant. The Ninth Circuit's approach treats OPA 90 as though it was meant to supersede the existing federal pollution prevention and liability regime, rather than complement certain limited aspects of that regime. Fidelity to Article VI requires that the court consider the purposes and objectives of all relevant federal laws, absent evidence that Congress or the President had abandoned an objective expressed in an earlier law. The proposed approach suggests several objectives in the federal marine safety and pollution prevention statutes that might be considered in a complete analysis.

(1) To Promote Uniformity Where Feasible

Federal statutes addressing the same subject as the state law under challenge may reflect a federal objective to establish uniform standards or practices for an industry. State laws that prescribe standards that are different from or stricter than the federal standards necessarily undermine uniformity. Where national or international uniformity is an objective of federal law, the practical effect is similar to occupation of the field. Congress has acknowledged that the historical preemption in maritime safety matter is founded on the need for uniformity in regulating vessels moving in interstate

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1302 See supra Part III at § VI.C.2.d.
1303 See supra Part III at note 1006. Ironically, the circuit court first correctly stated the relevant inquiry when it cautioned that the court "must look not to the purposes and objectives of any single Act, but instead to Congress' overarching purposes and objectives in the relevant legislative field." Intertanko v. Locke, 148 F.3d 1053, 1062 (9th Cir. 1998) (citing California v. ARC, 490 U.S. at 102). The court then went on to conclude that OPA 90 reflects the "full purposes and objectives of Congress" (emphasis in original) "better than the PWSA, PTSA, or the Tank Vessel Act, all of which OPA 90 was designed to complement," and then ignored the purposes of those other acts. Id. (emphasis added).
1304 Cf. Posadas v. National City Bank of New York, 296 U.S. 497, 503 (1936) (repeals by implication are not favored). The Court has observed that congressional silence may provide a "treacherous guide to its intent." Watt v. Alaska, 451 U.S. 259, 271 n.13 (1981). The Court went on to reason that it would be "almost inconceivable" that Congress would change a "longstanding formula" without a "word of comment." Id.
1305 Tribe, supra Part I at note 204, § 6-26, at 486.
commerce. The Supreme Court recognizes a "special need for uniformity" in foreign commerce. Earlier, in Florida Lime & Avocado Growers, Inc. v. Paul, the Court distinguished cases involving interstate carriers because that was a "field of paramount federal concern." In Ray v. Atlantic Richfield Co., the Court concluded that state laws governing tanker design and construction would "frustrate the congressional desire of achieving uniform, international standards." Uniformity is also a prominent goal in many areas of vessel operations. The Court has recognized that the federal interest in protecting maritime commerce "can be fully vindicated only if all operators of vessels on navigable waters are subject to uniform rules of conduct."

(2) To Foster Reciprocity

The linchpin of the federal regime for foreign vessels is reciprocal recognition that a foreign vessel's compliance with the IMO regulatory conventions satisfies the conditions for entry to U.S. ports and waterways on the subjects covered by the conventions. The U.S. has incorporated a number of reciprocity provisions into its vessel safety and vessel-source pollution prevention statutes. State actions that deny the benefits of reciprocity afforded by the national government may provoke retaliation by the aggrieved vessel's flag State, thus undermining a key federal purpose in reciprocity. Moreover, it is established that no state may prohibit the

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1307 Wardair Canada, Inc. v. Florida Dep’t of Revenue, 477 U.S. 1, 8 (1986).
1312 See, e.g., 46 U.S.C. § 3303(a) ("A foreign country is considered to have inspection laws and standards similar to those of the United States when it is a party to an International Convention for Safety of Life at Sea to which the United States is currently a party"); 46 U.S.C. § 3711 ("The Secretary may accept any part of a certificate, endorsement, or document issued by the government of a foreign country under a treaty, convention, or other international agreement to which the United States is a party, as a basis for issuing a [U.S.] certificate of compliance"); see also 46 U.S.C. § 5109 (extending reciprocity under the International Convention on Load Lines); 46 U.S.C. § 14306 (extending reciprocity under the International Tonnage Convention).
1313 See Act to Prevent Pollution from Ships (implementing the MARPOL Convention and Protocol), 33 U.S.C. § 1904(b) ("A certificate issued by a country which is party to the MARPOL Protocol has the same validity as a certificate issued by the Secretary under the MARPOL Protocol.").
exercise of a right granted by federal law, particularly where the state seeks to exclude a carrier engaged in interstate transportation under federal authority.

(3) To Vest Vessel Safety Decisions in a "Single National Decisionmaker"

When Congress has prescribed a program of cooperative federalism, the courts are less likely to find that a state law frustrates the purposes of the relevant federal law. While it is true that the U.S. has adopted a program of cooperative federalism in pollution control and coastal zone management, for over 25 years it has followed a program of international cooperation in vessel safety and vessel-source pollution prevention, together with a "consultation" relationship with the states. The Supreme Court found in the PWSA an intent to vest decisions on vessel safety in a "single national decisionmaker, rather than a different one in each state." The Court distinguished the "cooperative federal-state regulatory" regime prescribed by Congress in the CZMA and CWA from the PWSA regime, noting that in the CZMA and CWA there was no "compelling need for uniformity in decisionmaking."

(4) To Provide Discretion to the Secretary to Accept Compliance with International Standards

In the PWSA/PTSA and, later, in OPA 90, Congress provided the Secretary of Transportation discretion to determine whether international standards provide an adequate level of protection for U.S. waters and to accept a foreign vessel's compliance with international standards in satisfaction of U.S. requirements for port entry. State actions that frustrate the congressional purpose to have the adequacy of international safety standards

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1318See supra Part III at note 726 and accompanying text.
1319See supra Part II at § IV.A; see also 46 U.S.C. § 3703(c)(2) and 33 U.S.C. § 1231(b)(2).
1320Ray, 435 U.S. at 178.
1321Id. at 178 n.28.
1322These provisions are now codified in 46 U.S.C. § 3711 and 33 U.S.C. § 1228 (conditions for port entry).
1323See OPA 90 § 4106(a) and (b), 104 Stat. 513–14, codified at 46 U.S.C. § 9101.
and the safety of individual merchant vessels determined by the Secretary may give rise to a fatal conflict.\textsuperscript{1324}

\textit{(5) To Provide Flexibility in Vessel Operating Procedures when Appropriate}

State regulations prescribing vessel operating requirements may frustrate a federal decision to provide needed flexibility to vessel operators, to permit them to adapt to changing conditions, and to incorporate innovative technology. The differing approaches of the federal government and the state of Washington on the question of navigation fix intervals for merchant vessels provide an example. Congress\textsuperscript{1325} and the Coast Guard, in its navigation safety regulations (NSRs),\textsuperscript{1326} both rejected an approach that would prescribe a minimum, specific interval between navigation fixes for merchant vessels, opting instead to prescribe a general navigation standard.\textsuperscript{1327} By contrast, the Washington Office of Marine Safety (OMS) prescribed a rule requiring all covered tankers operating in state waters to fix the vessel's position every 15 minutes.\textsuperscript{1328} There is no evidence that Washington based its rule on any local navigation necessity. On the contrary, because the rule applies in all waters within the state, the rule appears to simply reflect a contrary judgment by OMS. The state's attempt to substitute a rigid rule for the more general federal standard may undermine the objective of the federal rule, which includes a policy of providing flexibility to the pilot and master to determine the interval appropriate to any given waterway.\textsuperscript{1329}

\textsuperscript{1324}See Maryland v. Louisiana, 451 U.S. 725 (1981) (holding that Louisiana's gas tax was preempted by Congress' decision to delegate the relevant decisions to the FERC).
\textsuperscript{1325}Section 101 of S. 1461 (the Oil Tanker Navigation Safety Act of 1989) would have required vessels to fix their position every six minutes. See S. Rep. No. 101-99, at 8 (1989). The provision was deleted from the final OPA 90 legislation.
\textsuperscript{1326}In promulgating the NSRs for vessels over 1,600 tons operating in U.S. waters, the Coast Guard originally proposed a requirement for such vessels to fix their position every 15 minutes; however, it later deleted the requirement from its final rule after concluding that it "would not be practicable in all navigable waters." 42 Fed. Reg. 5,956, 5,957 (1977).
\textsuperscript{1327}33 C.F.R. § 164.11.
\textsuperscript{1328}Wash. Admin. Code § 317-21-205.
\textsuperscript{1329}Marine navigation technology advances may have rendered the Washington rule obsolete before it became effective. Integrated radar, GPS/Differential GPS, and electronic chart display systems installed on many vessels continuously display the vessel's position electronically, obviating the need to obtain fixes by the methods contemplated by the Washington regulations.
(6) To Provide Reasonable Time for Implementation

Washington's "vessel management system" requirement for tankers operating in state waters went into effect on July 7, 1995.\(^\text{1330}\) By contrast, the SOLAS amendments establishing the analogous ISM Code requirement and the U.S. legislation implementing the ISM Code gave tanker owners until July 1998 to complete the planning and auditing steps necessary to comply with the new Code.\(^\text{1331}\) The state of Rhode Island enacted legislation that would require tank vessels operating in state waters to meet double hull construction standards by 2001, while Congress in OPA 90 chose to phase single hull tankers out over a period ending in 2015.\(^\text{1332}\) The states' decision to accelerate the implementation dates over those established by federal law by up to 15 years raises important questions that are likely to recur regarding the federal purposes in prescribing a future implementation date to ensure vessel owners and shipyards have adequate time to comply. Although some might argue that the states' accelerated compliance date "complements" the federal safety goal, such reasoning focuses on only one objective (pollution prevention) while ignoring the objectives that persuaded federal regulators to delay implementation. The legislative history of OPA 90, for example, reveals that Congress had other purposes and objectives in mind, including Congress' concern for the "substantial impact" of the double hull requirement on the maritime, oil, and shipbuilding industries, as well as on the availability of vessels to transport oil.\(^\text{1333}\)

b. Treaty Purposes and Objectives

Where treaties and multilateral conventions form a component of the governing federal law, no preemption analysis is complete without an assessment of the purposes and objectives of those international law instruments.\(^\text{1334}\) Under international law, a treaty "shall be interpreted in

\(^{1330}\)See Wash. Admin. Code § 317–21–260. Interim spill prevention plans were required by January 1, 1993, or upon a vessel's first entry into state waters.

\(^{1331}\)See supra Part III at note 1020.

\(^{1332}\)See R.I. Gen. Laws § 46–12.5–24 ("Effective January 1, 2001, no tank vessel shall transport oil or hazardous material over the waters of this state in any conditions unless the tank vessel (i) has a double hull or (ii) is accompanied by a tugboat escort."). By contrast, OPA 90 phases out single hull tankers over a period ending in 2015. See 46 U.S.C. § 3703a. The Rhode Island statute may also overlap with 46 U.S.C. § 3719 (interim measures for single hull tank barges).


\(^{1334}\)See United States v. Pink, 315 U.S. 203, 230–32 (1942) ("state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement.") (emphasis added).
good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.\textsuperscript{1335} The "context" includes the treaty's preamble and annexes, as well as "any agreement relating to the treaty which was made between the parties in connection with the conclusion of the treaty."\textsuperscript{1336} The purpose and objective of the President and the Senate in entering into a treaty, or of federal agencies in implementing those treaties, may include a desire for international uniformity, to provide an incentive for other nations to enhance the standards applicable to their vessels, to facilitate maritime commerce, or to obtain reciprocal privileges for U.S. vessels. Reciprocity is plainly a goal in the VTMS Agreement between the U.S. and Canada,\textsuperscript{1337} at issue in the \textit{Intertanko v. Locke} challenge.\textsuperscript{1338} The various bilateral friendship, commerce, and navigation (FCN) treaties are generally intended to obtain reciprocal benefits, promote commerce, and protect the nationals of one party while within the jurisdiction of the other.\textsuperscript{1339} Relevant FCN treaties must also be examined to determine whether they grant the flag State exclusive jurisdiction over the internal affairs of its vessels.\textsuperscript{1340}

Any relevant IMO regulatory convention (together with its implementing legislation and regulations) must be examined in the conflict preemption step to determine the extent to which its purpose is to promote uniformity in standards, reciprocity, and limited port State control.\textsuperscript{1341} The limited port State control regime embodied in the LOS Convention and the IMO regulatory conventions preserves the primacy of flag State control,\textsuperscript{1342} minimizes opportunities for discriminatory treatment of foreign vessels, and guards against delays in vessel and cargo operations. Uniformity in standards for instrumentalities of interstate and foreign commerce facilitates trade and transportation.\textsuperscript{1343} Indeed, the nation's interest in uniformity may be a "primary function" of an international convention.\textsuperscript{1344} International

\textsuperscript{1335}Vienna Convention on the Law of Treaties, supra Part I at note 221, at art. 31(1); see generally Vagts, Senate Materials and Treaty Interpretation: Some Research Hints for the Supreme Court, 83 Am. J. Int'l L. 546 (1989).

\textsuperscript{1336}Vienna Convention on the Law of Treaties, supra Part I at note 221, at art. 31(2).

\textsuperscript{1337}See supra Part II at § IV.B.

\textsuperscript{1338}See supra Part II at note 100 and accompanying text.

\textsuperscript{1339}FCN treaties may include agreements to extend national treatment to vessels flying the flag of the parties. See supra Part II at note 454.


\textsuperscript{1341}Congress may elect to incorporate the port State control limitation directly into implementing U.S. statutes. See, e.g., Act to Prevent Pollution from Ships (implementing the MARPOL Convention and Protocol), 33 U.S.C. § 1904(d).

\textsuperscript{1342}See supra Part II at § IV.A.1.

\textsuperscript{1343}See supra Part III at notes 783–85.

cooperation to protect ocean waters and resources both within and beyond national jurisdictions is a primary purpose of the LOS Convention. The Convention requires all nations to cooperate on a regional and global basis, directly or through competent international organizations, to formulate international rules and standards to prevent, reduce, and control pollution from vessels. The Court in Ray cited Congress' conclusion that "multilateral actions with respect to comprehensive standards for the design, construction, maintenance and operation of tankers for the protection of the marine environment would be far preferable to unilateral standards." In the years since Ray was decided, the national government has become a party to the 1978 SOLAS Protocol, the 1973 MARPOL Convention and its 1978 Protocol (MARPOL), and the 1978 STCW Convention. The progress toward uniformity through multilateral conventions is evident in the broad international support for the IMO regulatory conventions: 138 nations are now party to SOLAS, representing over 98% of the world's merchant fleet by tonnage. Promoting uniformity in vessel CDEM standards is one of the principal aims of the SOLAS, MARPOL, and Load Line conventions. By the time the U.S. adopted the 1995 STCW Convention amendments, 119 nations, representing almost 95% of the world's merchant fleet tonnage, had become parties to the Convention. In implementing the 1995 amendments, the Coast Guard stated that one of the goals of those

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Footnotes:

1345 See supra Part II at § VI.A.
1346 See supra Part II at note 389 and accompanying text. Where a treaty is pending Senate advice and consent, as is the LOS Convention, U.S. actions that would defeat the convention's "object and purpose" would be contrary to the norms codified in the Vienna Convention. See Vienna Convention on the Law of Treaties, supra Part I at note 221, at art. 18; United States v. Royal Caribbean Cruise Lines, Ltd., 1998 AMC 1841 (D.P.R. 1997) (holding that the United States is bound to observe limitations on punishments for oil spills imposed by the LOS Convention pending its ratification).
1347 435 U.S. at 166 (quoting S. Rep. No. 92-724, at 23 (1972), reprinted in 1972 U.S.C.C.A.N. 2766) (emphasis added). A National Research Council study found that in only one instance has the U.S. adopted a standard that is stricter than that provided for in a governing international convention to which the U.S. is party. See supra Part III at note 997.
1348 See the IMO conventions information database available at www.imo.org/imo/convent/summary.htm.
1349 See MARPOL, supra Part II at note 388, at Preamble (the parties to the convention consider that vessel source pollution control "may best be achieved by establishing rules not limited to oil pollution having a universal purport."). It should also be noted that Annex I to the MARPOL Convention, which addresses control of oil pollution from vessels, is not one of the "optional" annexes; all parties must agree to Annex I. See MARPOL art. 14(1) (listing Annexes III, IV, and V as the optional annexes).
amendments was to prescribe "clear, uniform standards of competence" for mariners.1352

c. Foreign Affairs and Foreign Commerce Purposes and Objectives

The potential for state action to encroach on the nation’s foreign affairs1353 may be brought into focus by framing the question:

Whether a foreign vessel, flying the flag of a party to SOLAS, MARPOL, STCW and an FCN treaty with the U.S. that extends “national treatment” to vessels of the other party, that is in full compliance with all applicable international conventions, and which, by international agreement, is subject to limited port State control, is nevertheless subject to more stringent state requirements before it may enter U.S. navigable waters within the state?1354

In evaluating the problem it must be borne in mind that any violation of international law or of an international agreement by a state within the U.S., or a denial of comity1355 or reciprocity benefits, may result in a protest against the federal government, withdrawal of reciprocal privileges for U.S. flag vessels, and even national liability for detention damages if a vessel meeting the applicable international standards is denied entry or detained by a state in violation of the conventions.1356

The Supreme Court has historically been circumspect in its determination

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1352Id. (emphasis added).
1353These foreign affairs and commerce concerns may be addressed under the rubric of “comity” or “international usage,” rather than as treaty violations. See, e.g., McDougal & Burke, supra Part I at note 451, at 157 (describing protests against U.S. liquor prohibitions under the Volstead Act by nine nations, resting their protests on comity and international usage rather than on positive violation of international law).
1354See also Bickel, supra Part III at note 740, at 20–21 (opining that interfering with a foreign vessel while in a U.S. port “may in the eyes of the nation of the flag be deemed an undue interference with her commerce, and a violation of that ‘comity and delicacy’ which in the more courtly days of some of the earlier cases were considered normal among nations”).
1355In Hilton v. Guyot, the Supreme Court observed that:

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.
159 U.S. 113, 163–64 (1895).
1356See Restatement, supra Part I at note 19, at § 901 (“[u]nder international law, a state that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, to make reparation, including in appropriate circumstances restitution or compensation for loss or injury.”); The M/V Saïga (No. 2) (Saint Vincent and the Grenadines v. Guinea), Int’l Tribunal for the Law of the Sea (July 1, 1999), available at www.un.org/Depts/los/ijudg_E.htm (ordering the government of Guinea to pay compensation to Saint Vincent and the Grenadines in the sum of $2,123,357 plus interest for its unlawful arrest of the M/V Saïga and the detention of her crew).
whether U.S. laws apply to the internal affairs of foreign flag vessels in U.S. ports.\textsuperscript{1357} The "possibility of international discord" supports "the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship."\textsuperscript{1358} The national government joined the challenge to Washington state's tanker regulations in both \textit{Ray v. Atlantic Richfield Co.}, in 1978, and twenty years later in \textit{Intertanko v. Locke}.\textsuperscript{1359} In \textit{Intertanko}, the U.S. argued that the Washington tanker regulations implicated the "immense foreign affairs interests of the United States in the international maritime field."\textsuperscript{1360} The federal concern stems in part from the protests by 14 nations and the Commission of the European Community who cautioned that the Washington regulations set an "unwelcome precedent for other federally-administered nations."\textsuperscript{1361} Yet the Ninth Circuit's \textit{Intertanko} decision gives scant attention to the nation's foreign affairs interests. Examples of state regulations that raised foreign affairs concerns, yet were upheld by the circuit court, include the Washington drug testing requirements, which call for tests that the federal government declined to require out of foreign affairs concerns,\textsuperscript{1362} and English language competency requirements, which may have a discriminatory effect against foreign vessels and foreign seamen.\textsuperscript{1363} Although the state's requirements are likely preempted under the Court's reasoning in \textit{Ray} concerning PWSA Title I requirements,\textsuperscript{1364} conflict preemption may provide an alternative basis for preemption.

d. Executive Branch Purposes and Objectives

Federal agencies within the executive branch are closely involved in the development, drafting, and implementation of the conventions, statutes, and regulations that constitute the federal law on merchant vessel safety and vessel-source pollution prevention. In the Act to Prevent Pollution from Ships, Congress delegated broad rulemaking authority to the Secretary of

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\item \textsuperscript{1357}See, e.g., Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 1957 AMC 900 (1957) (Taft-Hartley Amendments); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 1963 AMC 283 (1963) ("we find no basis for a construction [of the National Labor Relations Act] which would exert United States jurisdiction over and apply its laws to the internal management and affairs of [foreign vessels] contrary to the recognition long afforded to them not only by our State Department but also by the Congress.") (citations omitted).
\item \textsuperscript{1358}McCulloch, 372 U.S. at 21 (citations omitted).
\item \textsuperscript{1359}See supra Part III at § VI.C.2; Ray, 435 U.S. at 156.
\item \textsuperscript{1360}See supra Part I at note 7 and accompanying text.
\item \textsuperscript{1361}See supra Part I at notes 1 and 2.
\item \textsuperscript{1362}See supra Part III at note 936.
\item \textsuperscript{1363}See Wash. Admin. Code § 317-21-250.
\item \textsuperscript{1364}See Ray, 435 U.S. at 171-72 (once the Coast Guard has exercised its authority to prescribe regulations, the states are preempted from prescribing higher safety standards) (dictum).
\end{itemize}
Transportation to carry out the provisions of the MARPOL Convention and Protocol without further implementing legislation.\textsuperscript{1365} The PWSA directs the Secretary to prescribe regulations that \textquotedblleft may be necessary\textquotedblright\textsuperscript{1366} and authorizes the Secretary to deny entry to a foreign vessel not in compliance with any applicable treaty or statute.\textsuperscript{1367} In OPA 90, Congress directed the Secretary to evaluate the manning, training, qualification, and watchkeeping standards of the other maritime nations that issue documents to tank vessels, to determine whether the standards are equivalent to U.S. standards or the international standards accepted by the U.S.\textsuperscript{1368} The agencies' purposes and objectives in carrying out their broad mandate must be considered in any conflict preemption analysis. As agencies begin to give greater care to their preemption analyses, and to articulate the purposes and objectives of their regulations, the usefulness of the agencies' conclusions regarding conflicts between state laws and the federal regime will be enhanced.

Federal agencies are \textquotedblleft uniquely qualified\textquotedblright to provide the executive branch's views on whether a state regulation is likely to frustrate the purposes and objectives of the federal regulatory scheme.\textsuperscript{1369} The Coast Guard's Port State Control Initiative reflects the agency's objectives as the port State control authority for the U.S.\textsuperscript{1370} State actions that frustrate the agency's objective to establish a consistent national regime for control over foreign vessels must be examined under the conflict preemption step. In addition to the rulemaking authority under the PWSA/PTSA and other federal statutes and treaties, the Secretary of Transportation has been delegated the responsibility for general superintendence of the U.S. merchant marine and merchant marine personnel.\textsuperscript{1371} The Department of Transportation concluded in its 1996 Statement of Regulatory Priorities that \textquotedblleft[t]hrough Coast Guard initiatives at the International Maritime Organization (IMO), international standards have been raised to a level comparable with U.S. domestic requirements.	extquotedblright\textsuperscript{1372} As a result, the Coast Guard has launched a regulatory initiative designed to harmonize standards applicable

\footnotesize{\textsuperscript{1365}33 U.S.C. § 1903(b).} \\
\footnotesize{\textsuperscript{1366}46 U.S.C. § 3703(a).} \\
\footnotesize{\textsuperscript{1367}33 U.S.C. §§ 1228(a)(2) and 1223(b)(2).} \\
\footnotesize{\textsuperscript{1368}See 46 U.S.C. § 9101(a).} \\
\footnotesize{\textsuperscript{1369}See Medtronic, Inc. v. Lohr, 518 U.S. 470, 496 (1996) (federal agency to which Congress has delegated authority to implement an act is \textquotedblleft uniquely qualified to determine whether a particular form of state law \textquoteleft stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,\textquoteright and therefore, whether it should be pre-empted."); see also San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959) (deferring to an agency's determination that state regulation would interfere with the national policy).} \\
\footnotesize{\textsuperscript{1370}See supra Part II at note 558.} \\
\footnotesize{\textsuperscript{1371}46 U.S.C. § 2103.} \\
to U.S. vessels with those prescribed by the IMO regulatory conventions.\textsuperscript{1373} The harmonization initiative is designed in part to eliminate any competitive disadvantage to U.S. vessels that would attach if they were required to meet standards that are more stringent than their foreign competition.\textsuperscript{1374} If the states are permitted to impose more stringent requirements on U.S. vessels, while being preempted by treaties from imposing those same requirements on foreign vessels, the federal goal might be frustrated. Where Congress or the administering agency "has struck a particular balance between safety and quantity," state laws that strike a different balance produce a conflict.\textsuperscript{1375}

\textbf{VIII

\textbf{CONCLUSION

In an era when over 90\% of the goods traded globally are shipped by ocean carriers, few would dispute the need for an effective regulatory regime to promote merchant vessel safety and vessel-source pollution prevention. Disagreement may arise among internationalists, nationalists, and localists, however, when the discussion turns to just which government should undertake the regulation. At the international level, agreement has now been reached on the respective roles of flag States and port States, and on the need for international rules and standards. But while there may be agreement within the international community, there is ferment in the capitols of several states within the U.S. over who should regulate those vessels when they enter the waters of the state.

The crux of the question facing the Supreme Court if it grants certiorari in \textit{Intertanko v. Locke} will be whether the federal judgments that the IMO regulatory conventions strike an acceptable balance between protection of the marine environment and facilitation of global trade and transportation, and whether a vessel is safe to navigate in U.S. waters, are to prevail over a contrary judgment by state or local governments. Those of us who see value in the uniformity that comes with international standards and the balanced approach to the use of the sea offered by the 1982 Law of the Sea Convention, see in state initiatives like Washington's a threat to the emerging international regime.

Justice Holmes cautioned that "I do not think the United States would

\textsuperscript{1373}See supra Part II at note 553.
\textsuperscript{1375}Cf. Hillsborough County, Fla. v. Automated Med. Laboratories, Inc., 471 U.S. 707, 721 (1985) (rejecting an argument that local regulation of plasma supplies conflicted with federal law by restricting the supply of plasma, the Court observed that neither Congress nor the implementing agency had struck a particular balance. The Court went on to note that if the FDA became concerned about the supply, they were free to preempt the local regulations. Id.).
come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make the declaration as to the laws of the several states."\textsuperscript{1376} No one would reasonably argue that the Republic is imperiled by the recent state maritime regulatory initiatives. There is, however, reason to fear that the nation’s leadership role in the development of public order in international marine safety and pollution prevention will be undermined if states within the nation are free to chart an independent course.

\textsuperscript{1376}O. Holmes, Collected Legal Papers 295–96 (1920).