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

CRAIG H. ALLEN**

VI
PROBLEMS IN THE TRADITIONAL APPROACH TO MARITIME PREEMPTION ANALYSIS

The traditional approach to questions involving displacement of state laws regulating merchant vessels and their crews has become cumbersome and unpredictable. At best, preemption doctrines are flexible and responsive; more commonly, they are rife with inconsistencies and subject to shifting judicial attitudes toward federalism. The traditional preemption approach—fashioned for the most part from precedents addressed to grain elevators, avocado quality, and meat packaging—often fails to recognize federal primacy in foreign affairs, the regulation of foreign commerce and maritime affairs, and the weight that should be given to those interests in preemption challenges to state regulation of merchant vessels. It often ignores or downplays the nation’s treaty obligations and foreign policy objectives. The traditional approach does not provide a consistent frame of reference for analyzing preemption challenges, directing the courts to examine alternately the relevant federal and state laws’ subject, their purpose, and their object. The traditional approach invokes a presumption against preemption of a state’s exercise of its “historic” police powers, but provides little guidance for determining the scope of the state police powers or which are “historic.”

*Editor’s Note: This is the third 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 IV, which will propose a new method of maritime preemption analysis, will be published in a future issue of the Journal.

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717 The “traditional approach” is described in ¶ III.B.2 of Part I of this article.
Finally, no attempt has yet been made by the courts to reconcile the approach to preemption in the regulation of the primary conduct\textsuperscript{718} of merchant vessels and their crews with the closely related issue of application of state law to private litigation involving those same vessels.

Drawing on the background laid in the first and second parts of this article, this part discusses the principal weaknesses in the traditional approach to preemption. Although the analysis focuses primarily on preemption doctrines, it is necessary to also examine how the courts have applied the doctrines in order to appreciate the weaknesses in the traditional approach. Thus, the article will examine three federal decisions in which the approach followed produced results that are at odds with international law, congressional policy choices on uniformity and reciprocity, or the Supreme Court's maritime precedents. The fourth part of the article will propose a new approach to maritime preemption analysis and apply that approach to several contemporary regulatory issues.

A. The Traditional Approach is Poorly Suited to Merchant Vessel Safety Regulation

The U.S. approach to most environmental protection and coastal zone management programs has been one of cooperative federalism. Federal environmental legislation sets minimum nationwide standards for water and air quality, while leaving the states free to enact more stringent requirements should they choose to do so.\textsuperscript{719} Federal and state agencies often work together to enforce environmental standards, and for decades federal and state governments have contributed the funds necessary to restore or improve the quality of the environment. When Congress establishes a program of cooperative federalism, courts are unlikely to conclude that state laws frustrate the purposes and objectives of the federal regime.\textsuperscript{720} However, neither the Constitution nor existing federal statutes prescribe a program of cooperative federalism for the regulation of merchant vessels. Any preemption analysis of regulations governing the primary conduct of merchant vessels and their crews must respect this distinction.

The parallel but distinct development of the Federal Water Pollution

\textsuperscript{718}"Primary conduct" refers to the out of court behavior of ships and sailors. See Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 629–30 n.4, 1994 AMC 2705 (1st Cir. 1994) (citing O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994), for the suggestion that "uniformity is most important where the rule at issue is one governing primary conduct").

\textsuperscript{719}See, e.g., 33 U.S.C. §§ 1316(c), 1342(b), 1344(g) & 1370 (establishing cooperative federal-state program for water pollution control).

Control Act (FWPCA)\textsuperscript{721} and the Coastal Zone Management Act (CZMA)\textsuperscript{722} on the one hand, and the Ports and Waterways Safety Act (PWSA)\textsuperscript{723} and the Port and Tanker Safety Act (PTSA),\textsuperscript{724} on the other, highlights the differing treatment Congress gave to regulation of pollutant discharges into state waters and vessel safety and vessel-source pollution prevention. The 1972 FWPCA (now the Clean Water Act (CWA)) and the CZMA embrace a cooperative approach. The CWA expressly permits states to enact stricter water quality standards and preserves the states’ authority to establish additional oil spill liability and cleanup requirements.\textsuperscript{725} Congress has never however prescribed a cooperative federalism approach to regulation of merchant vessels. In contrast to the CWA and the CZMA (a contrast noted by the Supreme Court\textsuperscript{726}), the PWSA and its 1978 PTSA amendments recognize the primacy of the federal government in maritime affairs and in the negotiation and implementation of the governing international conventions on merchant vessel safety and vessel-source pollution prevention. Although states are free under the PWSA to establish safety standards for structures that are stricter than federal standards, the Act impliedly preempts state regulation of the construction, design, and equipment standards for vessels covered by Title II of the Act. Moreover, once the federal government has exercised its authority to control the operation of vessels or waterways under Title I of the PWSA, state laws on the same subject are displaced. Such was the understanding in 1978, when the Supreme Court handed down its decision in \textit{Ray v. Atlantic Richfield Co.}\textsuperscript{727} The Court rejected state arguments that the FWPCA or CZMA provide a basis for the states to regulate maritime subjects that were preempted by the PWSA or PTSA.\textsuperscript{728} Unfortunately, any peace \textit{Ray} may have brought to the maritime federalism debate was short-lived, as Justice White witnessed in reviewing

\textsuperscript{726}The Supreme Court recognized the contrast in \textit{Ray v. Atlantic Richfield Co.}, 435 U.S. 151, 178 n.28, 1978 AMC 527 (1978) (observing that, while the FWPCA [the predecessor to the CWA], Coastal Zone Management Act, and Deepwater Port Act "contemplate cooperative federal-state regulatory efforts, they expressly state that intent, in contrast to the PWSA").
\textsuperscript{727}See supra Part II, ¶ V.B.3, particularly notes 633–42 and accompanying text.
\textsuperscript{728}Ray, 435 U.S. at 178 n.28.

1. The Traditional Approach Fails to Recognize the Importance of Foreign Relations Laws in Merchant Vessel Safety Regulation

Chief Justice Warren articulated a three-part test for preemption in Pennsylvania v. Nelson.\footnote{730}{350 U.S. 497 (1956).} In addition to the familiar "actual conflict" test, Nelson requires lower courts to examine the pervasiveness of the federal regulatory scheme and to determine whether the need for national uniformity necessitates a finding that the federal government has occupied the field.\footnote{731}{Id. at 502–05.} It is in these latter two inquiries that the foreign relations laws of the U.S. should play a pivotal role in a court's preemption analysis of state regulations on merchant vessel safety and vessel-source pollution prevention. International law, particularly the IMO-sponsored conventions, is a major component of the federal regulatory scheme for merchant vessels.\footnote{732}{See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51–52 (1987) (holding that in examining whether a state statute is preempted, a court must look to federal law as a whole and to the federal law's object and policy). International law is an integral component of "federal law." See The Paquete Habana, 175 U.S. 677, 700 (1900).} However, no court has yet attempted a comprehensive analysis of the principal IMO conventions and their port State control provisions in a maritime preemption analysis. By overlooking or ignoring relevant international conventions binding on the U.S., and the objects and policies they embrace, the courts are more apt to reach the conclusion that the overall federal regulatory regime is not "pervasive," and, therefore, does not occupy the field of merchant vessel safety or pollution prevention. When courts fail to consider the international regime comprehensively in the "conflict" step of their preemption analysis, they will also omit from the analysis the purposes of both the President and the Congress in negotiating and ratifying the IMO conventions. Finally, by omitting from their conflict analysis the purposes underlying the international conventions, the court is more likely to conclude that the state regulation under challenge does not stand as an obstacle to any federal purpose.\footnote{733}{Such a narrow view conflicts with the canon that treaties are interpreted liberally to effectuate the manifest purposes and object sought to be achieved by the participating countries, in order that all potential rights and claims under them may be given full force and effect. Hauenstein v. Lynham, 100 U.S. (10 Otto) 483 (1879); De Geoffroy v. Riggs, 133 U.S. 258 (1890); Tucker v. Alexandroff, 183 U.S. 424 (1902).} This narrow view of the breadth and
purposes of international maritime law may explain the Ninth Circuit's decisions in the *Hammond* and *Intertanko* cases discussed below.

In 1978, the Supreme Court acknowledged the need for the nation to speak with "one voice" on matters of tank vessel design and construction in the international community. The SOLAS convention and the coming MARPOL convention required nothing less at the time. Subsequent negotiations to amend those conventions and to reach new international agreements on the qualifications and watchstanding of merchant mariners (the STCW Convention) and ship safety management systems (the ISM Code) similarly required that the nation speak with one voice. Yet, the Ninth Circuit, in the *Intertanko* decision discussed below, upheld state regulations that varied significantly from international requirements prescribed by the STCW Convention and the ISM Code. Lower courts too often fail to recognize that the nation's obligations under the IMO conventions require that the nation's standards and inspection practices for foreign vessels conform to the conventions' prescriptions as a matter of international law, absent an appropriate exception or reservation by the national government.

Actions taken against foreign vessels, like actions against foreign citizens, may have far-reaching international relations implications for the national governments involved. In *Hines v. Davidowitz*, the Supreme Court observed that one of the "most important and delicate of all international relationships" is the protection of the rights of the country's nationals when they are in another country. The U.S. and other flag States have long demonstrated a similar national solicitude for vessels flying their flag while those vessels are abroad. State laws that deny entry to, provide for

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734 Ray, 435 U.S. at 166.

735 See supra Part I, notes 221–22 (citing the Vienna Convention on the Law of Treaties).

736 See Vienna Convention on the Law of Treaties, supra part I, note 221, art. 17(1) ("the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree"). It is well-established that "A treaty cannot be the supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way." Ware v. Hylton, 3 U.S. (3 Dall.) 199, 236 (1796); see also United States v. Belmont, 301 U.S. 324, 331 (1937). The Supreme Court has held in a case involving only domestic law that "the purpose of Congress is the ultimate touchstone in every preemption case." Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (internal quotation marks and citations omitted). Although the Court speaks of "Congressional" intent and "legislative" history, not all "federal" law under the Supremacy Clause is made by Congress. For international agreements entered into under the President's Article II treaty power, it is the President's and Senate's intent that are relevant.

737 Significantly, nothing in the legislative record of the 1991 Washington tanker laws at issue in the *Intertanko v. Locke* suit, discussed below, indicates that the state considered the possible foreign relations implications of its statutes. The Act does, however, require that it be implemented in a manner consistent with federal law. Wash. Rev. Code § 88.46.020.

738 312 U.S. 52, 64 (1941).

739 See supra Part I, note 94 and accompanying text (describing U.S. actions against foreign nations for interference with U.S. vessels).
detention of, or impose additional burdens on foreign vessels while in U.S. ports or waters, beyond those requirements imposed by federal law or treaties to which the U.S. is party, affect the entire nation. "[E]ven though they may be intended to accomplish a local purpose, they provoke questions in the field of international relations."740

2. The Growing Reluctance to Scrutinize State Legislation Under the Dormant Commerce Clause Doctrine Omits Vital National Interests from the Preemption Analysis

Beginning with Gibbons v. Odgen in 1824,741 analysis of federal and state authority under the Commerce Clause has played a prominent role in most Supreme Court decisions on maritime preemption. The Court has recognized a "paramount federal concern" in the activities of interstate carriers,742 and a "special need for uniformity" in foreign commerce.743 Similarly, Congress acknowledged the "long history of preemption in maritime safety matters... founded on the need for uniformity applicable to vessels moving in interstate commerce."744 But recent cases reveal a growing reluctance by the federal courts to scrutinize state regulations under the Commerce Clause, to evaluate their impact on uniformity. After studying several of the Supreme Court's recent admiralty decisions, one commentator similarly concluded that, in the private maritime law arena, "[t]he protection of maritime commerce through uniform national rules is not what it used to be."745 If the dormant Commerce Clause doctrine yet has vitality, it has for the most part been effectively limited to cases alleging discriminatory treatment of interstate or foreign commerce.746

Gibbons and Cooley v. Board of Wardens,747 the Court's seminal Commerce Clause cases, both examined a state's regulation of vessels

740Hines, 312 U.S. at 66; see also Bickel, The Doctrine of Forum Non Conveniens As Applied in the Federal Courts in Matters of Admiralty, 35 Cornell L.Q. 12, 20–21 (1949) ("holding a ship and its crew in an American port, to which they may have come to do no more than refuel, 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").
743Wardair Canada, Inc. v. Florida Dept' of Revenue, 477 U.S. 1, 8 (1986).
745Friedell, Searching for a Compass, supra Part I, note 17, at 845.
746See, e.g., Barber v. Hawaii, 42 F.3d 1185, 1194, 1995 AMC 1763 (9th Cir. 1994) (describing the dormant Commerce Clause, in a case involving a challenge to a state's vessel anchoring regulations, as a two-tiered approach, which did not include an inquiry into whether the subject was national or one which required a uniform national rule).
74753 U.S. (12 How.) 299 (1851). Both cases are examined supra Part I, in ¶ III.A.1.
engaged in maritime commerce. The Court held in *Cooley* that nothing in the Commerce Clause precludes a state from enacting laws addressed to "local" concerns; that is, to matters that are not national in their nature or which do not require a uniform national rule. When *Cooley* is read together with *Kelly v. Washington*, one may reasonably conclude that the construction, design, equipment, and internal operations of merchant vessels engaged in international or interstate commerce are "national" subjects, or subjects that require uniform national rules. In *Kelly*, the Court adopted a "uniformity versus locality" approach to Commerce Clause analysis. The *Kelly* opinion points out that Congress had been warned of the need to regulate the class of boats that had become the subject of the Washington state regulations, but Congress had so far failed to act. Faced with a dangerous lacuna in the federal vessel regulatory scheme, the Court upheld the state's decision to step in. The Court noted, however, that an Article VI preemption analysis would have been "unnecessary and inapposite if the subject is one demanding uniformity of regulation." In that class of cases, the Court held, "the Constitution occupies the field even if there is no federal legislation." In *Ray v. Atlantic Richfield Co.*, the Court again applied the familiar *Cooley* test to the Washington State requirement that tankers in state waters employ an escort tug. The state requirement was upheld against a Commerce Clause challenge only after the Court concluded that it addressed a "local" need in a particular body of water.

Some argue that the dormant Commerce Clause doctrine, which has played an important role in analyzing the role of state regulation of merchant vessels, is obsolete. Justice Scalia openly questions the constitutional legitimacy of the doctrine. But any decision to eliminate the doctrine must recognize the strong federal interest in interstate commerce and the need for uniformity in foreign commerce that the doctrine's precedents have pro-

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748 302 U.S. 1, 1937 AMC 1490 (1937).
750 *Kelly*, 302 U.S. at 15; see also *California v. Zook*, 336 U.S. 725, 728 (1949) (holding that "the familiar test is that of uniformity versus locality. If a case falls within an area in commerce thought to demand a uniform national rule, state action is struck down. If the activity is one of predominately local interest, state action is sustained").
752 Id.
753 *Ray*, 435 U.S. at 179 (holding that a tug escort requirement is not the type of regulation that requires a uniform national rule).
754 Id.
756 Justice Scalia has concluded that "[t]he historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate Commerce." *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 263 (1987) (Scalia, J., concurring in part and dissenting in part).
ected, particularly in maritime preemption analysis, and ensure those interests are fairly incorporated into the surviving Article VI preemption analysis.\textsuperscript{757}

3. The Traditional Approach Turns Almost Exclusively on the Court’s Characterization of Legislative Purpose, But Provides Little Guidance on How the Purpose Should Be Determined

The trend in decisions over the past two centuries reveals a gradual about-face in the Supreme Court’s approach to “occupation of the field” analysis. In 1824, Chief Justice Marshall intimated his agreement with Daniel Webster’s argument in Gibbons that the federal commerce power is exclusive, occupying the field as a matter of constitutional law.\textsuperscript{758} In 1852, the Court in Cooley adopted the “selectively exclusive” position on the Commerce Clause,\textsuperscript{759} but left open the question whether any federal legislation by Congress on a subject would effectively occupy the field, displacing all state law on that same subject. In 1913, Justice Holmes, writing for the Court in Charleston & Western Central Railway Co. v. Varnville Furniture Co., answered the question left open in Cooley in the affirmative, holding that “[w]hen Congress has taken the particular subject matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go further than Congress has seen fit to go.”\textsuperscript{760} Even Justice Brandeis, who championed the role of the states as “laboratories of democracy,” held for a unanimous Court in Napier v. Atlantic Coast Line Railroad Co. that Congress had occupied the field of railroad locomotive safety by delegating to the Interstate Commerce Commission authority over the subject without expressly saving state regulatory authority within the statute.\textsuperscript{761} As recently as 1947, in Rice v. Santa Fe Elevator Corp.,\textsuperscript{762} the Court held that the test for displacement of state law is “whether the matter on which the State asserts the right to act is in any way

\textsuperscript{757} In arguing that a negative Commerce Clause doctrine was still needed, Justice Jackson observed that “The practical result is that in default of actions by us [the states] will go on suffocating and retarding and Balkanizing American commerce, trade and industry.” Duckworth v. Arkansas, 314 U.S. 390, 400 (1941) (Jackson, J., concurring).

\textsuperscript{758} See supra Part I, note 147 and accompanying text.

\textsuperscript{759} See supra Part I, note 154 and accompanying text.

\textsuperscript{760} 237 U.S. 597 (1915).

\textsuperscript{761} 272 U.S. 605, 612 (1926). In later comments on the Napier decision written to Justice Frankfurter, Justice Brandeis stated that “I think the states could be taught, . . . if they wish to reserve their police power, they should, through the ‘state block’ in Congress, see to it in every class of Congressional legislation that the state rights which they desire to preserve be expressly provided for in the acts.” Letter from Louis Brandeis to Felix Frankfurter, Nov. 30, 1926, in 5 M. Urofsky & D. Levy, Letters of Louis D. Brandeis 47 (1975).

\textsuperscript{762} 331 U.S. 218 (1947).
regulated by the Federal act.” If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State.763 Two years later, however, in California v. Zook, a bare majority of the Court abandoned the Varnville-Rice approach in a decision criticized by the prominent dissenters.764 Under the majority’s decision in Zook, federal legislation on a “subject” would no longer automatically displace state law on the same subject. To determine whether state law is displaced, courts would henceforth examine not just the “subject” regulated by the respective federal and state laws, but Congress’ “purpose” in the legislation765 and whether the state regulation conflicted with the federal law.

How the court characterizes the “subject” and “purpose” of the respective federal and state laws at issue may well dictate the outcome of the case, yet there is conflicting guidance on how the characterization should be conducted.766 In its 1963 decision in Florida Lime, a narrowly divided Court held that the preemption analysis does not turn on whether the state and federal legislation “aimed at similar or different objectives,” but whether both regulations may operate “without impairing the federal superintendence of the field.”767 Yet, in attempting to reconcile its precedents fifteen years later in Ray, the Court appeared to return to a “purpose” test, observing that in “none of the relevant cases sustaining the application of state laws to federally licensed or inspected vessels did the federal licensing or inspection procedure implement a substantive rule of federal law addressed to the

763Id. at 236 (emphasis added).
764California v. Zook, 336 U.S. 841, 853 (1949) (Burton, Douglas & Jackson, JJ., dissenting). The dissenters argued for a contrary presumption, providing that “[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.” Id.
765The “purpose” analysis is often applied inconsistently with the Court’s seminal precedent. In Rice, Justice Douglas, writing for the Court, held that:

The question in each case is what the purpose of Congress was. Congress legislated here in a field which the States have traditionally occupied. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Such a purpose may be evidenced in several ways. . . . 331 U.S. at 230 (emphasis added). Thus, the “purpose” the Court was referring to is not the overall legislative intent, but rather whether Congress had as a “purpose” preemption of state law.
766As Justice Stone observed in Hines v. Davidowitz, 312 U.S. 52, 78-79 (1941) (Stone, J., dissenting):

Little aid can be derived from the vague and illusory but often repeated formula that Congress by “occupying the field” has excluded from it all state legislation. 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. To discover the boundaries we look to the federal statute itself, read in the light of its constitutional setting and its legislative history.
object also sought to be achieved by the challenged state regulation.” Whether preemption is to turn on an overlap of “subject,” “object” or “purpose,” or on interference with “federal superintendence of the field,” is crucial to the analysis. Virtually every state regulation of merchant vessel safety can also be characterized as having a “pollution prevention” purpose. Thus, federal legislation on the subject of vessel construction, design, equipment, and manning (CDEM), but having, by the court’s characterization, a purpose other than pollution prevention, would not occupy the field of pollution prevention addressed by the challenged state law.

The court’s characterization of the federal regulation’s purpose remains important beyond the court’s implied preemption analysis. When the court turns to “conflict” preemption analysis, it must determine whether the state law stands as an obstacle to accomplishment and execution of the “full purposes and objectives of Congress.” The court’s characterization of the federal purposes and objectives is critical in the conflict inquiry, and the court’s analysis disserves the federal interest if the court fails to consider all relevant purposes. As shown in the following section, courts too often fail to consider the congressional and presidential purposes in pursuing an international approach to vessel safety and vessel-source pollution prevention and in encouraging reciprocal exemptions from port State control of vessel standards. More fundamentally, the lower courts often fail to recognize the quid pro quo incentive in the international regime for merchant vessel safety and pollution prevention, its importance to the efforts to avoid an international “race to the bottom” by substandard vessels, and the related “purpose” of the federal government in ratifying the treaties composing that regime.

The traditional preemption analysis has so far expended little effort on defining the scope of the states' historic police powers. Legislation grounded on the state’s “historic” police powers benefits from the important presumption against preemption. Moreover, the Supreme Court has indicated in a case challenging a state police power law that it will narrowly construe preemption clauses in federal statutes. No cases found have examined

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769 Of course, an intent to occupy the field may be inferred from other considerations. See Ray, 435 U.S. at 157–58.
770 Hines, 312 U.S. at 67.
771 See supra Part I, note 111 (citing Ely, The Irrepressible Myth of Erie); Robertson, Displacement of State Law, supra Part I, note 17, at 341 (labeling the concept of the “traditional police powers of the states” one of “notoriously uncertain meaning”).
whether regulation of merchant vessel safety is within the states' police powers, historic or otherwise.\textsuperscript{773} One court has held that aviation safety is \textit{not} one of the historic police powers of the states.\textsuperscript{774} It may be similarly argued that regulation of construction and design of vessels or primary conduct on merchant vessels is outside the historic police powers of the states. Subjects requiring uniform national standards, which are beyond state legislative competence under cases such as \textit{Kelly}, could not be within the states' historic police powers, and should not benefit from the presumption against preemption. It is also unclear why a court would continue to apply a presumption of validity to a state's regulation if the Supreme Court has ruled in an earlier case that state laws on that subject or having that purpose are preempted.\textsuperscript{775} Judicial economy and the principle of stare decisis might instead justify eliminating or even reversing the presumption in such cases.

\textbf{B. The National Judgment as "Law of the Land"}

In setting safety standards for vessels navigating U.S. waters, the federal government has frequently been torn between pursuing uniform international standards and taking unilateral action.\textsuperscript{776} The decision presents a foreign policy choice for the national government. The former approach seeks to prevent a "race to the bottom" in vessel safety and pollution prevention standards, obtain reciprocal treatment for U.S. merchant and naval vessels, and facilitate the maritime trade and transportation on which the nation depends. The latter, "go-it-alone," approach may provide a higher degree of safety and protection for U.S. waters, but may come at the price of reduced protection for the rest of the planet—particularly the oceans beyond national jurisdiction—and a loss of reciprocity for U.S. vessels abroad. State laws do not always reflect the same judgment on the merits of international versus unilateral national, or even regional or local, regulation. The extent to which the federal judgment will be the supreme "Law of the Land" under Article VI lies at the heart of federalism disputes over merchant vessel regulation.

\textsuperscript{772}The Supreme Court's decision in \textit{Kelly} v. Washington, 302 U.S. 1, 1937 AMC 1490 (1937), suggests that the states entered the field of vessel safety regulation rather recently, to fill actual or perceived gaps in the federal regulatory scheme.


\textsuperscript{774}For example, the Ninth Circuit began its preemption analysis in \textit{Intertanko} v. \textit{Locke} by invoking the presumption against preemption, even though the Supreme Court had previously held in \textit{Ray} v. \textit{Atlantic Richfield Co.} that state regulation of tank vessel, design, equipment, and safety standards were preempted. See infra ¶ VI.C.2.

1. The National Judgment to Adopt Uniform, International Standards and Limited Port State Control

In the absence of an agreement to the contrary, the U.S. has jurisdiction under international law to prescribe and enforce national requirements with respect to foreign vessels voluntarily in U.S. ports or internal waters.777 But, as the Supreme Court observed in *Cunard S.S. v. Mellon*, a port State "may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way."778 As a matter of public policy and foreign policy, the U.S. has in fact chosen to limit its port State role in many respects, by becoming party to the IMO conventions.

The LOS Convention requires States-parties to cooperate in regional and/or global efforts to develop international standards and rules to combat vessel-source pollution.779 The most remarkable development in the regulation of merchant vessel safety and pollution prevention over the past two decades has, in fact, been the increasingly dominant role of international law, developed under the auspices of the IMO. The Tanker Safety and Pollution Prevention (TSPP) Conference, called by the U.S. in 1978,780 heralded a fundamental shift toward a global approach to merchant vessel safety and pollution prevention. Three developments in that year (discussed in Part II of this article) irrevocably transformed vessel regulation for all maritime nations. First, the IMO passed much needed protocols to the MARPOL and SOLAS conventions. That same year, the IMO member nations reached international agreement on the new STCW convention, which provided qualification and training standards for merchant vessel officers and crewmembers. Finally, while reaffirming their commitment to toughen international rules and standards, the 1978 TSPP conferees also recognized the need for port State control authority, to ensure that vessels complied with the international standards while in foreign ports. The 1982 LOS Convention, many provisions of which were forged in the same international milieu that led to the 1978 SOLAS and MARPOL protocols, recognizes the central importance of international standards, to be enforced principally by flag States, while reserving to port States well-defined authority to identify and take action against sub-standard foreign vessels. The U.S. government's decision to join this international legal regime, through treaties that are now Law of the Land, fundamentally altered maritime federalism in the nation.

In numerous statutes, Congress has expressed its judgment that a foreign

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778Id.; see also *Lauritzen v. Larsen*, 345 U.S. 571, 1953 AMC 1210 (1953); Restatement, supra Part I, note 19, § 152 n.3.
779*LOS Convention*, supra Part II, note 384, art. 211.
780The TSPP developments are discussed supra Part II, note 611 and accompanying text.
vessel’s compliance with international standards for merchant vessel safety and pollution prevention will satisfy U.S. requirements for entering U.S. ports or waters.\textsuperscript{781} Several interests animated the U.S. decision to ratify the 1978 MARPOL and SOLAS protocols and the STCW Convention, and to acknowledge the binding force of the legal principles embodied in the 1982 LOS Convention. The U.S., like all maritime nations, shares a common interest in protecting the world’s oceans and the ports and waters of all nations. The common interest is served in large part by heading off the potential “race to bottom” in international shipping standards.\textsuperscript{782} Many believe that in the absence of uniform international standards, substandard ships will be drawn to lax flag States and port States, to avoid the more demanding legal regimes.

Lack of uniformity in merchant vessel standards may also undermine a nation’s maritime commerce.\textsuperscript{783} The nation’s interest in uniformity may be a “primary function” of entering into an international convention.\textsuperscript{784} The U.S. State Department, commenting on the proposed 1978 Port and Tanker Safety Act, reported to Congress that adopting international standards for merchant vessels would “enable the United States to avoid a conflicting patchwork of national standards that would impede the free-flow of commerce.”\textsuperscript{785} While proclaiming the U.S. exclusive economic zone in

\textsuperscript{781}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 International Convention on Load Lines); 46 U.S.C. § 14306 (extending reciprocity under International Tonnage Convention). Similarly, the Department of Transportation concluded in its 1996 Statement of Regulatory Priorities that “[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.” U.S. Dep’t of Transp., Unified Agenda, Nov. 29, 1996, 61 Fed. Reg. 62,111 (DOT 1996).

\textsuperscript{782}Early proponents of the trend toward federalization of environmental law argued that only federal rules would head off a “race to the bottom” by states that might otherwise be tempted to lower their environmental standards to attract commercial activities. See Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 Yale L.J. 1196 (1977); Engel, State Environmental Standard-Setting: Is there a “Race” and Is It “to the Bottom”?”, 48 Hastings L.J. 271 (1997) (concluding that evidence points toward an affirmative answer to both questions raised in the article’s title).

\textsuperscript{783}Fitch, Unilateral Action Versus Universal Evolution of Safety and Environmental Protection Standards in Maritime Shipping of Hazardous Cargoes, 20 Harv. Int’l L.J. 127, 160 (1979) (concluding that individual, national standards governing the design, construction, equipment, and manning of vessels could greatly impede the flow of world ocean commerce).


\textsuperscript{785}Letter from Douglas J. Bennett, Jr. (Asst. Sec’y for Cong. Affairs) to Cong. John Murphy (Chair,
1983, President Reagan affirmed the nation’s commitment to pursuing a uniform, international approach to regulation of merchant shipping.786

In concluding that the Ports and Waterways Safety Act evinced an intent that the “Nation was to speak with one voice with respect to tanker-design standards,”787 the Supreme Court observed that the Act’s legislative history revealed a “decided congressional preference for arriving at international standards for building tank vessels.”788 The Senate Report cited by the Court concluded that “multilateral action 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 imposition of standards.”789 The foreign relations implications of a decision to pursue unilateral action against foreign vessels are apparent in the legislative history of the PWSA: the Departments of State and Transportation joined twelve foreign nations in expressing concern over unilateral action.790 As shown in the following section, by agreeing to the international conventions, the U.S. is also able to obtain favorable, reciprocal treatment for its own vessels and to preserve the navigational mobility so important to its naval forces.

State regulation of primary conduct of merchant vessels “presents the most direct risk of conflict between federal and state commands, or of inconsistency between various state regimes to which the same vessel may be subject.”791 Such laws create a risk of disrupting uniformity and impinging on the U.S. treaty obligation to recognize certificates issued by other parties to those treaties. State regulations may also interfere with “the accomplishment and execution of the full federal purposes and objectives of Congress” and the President in the PWSA/PTSA and statutes and regulations implementing the SOLAS, MARPOL, and STCW conventions to pursue uniform international standards. The Court in Ray recognized that state laws on tanker design and construction would “frustrate the congressional desire of achieving uniform, international standards.”792 Indeed, as the

The United States will continue to work through the International Maritime Organization and other appropriate international organizations to develop uniform international measures for the protection of the marine environment while imposing no unreasonable burdens on commercial shipping.
788Id.
790Id.; see also Ray, 435 U.S. at 167 n.18.
792Ray, 435 U.S. at 168.
United States argued in the *Intertanko* appeal, discussed below, its representatives at the IMO will have little to bargain with in negotiating for stricter international standards if the federal government cannot bind the entire nation to the agreed-upon standards. As one congressional representative observed in support of uniformity based on the internationally agreed-upon standards, "the United States simply cannot urge the world community to adopt tougher anti-pollution measures, get most of what it wants through international agreement, . . . and then return home and pass unilaterally the few things it was unable to get at the international conference."  

2. The National Judgment to Pursue Comity and Reciprocity

International comity and reciprocity considerations enter into maritime preemption analysis in two respects. First, international agreements and federal legislation that incorporate comity or reciprocity provisions are federal law, which may displace state law under the Supremacy Clause. Second, state regulatory regimes that deny a foreign vessel the benefits of reciprocity granted by the national government may embarrass the national government and interfere with the nation's foreign relations policy.

"Comity with other nations and among the States was a primary aim of the Constitution. At the time of the framing, it was essential that our prospective trading partners would know that the United States would uphold its treaties, respect the general maritime law, and refrain from erecting barriers from commerce." The IMO marine safety and pollution prevention conventions are all quite clear in their reciprocity provisions: flag State compliance certificates shall be accepted by all port States that are party to the conventions, unless there are clear grounds for believing that the condition of the ship or of her equipment does not correspond substantially with the particulars of those certificates. Those internationally recognized certificates now serve as evidence of compliance with merchant vessel construction, design, equipment, and manning (CDEM) requirements, the vessel safety management systems code, and the crew qualification, training, and watchstanding standards. Any state regulation or enforcement action that denies a foreign vessel the benefits of reciprocal recognition of compliance
with international standards may undermine the nation’s foreign relations and create the potential for a protest or even retaliation by the vessel’s flag State.

Consistent with the IMO conventions, Congress incorporated a number of reciprocity provisions in Titles 33 (Navigable Waters) and 46 (Shipping) of the U.S. Code. Unfortunately, courts often fail to consider the purpose and objective of such statutes in a maritime preemption analysis. Congress has explicitly determined in those statutes that vessels which meet the standards of the IMO-sponsored treaties to which the U.S. is party shall be exempt from regulations promulgated under the PWSA, and many other statutes. The reciprocity statutes embody more than a federal judgment that the international standards prescribed by the IMO conventions provide an acceptable level of safety and marine environmental protection. The statutes also seek to obtain reciprocal benefits for U.S. vessels in the ports and waters of other nations. Any preemption analysis that overlooks the purposes and objectives which animate comity and reciprocity provisions fails to accord all federal law its appropriate status under Article VI.

3. The National Judgment to Promote Freedom of Navigation and Reciprocal Port Access

At the same time that it confirmed to the states title to the submerged lands and waters of the adjacent oceans out to three nautical miles, Congress, in the Submerged Lands Act, reserved to the federal government the “paramount” power to control and regulate the navigable waters of the U.S. “for the constitutional purposes of commerce, navigation, national defense, and international affairs.” Within its territorial sea, the United States recognizes, as a matter of international law, a foreign vessel’s right of innocent passage and a right of transit passage through international straits. In return, the U.S. expects similar treatment for its vessels. As a matter of domestic law, federal merchant vessel safety and pollution prevention statutes and regulations, with few exceptions, expressly exempt

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798See supra note 781.
799PWSA, supra Part II, note 587, tit. II, § 5 (“The rules and regulations for vessel safety established hereunder and the provisions of this subsection shall not apply to vessels of a foreign nation having on board a valid certificate of inspection recognized under law or treaty by the United States”) and § 7(d) (extending reciprocity to foreign vessel certificates issued under authority of a treaty to which United States is party).
800See supra note 781.
80143 U.S.C. § 1314. The regulatory power over the territorial sea is shared with the states. Barber v. Hawaii, 42 F.3d 1185, 1191, 1995 AMC 1763 (9th Cir. 1994). State regulation is, however, subject to preemption under Article VI, the Commerce Clause, or if in conflict with an international treaty. Id.
802See supra Part I, note 91 and accompanying text.
vessels in innocent passage through the territorial sea or in transit through an international strait.\textsuperscript{803} The U.S. position is consistent with the limitations on coastal State jurisdiction under the 1982 LOS Convention.\textsuperscript{804} The national judgment to exempt transiting vessels from U.S. laws serves the national self-interest in preserving freedom of navigation. Not all states act consistently with the U.S. obligation under international law, however; creating potentially serious foreign relations problems for the nation. The state of Washington, for example, expressed its intent to apply its tanker laws to all vessels in state waters—even those transiting to foreign ports.\textsuperscript{805} Similar problems may arise if Alaska attempts to enforce state requirements on vessels entitled to a right of transit passage through Unimak Pass on their great circle route across the north Pacific Ocean.\textsuperscript{806}

In the PWSA, Congress determined that vessel safety and pollution prevention in international boundary waters lying between the U.S. and Canada and Mexico was best achieved by negotiating international agreements with the adjacent nations.\textsuperscript{807} The President entered into such an agreement with Canada for the northwest straits that form the western boundary between the U.S. and Canada.\textsuperscript{808} Pursuant to the grant of authority by Congress, the Coast Guard may waive U.S. requirements for vessels bound for Canada, if those vessels comply with Canadian requirements. Notwithstanding the federal government's agreement with Canada, the state of Washington has asserted that it will enforce its own requirements on vessels bound for Canadian ports, essentially stripping Canada-bound vessels of the reciprocity benefits of the international agreement.\textsuperscript{809}

\textsuperscript{803}See, e.g., PTSA, supra Part II, note 724, tit. I, § 5(d) ("Except pursuant to international treaty, convention, or agreement, to which the United States is a party, this Act shall not apply to any foreign vessel that is not destined for, or departing from, a port or place subject to the jurisdiction of the United States and that is in" innocent passage through the territorial sea of the United States or through the navigable waters of the United States which form an international strait); 33 C.F.R. § 164.02 (exempting foreign vessels in innocent passage or transit passage from Navigation Safety Regulations).

\textsuperscript{804}LOS Convention, supra Part II, note 384, art. 21. Providing that, with respect to foreign vessels in innocent passage, the coastal State "laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards."

\textsuperscript{805}Letter from Barbara Herman, Administrator, Washington Office of Marine Safety, to RADM James Card, U.S. Coast Guard, dated Apr. 19, 1995 ("All tank vessels operating in Washington waters, including Canadian-bound vessels, are subject to [Washington] prevention plan requirements"). By contrast, the Hawaii statute regulating vessel mooring in state waters that was analyzed by the Ninth Circuit in Barber v. Hawaii expressly exempted vessels engaged in interstate or foreign commerce and was drafted to avoid any interference with the right of innocent passage. Barber, 42 F.3d at 1195–96.

\textsuperscript{806}See LOS Convention, supra Part II, note 384, arts. 38 & 42 (describing transit passage regime).

\textsuperscript{807}See supra Part II, ¶ IV.B.

\textsuperscript{808}Id.

\textsuperscript{809}See supra note 805.
4. The Role of Federal Agency Judgments on Preemption

The President has directed all federal agencies to analyze the potential federalism implications of any new agency regulations. An agency’s conclusion regarding the preemptive effect of a rule and any related federal law may serve as a guide to state legislatures and administrative agencies in developing consistent state rules. Federal agency decisions will be particularly important under circumstances where the enabling state statute requires that the state agency’s rules be implemented in a manner consistent with federal law. Under such circumstances, the responsible state agency may look to the federal agency’s federalism statements to ascertain the agency’s conclusions on any subjects that are preempted by federal law. Additionally, the agency’s federalism statements may provide guidance to the states on the circumstances under which the federal government is likely to challenge state regulations on preemption grounds.

Opinions by involved federal agencies can also provide invaluable information to courts reviewing challenges to state regulations, particularly when international treaties or foreign relations concerns are relevant. Some commentators have even argued that federal agencies should be given “primary jurisdiction” over preemption challenges. Federal agencies are generally well informed on treaty and other international law developments affecting subjects within their assigned responsibility. And federal agencies may provide needed information on the relationship between federal and state regulatory regimes and whether the state regime will interfere with the full accomplishment of the federal legislation’s purpose.

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810 Executive Order 12,612, 3 C.F.R. § 253 (1987). The agency’s federalism assessment is published in the Federal Register. The President directed that agencies should conclude that state authority is preempted only “when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute.”

811 In enacting Washington’s new tanker laws, for example, the state legislature required that the act be implemented in a manner consistent with federal law to the maximum extent practicable. Wash. Rev. Code § 88.46.020.

812 Problems will arise, however, if agency opinions are either poorly reasoned or inconsistent. In the Intertanko v. Locke litigation, one of the chief complaints was that the Coast Guard had not been consistent in its position on preemption of the state’s tanker laws. See Brief of Intervenors, Washington Environmental Council, et al., at 21–23, Intertanko v. Locke, 1998 WL 547205 (9th Cir. 1998) (No. 97-35010).

813 R. Findley & D. Farber, Environmental Law 85 (3d ed. 1992) (“the ability of an agency to issue a preemptive regulation suggests that the courts should require all preemption issues to be presented initially to the agencies, subject to ultimate judicial review”).

814 See Medtronic, Inc. v. Lohr, 518 U.S. 470, 496 (1996) (“Because the FDA is the federal agency to which Congress has delegated its authority to implement the provisions of the Act, the agency is uniquely qualified to determine whether a particular form of state law ‘stands as an obstacle to the
earlier, one test of whether federal and state regulations may coexist is whether both regulations can be enforced without impairing the federal superintendence of the field.\(^8\) Congress has assigned to the Secretary of Transportation responsibility for "general superintendence over the merchant marine of the United States."\(^8\) Agency judgments on whether state regulatory measures impair federal superintendence of the field will often be the most reliable measure of any conflict.

Agency preemption statements are not merely precatory. The Supreme Court has "held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes."\(^8\) The agency’s decision to preempt state regulation is to be upheld unless it is clear that Congress would not have sanctioned a preemption of state authority in the subject area regulated by the agency.\(^8\) An agency’s preemption statement is "dispositive on the question of implicit intent to pre-empt unless either the agency’s position is inconsistent with expressed congressional intent . . . or subsequent developments reveal a change in that position."\(^8\) The Court concluded in *Ray v. Atlantic Richfield Co.* that an agency determination *not* to impose a regulation may also preempt state laws on the subject.\(^8\)

The Coast Guard has been selective in its determinations regarding the preemptive effect of its regulations, other than those establishing construction, design, equipment, and manning (CDEM) requirements. In promulgating final rules designed to harmonize Coast Guard requirements for U.S. vessels with international standards, the Coast Guard concluded that "vessel design, construction, equipment, and manning standards fall within the exclusive province of the Federal Government."\(^8\) In its recent regulatory project to provide alternative methods to fulfill design, inspection, and certification requirements,\(^8\) the agency concluded that the

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\(^8\)Fidelity Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153–54 (1982); see also *Medtronic*, 518 U.S. at 496–97 (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 in determining preemption).
\(^8\)Hillsborough, 471 U.S. at 714–15 (citations omitted).
\(^8\)35 U.S. 151, 171–72, 1978 AMC 527 (1978) (federal agency’s determination that no tug escort requirement should be imposed would preempt a contrary requirement by the state) (dictum).
authority to regulate safety requirements of U.S. vessels is committed to the Coast Guard by statute. Furthermore, since these vessels tend to move from port to port in the national market place, these safety requirements need to be national in scope to avoid numerous, unreasonable and burdensome variances. Therefore, this action will preempt State action addressing the same matter.\textsuperscript{823}

In implementing the new ISM Code, the Coast Guard concluded that state regulations that seek to impose different or higher standards than those established by federal regulations are preempted.\textsuperscript{824} Similarly, after concluding that no additional structural measures to reduce oil spills from existing tank vessels without double hulls are presently justified, the Coast Guard determined that the states were preempted from establishing any additional requirements.\textsuperscript{825} The Coast Guard also stated its intent to preempt state standards concerning oil spill prevention and response equipment for vessels.\textsuperscript{826}

By contrast, in promulgating regulations establishing requirements for escort tugs in Prince William Sound, the Coast Guard concluded that more stringent state requirements were not preempted, unless the state regulations directly conflicted with the Coast Guard’s regulations.\textsuperscript{827} Similarly, in promulgating regulations for vessel response plans, the Coast Guard concluded that state requirements were not preempted, unless it would be impossible to comply with both the federal and state requirements.\textsuperscript{828}

C. When State Judgments Conflict with International or Federal Standards

Federalism disputes over merchant vessel regulation are most likely to arise when the state denies entry to a commercial vessel that holds all of the federally-required licenses and inspection certificates to operate in U.S. waters or admits the vessel only if it complies with additional state requirements. The Supreme Court in \textit{Ray v. Atlantic Richfield Co.} held that the “Supremacy Clause dictates that a federal judgment that a vessel is safe

\textsuperscript{823}Id. at 68,517.
\textsuperscript{825}62 Fed. Reg. 1622, 1625-26 (DOT 1997) (“The Coast Guard believes the clear and manifest purpose of Congress is to confer upon the Federal government, through the Coast Guard, the exclusive authority to set structural standards for vessels to protect the environment from harm. The Coast Guard has determined that no additional structural measures are required for single-hull tank vessels. Nevertheless, the Coast Guard believes that States are precluded from imposing structural measures on tank vessels operating in interstate or foreign commerce.”).
\textsuperscript{826}58 Fed. Reg. 67,988, 67,995 (DOT 1993). Whether a state law saving clause similar to § 1018 of OPA 90 “saved” the state’s authority to impose oil spill containment equipment requirements on vessels was left open by the Supreme Court in \textit{Askew v. American Waterways Operators, Inc.}, 411 U.S. 325, 336-37, 1973 AMC 811 (1973).
to navigate United States waters prevails over the contrary state judgment."\(^{829}\) At the same time, however, holding a federal license or inspection certificate does not completely immunize a vessel from state regulation. The Court has upheld the states’ application of reasonable, non-discriminatory “conservation and environmental protection measures” to federally licensed vessels.\(^{830}\) In reconciling these holdings, the Court in \textit{Ray} noted that in none of the cases upholding state conservation and environmental protection measures did the state law address the same object as federal law.\(^{831}\) Notwithstanding the “no overlap” rule, states continue to impose safety and pollution prevention requirements on vessels operating in state waters even though the state regulations address the same object as the treaties, federal statutes, and federal regulations that make up federal law. States enforce those requirements through a variety of sanctions, including banishment from state waters. Three federal cases—drawn from Alaska, Washington, and New York—demonstrate the extent to which some states seek to regulate, even bar, maritime operations in state waters.

1. \textit{Chevron v. Hammond: Ninth Circuit Upholds an Alaska Ban on Ballast Water Discharges that are Permitted by Federal Law}

In 1976, the Alaska legislature enacted a comprehensive tanker act to address the state’s concerns over the transport risks associated with the opening of the Trans-Alaska Pipeline.\(^{832}\) The Act required oil tankers operating in state waters to obtain a “risk avoidance certificate” from the state and prohibited the discharge of any ballast water from a vessel’s cargo tanks.\(^{833}\) Tankers operating in state waters were required to pay a “risk charge” to the state’s Coastal Protection Fund. The amount of the charge depended in part on the vessel’s construction and equipment. Vessels not fitted with state-specified navigation and collision avoidance equipment or a bow-thruster paid higher risk charges.\(^{834}\) By characterizing the construction and equipment standards as a “risk factor,” rather than a direct regulation of vessel construction and equipment, the state hoped to avoid what it acknowledged was a serious threat of preemption.\(^{835}\)

The United States joined several tanker owners in challenging the state law on preemption grounds. While the preemption challenge was pending in


\(^{830}\)Id. at 164 (citations omitted).

\(^{831}\)Id. (citations omitted).

\(^{832}\)1976 Alaska Sess. Laws ch. 266.


\(^{834}\)Id.

\(^{835}\)See id. at 1705 (statement of the Alaska Attorney General).
the district court, Alaska conceded that the navigation equipment requirements of the Act were preempted by the Ports and Waterways Safety Act, as construed by the Supreme Court in *Ray v. Atlantic Richfield Co.* In reviewing the remaining provisions of the Alaska act, the district court first pointed out that the state had failed "to distinguish the complete federal preemption provided by Title II of the Ports and Waterways Safety Act from the limited federal preemption of Title I." Under the Supreme Court’s decision in *Ray*, said the district court, Title II of the PWSA completely occupies the field of vessel design. Moreover, differing state regulations would frustrate the object of Title II. By contrast, Title I does not completely occupy the field. The district court held that the Alaska risk charge scheme fell within the subject regulated by Title II of the PWSA, and was therefore completely preempted.

The district court reviewed the Alaska ballast water regulations for tank ships in a separate decision. Under authority of the PTSA, the Coast Guard had already established effluent standards for the discharge of ballast water from tank ships. The federal standards, which adopted the ballasting standards prescribed by Annex I of the MARPOL Convention, permitted tankers to discharge "clean ballast" water. Rejecting the federal government’s judgment, Alaska’s legislation completely prohibited the discharge of ballast water from a tanker’s cargo tanks, even if the ballast water met the federal definition of "clean ballast.” The district court held that the state’s ban on ballast water discharges was preempted by the Coast Guard regulation issued under authority of Title II of the PWSA. On appeal, the United States again joined the challengers in arguing that the Alaska law was

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836 Id. at 1701.
837 Id. at 1713.
838 Id. at 1714.
839 Id. at 1713.
840 Id. at 1714.
841 The district court’s decision on the ballast water discharge ban is not reported.
843 33 C.F.R. § 157.37(a) (1982). 33 C.F.R. § 157.03 defines “clean ballast” water as ballast which:
(1) If discharged from a vessel that is stationary into clean, calm water on a clear day, would not—
(i) produce visible traces of oil on the surface of the water or on adjoining shore lines; or
(ii) cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shore lines; or
(2) If verified by an approved cargo monitor and control system, has an oil content that does not exceed [now 15 parts per million].

The Coast Guard definition of “clean ballast” is identical in all relevant respects to the definition in the MARPOL regulations. See MARPOL, supra Part II, note 388, Annex I, reg. 9(4).
844 Alaska Stat. § 46.03.750(e) (1976).
The Ninth Circuit reversed the district court, upholding the state rule. Four aspects of the circuit court’s decision merit examination. First, the court characterized the Alaska tanker ballast statute as strictly a pollutant discharge regulation, despite the statute’s effect on tanker operations. Second, the court relied heavily on a Clean Water Act (CWA) state law saving provision to support its conclusion that the Alaska law was not preempted by the PWSA. Third, the court appeared to give no weight to the Executive Branch’s conclusion that state ballast water regulations were preempted by the federal regulations. Finally, the court’s conclusion that the federal government has little or no interest in regulatory uniformity or in aligning domestic laws with its treaty obligations merits examination, particularly because the Ninth Circuit’s Hammond decision continues to be cited within the circuit in support of a view that international agreements set only “minimum standards,” which the states are free to exceed.

a. Characterizing the Subject Matter

The Ninth Circuit began its “occupation of the field” analysis by acknowledging the importance of the subject matter of the federal and state regulations under examination. Indeed, it will be seen that the court’s single-purpose characterization of the Alaska statute’s subject matter largely determined the outcome of the case. The Alaska statute challenged in Hammond:

1. Prohibited the carriage of oil cargo in a tanker’s segregated ballast tanks;
2. Prohibited tankers fitted with segregated ballast tanks from carrying ballast water in the vessel’s cargo tanks, except in an emergency, and only then with the permission of the relevant state regulatory agency;
3. Prohibited the discharge of ballast water from a tanker’s cargo tanks in state waters; and,
4. Required that all ballast water carried in a tanker’s cargo tanks be processed by or in an onshore ballast water treatment facility.

The United States participated as amicus curiae in the district court and the court of appeals to urge that the deballasting prohibition contained in Alaska Stat. § 46.03.750(e) (Supp. 1977) is preempted by regulations promulgated pursuant to Title II of the Ports and Waterways Safety Act of 1972 (PWSA), 46 U.S.C. § 391a, as amended by the Port and Tanker Safety Act of 1978 (PTSA). . . .


Id. at 487–88.

Alaska Stat. § 46.03.750(e) (1976) (as quoted in 726 F.2d at 485 n.1).
In characterizing the Alaska statute, the court chose to classify it as a regulation of "ocean pollutant discharges."\textsuperscript{850} The immediate problem with the court's classification of the Alaska statute is that it was not drafted as a pollutant discharge prohibition. As drafted at the time of the challenge,\textsuperscript{851} the statute prescribed where a tanker may and may not carry ballast water, a subject regulated by MARPOL and federal regulations.\textsuperscript{852} The court did not address this aspect of the Alaska statute in its preemption analysis.\textsuperscript{853} The statute also requires that all ballast water carried in a tank ship's cargo tanks be "processed by or in an onshore ballast water treatment facility,"\textsuperscript{854} and forbids the discharge of ballast water from a tanker's cargo tanks in state waters. Because the statute is framed in the conjunctive, the shore-side processing requirement could be construed by state regulators as precluding Alaska-bound tank vessels from discharging clean ballast water immediately before arriving in state waters. The court did not examine whether this created a conflict with the federal rule or with MARPOL Annex I,\textsuperscript{855} which governs discharges beyond U.S. waters. Even more problematic for the court's characterization is the fact that the "no discharge" rule in the Alaska statute is not based on the presence or concentration of pollutants in the vessel's ballast water. The statute prohibits the discharge of ballast water from a cargo tank even if the water is completely free of oil and any other pollutant.\textsuperscript{856} This aspect of the Alaska statute renders the circuit court's classification of the deballasting ban solely as an "ocean pollutant dis-

\textsuperscript{850}726 F.2d at 488. By contrast, the Coast Guard's regulation for tanker de-ballasting is codified in the "vessel operation" subpart of its rules for oil tankers. See 33 C.F.R. pt. 157, subpart C (1982).

\textsuperscript{851}The statute was amended in 1980. See 726 F.2d at 499 n.21. The court's analysis focused on the pre-1980 version of the statute.

\textsuperscript{852}See, e.g., 33 C.F.R. § 157.35 (prescribing conditions under which ballast water may be carried in cargo tanks); MARPOL, Annex I, reg. 13 (prescribing conditions under which ballast water may be carried in cargo tanks). The MARPOL Convention of 1973 became effective through its 1978 Protocol on October 2, 1983. The \textit{Hammond} opinion creates the impression, however, that the MARPOL convention was not in force at the time the decision was issued, on February 3, 1984. See 726 F.2d at 494 n.14.

\textsuperscript{853}The court's holding is limited to the state's ban on ballast water discharges in state waters. See 726 F.2d at 501.

\textsuperscript{854}Alaska Stat. § 46.03.750(e) (1976) (quoted in 726 F.2d at 485 n.1).


\textsuperscript{856}Admittedly, ballast water discharged from a cargo tank will almost certainly contain some residual oil, even if it is first processed through the vessel's oily-water separator. See generally G. Marton, Tanker Operations: A Handbook for the Ship's Officer ch. 7 (3d ed. 1992).
charges” rule questionable. A thorough analysis might have also classified the Alaska statute as a regulation of vessel operations, with potentially far-reaching implications for tank vessel design. Had the court in Hammond begun with such a characterization, and considered all of the objectives in the federal “vessel operation” rule, it might have reached a different conclusion on the effect of the Supreme Court’s decision in Ray, whether Title II of the PWSA/PTSA occupied the field, and whether the Alaska statute frustrated one or more of the federal purposes in the vessel ballasting regulations.

b. The Switch: Distinguishing Ray v. Atlantic Richfield Co. by Shifting to a CWA Analysis

In Title II of the PWSA, Congress directed the Coast Guard to prescribe regulations to reduce or eliminate oil discharges during ballasting and deballasting of tank vessels. As with all Title II requirements, the Coast Guard is directed to consult with the affected states in developing the regulations. The only saving provision for state laws in the PWSA/PTSA applies to safety standards for facilities. Nothing in the PWSA or the PTSA saves state authority to regulate tanker ballasting. The Supreme Court held in Ray that Title II of the PWSA/PTSA completely occupied the field of tanker design and construction. It will be recalled, however, that Title II requires the Coast Guard to promulgate regulations that go beyond tanker design and construction. Title II also directs the agency to prescribe regulations for, inter alia, tanker operations, equipment, personnel qualification and training, manning standards, the handling and stowage of cargo, and tanker ballasting and deballasting. The Supreme Court in Ray found it unnecessary in that case to examine the extent to which

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857 It will be seen that in its 1998 decision in the Intertanko case, the circuit court characterizes the Alaska statute as an “operations” rule. See infra note 961.

858 Chevron U.S.A., Inc. v. Sheffield, 471 U.S. 1140, 1142 n.3, 1985 AMC 2395 (1985) (White, J., dissenting from denial of petition for certiorari) (noting that “[d]esign specifications and operating procedures are in many respects inextricably linked, and this linkage is striking where ballasting—the subject of the regulations at issue in this case—is concerned”).

859 PWSA, supra Part II, note 587, § 201(7).


861 At the time of the Hammond decision, the statutory requirement for the Coast Guard to promulgate rules for “the reduction or elimination of discharges during ballasting, deballasting, tank cleaning [and] cargo handling” was codified at 46 U.S.C. § 391a. When Title 46 was re-codified and enacted into positive law the provision was re-codified at 46 U.S.C. § 3703(a)(7).


863 See supra Part II, note 633 and accompanying text.

864 The requirement is presently codified at 46 U.S.C. § 3703(a).
Title II occupied the field for the rest of the subjects for which the Coast Guard was directed to prescribe regulations.\(^{865}\)

Having characterized the Alaska statute as an oil pollution regulation, the Ninth Circuit in *Hammond* framed the issue on appeal as whether Congress in passing the PTSA/PWSA implicitly intended to occupy the field of "regulating pollution from oil tankers within a state’s territorial waters."\(^{866}\) The court noted that the Supreme Court’s decision in *Ray* regarding the extent to which Title II of the PWSA occupied the field did not extend beyond tanker design requirements, but it did not attempt to apply the Supreme Court’s reasoning in *Ray* (the statutory pattern in Title II, the fact that the Secretary was required to prescribe regulations) to the ballasting regulation at issue in *Hammond*. The court instead recalled that *Ray* "specifically explained that tankers must meet ‘otherwise valid state or federal rules of regulation that do not constitute design or construction specifications.’"\(^{867}\) For reasons not explained in the opinion, the court failed to mention the closely-related passage in *Ray*, in which the Supreme Court limited the passage quoted by the Ninth Circuit above by explaining that:

\[\text{[I]n none of the relevant cases sustaining the application of state laws to federally licensed or inspected vessels did the federal licensing or inspection procedure implement a substantive rule of federal law addressed to the object also sought to be achieved by the challenged state regulation.}\]

It will be readily seen that the Alaska ballast water discharge ban in *Hammond* and the statute’s prescriptions on where tankers may legally carry ballast water were addressed to the same object as the federal rule and the MARPOL Convention. For that reason, the Alaska statute is readily distinguishable from the air emission ordinance upheld by the Supreme Court in *Huron Portland Cement Co. v. Detroit.*\(^{869}\) At the time *Huron* was decided, no federal law or regulation controlled air pollution from vessels. Accordingly, the Supreme Court found "no overlap" between the scope of the federal ship inspection laws and that of the municipal ordinance.\(^{870}\) By contrast, the Alaska regulation challenged in *Hammond* prohibited tanker...
deballasting operations that the federal regulations (and MARPOL) permitted. Despite the critical difference between the Alaska ballast water law and the state laws that the Supreme Court had earlier upheld in cases such as *Huron*, and *Ray*’s explicit reference to the absence of “overlap” in explaining its earlier decisions, the circuit court in *Hammond* concluded that *Ray* did not control the outcome of the case. The court did not analyze whether the MARPOL Convention or the U.S. implementing regulations occupied the broader field of tanker ballasting, the relationship between the design and layout of cargo tanks, segregated ballast tanks and dedicated clean ballast tanks, and the circumstances under which ballast water and/or oil could be carried in those tanks.

In reasoning that at least one justice of the Supreme Court later found unusual, the Ninth Circuit in *Hammond* elected to focus much of its analysis on the federal CWA, a cooperative federalism regime, to determine whether Congress intended to occupy the field of pollution by tankers caused by deballasting in state waters. The court sought to reconcile its reliance on the CWA with the Supreme Court’s rejection of that very argument in *Ray* by again distinguishing the “subject matter” of the Alaska statute. The court also explained that the need to look “at the entire federal statutory scheme relative to a particular subject matter” animated the court’s decision to turn to the CWA. The court then focused on the CWA provisions establishing the National Pollution Discharge Elimination System (NPDES) and its related state law saving clause. That saving clause provides that “nothing in this chapter” (chapter 26 of Title 33 of the U.S. Code) shall preclude or deny the right of any state or political subdivision to adopt or enforce any standard or limitation respecting the discharge of pollutants or

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871 26 F.2d at 487. Oddly, the same court later described its opinion in *Hammond* as one that relied “heavily” on *Ray*. See Beveridge v. Lewis, 939 F.2d 859, 863, 1992 AMC 130 (9th Cir. 1991).

872 See infra note 883 and accompanying text.

873 The court mentioned, but did not analyze, the 1990 APPS, even though that Act expressly regulates oil discharges from vessels and assigns authority to implement MARPOL to the Secretary of the department in which the Coast Guard is operating. See 33 U.S.C. §§ 1903 & 1907.

874 *Ray*, 435 U.S. at 178 n.28 (rejecting the state’s reliance on the FWPCA, CZMA, and Deepwater Port Act).

875 26 F.2d at 491 n.10 (explaining that “[t]he *Ray* footnote [rejecting the state’s reliance on the FWPCA] does not control this case for the same reason that *Ray*’s holding does not control this case—*Ray* is specifically and narrowly confined to a different subject”). For reasons the Ninth Circuit never explained, the court found it unnecessary to its judicial review to apply the reasoning in *Ray* to the remaining subjects addressed by Title II, to determine whether Congress intended to occupy the field for each of the subjects now listed in 46 U.S.C. § 3703.

876 Id. A truly comprehensive review of the relevant federal law would have considered the MARPOL Convention and Protocol, APPS, the PWSA and PTSA, the Coast Guard’s implementing regulations, and the agency’s conclusions regarding the extent to which state regulations on the same subject were preempted.
any requirement respecting control or abatement of pollution.\footnote{33 U.S.C. § 1370. The Ninth Circuit cited Askew v. American Waterways Operators, Inc., 411 U.S. 325, 1973 AMC 811 (1973), in its decision in \textit{Hammond}, and noted that the statute at issue in \textit{Askew} had express non-preemption language [now 33 U.S.C. § 1321(o)(2)]. However, the \textit{Hammond} court did not rely on the § 1321(o)(2) saving clause in the CWA to "save" the state’s regulation of ballast water discharges. See \textit{Hammond}, 726 F.2d at 488 n.6 & 490–91 n.9.} Although by its terms the CWA saving provision has no bearing on preemption of state law by any federal law other than the CWA, the court found that it was relevant to Congress’ preemptive intent under the PWSA/PTSA.\footnote{The court sought to bolster its CWA reasoning by referring to sections of the Oil Pollution Act Amendments of 1973 (OPAA), an act which the court acknowledged was superseded by APPS before it ever became effective. \textit{Hammond}, 726 F.2d at 494 n.14. The court did not explain why it did not rely instead on the APPS, the act that superseded the OPAA.} After observing that states were free to establish more stringent water quality standards \textit{under the CWA}, and concluding that the CWA’s NPDES provisions “converted” the Alaska ballasting law into a “federal CWA standard,”\footnote{726 F.2d at 489–90.} the court held that Alaska was not preempted from enacting tanker ballast water discharge standards that were stricter than those promulgated by the Coast Guard.\footnote{Chevron U.S.A., Inc. v. Sheffield, 471 U.S. 1140, 1985 AMC 2395 (1985) (White, J., dissenting from denial of the petition for writ of certiorari).} The Supreme Court denied the challengers’ petition for certiorari over Justice White’s dissent.\footnote{Id. at 1143.} Justice White criticized the Ninth Circuit’s reliance on the CWA.\footnote{Id. (citing 40 C.F.R. § 122.3(a)). Vessels are included within the statutory definition of a "point source." See 33 U.S.C. § 1362(14). However, vessels are exempt from the NPDES permit requirement. See 40 C.F.R. § 122.3(a). In a related provision, any discharge of oil permitted under MARPOL 73/78, Annex I, as provided by 33 C.F.R. pt. 151, is not a discharge of oil in a quantity which may be harmful. See 40 C.F.R. § 110.5(a) & (b).} He observed that the CWA “sheds little or no light on the question whether protection of the marine environment against the threats posed specifically by oil tanker traffic is, under Title II of the PWSA, a matter in which federal regulation has displaced state control.”\footnote{Natural Resources Defense Council, Inc. v. EPA, 859 F.2d 156 (D.C. Cir. 1988).} He singled out the Ninth Circuit’s reliance on the NPDES provisions in the CWA for particular criticism, after noting that the federal regulations implementing the NPDES program expressly exempt discharges from vessels incident to their normal operation.\footnote{Id. (33 U.S.C. § 1370). The Ninth Circuit cited Askew v. American Waterways Operators, Inc., 411 U.S. 325, 1973 AMC 811 (1973), in its decision in \textit{Hammond}, and noted that the statute at issue in \textit{Askew} had express non-preemption language [now 33 U.S.C. § 1321(o)(2)]. However, the \textit{Hammond} court did not rely on the § 1321(o)(2) saving clause in the CWA to "save" the state’s regulation of ballast water discharges. See \textit{Hammond}, 726 F.2d at 488 n.6 & 490–91 n.9.} It should also be noted that the CWA authority to regulate point source discharges does not carry with it the authority to regulate the point source itself.\footnote{Id.} Thus, even if the NPDES
regime applied to vessels, nothing in the regime would authorize a state (or the EPA) to regulate a tank vessel’s internal ballasting operations.

c. Effect Given to the Executive Branch’s Preemption Judgment

The Coast Guard, acting through the Department of Justice, joined the challengers in arguing that federal law preempted the Alaska ballast water discharge ban. The Ninth Circuit opinion paid only passing attention to the relevance of the agency’s intent to preempt state laws on tanker ballasting, even though the Supreme Court has held that an agency’s preemption judgment is “dispositive on the question of implicit intent to pre-empt unless either the agency’s position is inconsistent with expressed congressional intent . . . or subsequent developments reveal a change in that position.”

The Coast Guard was required by Title II of the PWSA/PTSA to prescribe ballasting regulations. The Supreme Court in Ray had already recognized that other provisions of Title II occupied the field of tanker design requirements. The Act to Prevent Pollution by Ships (APPS) delegated to the Coast Guard authority to implement the MARPOL 1978 Protocol. The Coast Guard regulation permitting tankers to discharge clean ballast was identical to the MARPOL Annex I standard. Neither the PWSA/PTSA nor APPS contains saving provisions for state laws regulating tanker ballasting. The only source of congressional intent the Ninth Circuit identified that, in the court’s opinion, demonstrated the Coast Guard’s intent to preempt state regulations was “inconsistent with expressed congressional intent” came from the NPDES provisions of the CWA, which do not apply to vessel discharges incident to normal operations, and the 1973 Oil Pollution Act Amendments, which were superseded even before they became effective. Neither provides persuasive evidence that the Coast Guard’s judgment was inconsistent with expressed congressional intent. On the other hand, the


It has been the position of the United States throughout this litigation that the PWSA and the PTSA systematically regulate pollution from tanker operations and that the interest in a nationally uniform approach to the problem of oil pollution from vessels leaves no room for varying state regulations.

887Hillsborough County, Fla. v. Automated Med. Labs., 471 U.S. 707, 714–15 (1985) (citations omitted); Fidelity Sav. & Loan Ass’n v. de la Cuesta, 458 U.S. 141, 153–54 (1982) (holding that an agency’s decision to preempt state regulation is to be upheld unless it is clear that Congress would not have sanctioned a preemption of state authority in the subject area regulated by the agency). The Ninth Circuit sought to avoid the Fidelity rule by noting that the Coast Guard “did not make any specific findings that as to Alaska waters such a prohibition would seriously affect vital concerns for the safety of vessels or the environment.” Hammond, 726 F.2d at 498 n.19. The court cited no authority for imposing a requirement so plainly at odds with the rule in Fidelity and Hillsborough.

888See 33 U.S.C. § 1903(b).
Coast Guard had not made clear its intent to preempt state regulation of tanker ballasting operations at the time it promulgated its rule.\textsuperscript{889} Perhaps that is one reason why Justice Stevens suggested, in explaining the Court's denial of the petition for certiorari in \textit{Hammond}, that "the Coast Guard retains the power to modify its regulations relating to deballasting."\textsuperscript{890}

\textbf{d. Downplaying International Law and Uniformity}

Perhaps the most troubling aspects of the Ninth Circuit's decision in \textit{Hammond}, at least for maritime and international law practitioners and scholars, is its conclusion that international agreements set only "minimum standards,"\textsuperscript{891} and that states within the U.S. are therefore free to impose stricter requirements. The court misunderstood the Article VI analysis for treaties and underestimated the commitment of Congress and the President to uniform international standards for merchant vessel safety and vessel-source pollution prevention.\textsuperscript{892} Moreover, the court's decision fails to appreciate the difference between the national government excepting to specific provisions of a treaty, as a foreign affairs policy choice, and state governments enacting laws that conflict with a treaty to which the national government has agreed to be bound.

The Ninth Circuit concluded that because Congress required the Coast Guard to promulgate regulations, while permitting those regulations to exceed international standards, Congress must have the "view that the international agreements set only minimum standards, that strict international uniformity was unnecessary, and that standards stricter than the international minimums could be desirable in waters subject to federal jurisdiction."\textsuperscript{893} Even if the court was correct in its assessment of congres-

\textsuperscript{889}See \textit{Hillsborough}, 471 U.S. at 718 ("because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive").


\textsuperscript{891}\textit{Hammond}, 726 F.2d at 493 (concluding that, because Congress authorized the Coast Guard to establish standards stricter than those established by international agreements, "This indicates Congress' view that the international agreements set only minimum standards, that strict international uniformity was unnecessary, and that standards stricter than the international minimums could be desirable in waters subject to federal jurisdiction").

\textsuperscript{892}The same cannot be said of the U.S. attitude toward international conventions on liability, as demonstrated by the nation's rejection of the CLC and Fund Conventions on oil pollution liability. See supra Part II, note 415.

\textsuperscript{893}726 F.2d at 493. The court also characterizes the national government as being constrained by international law when acting beyond its territorial sea, but a sovereign within it. Id. at 497 n.17. While correct as far as it goes, the court overlooks the fact that the U.S. may, by treaty, agree to restrict its
sional intent, it does not follow that Congress’ decision to forgo international uniformity (and, presumably, to require the President to make appropriate exceptions or reservations to the relevant treaties or conventions, as a condition of giving its advice and consent) left the states free to enact state and local laws that varied from international standards set by treaties to which the U.S. had agreed. By virtue of the supremacy of federal law “no state can add to or take from the force and effect of [a] treaty.”

The “conflict” prong of the Hammond analysis rests almost exclusively on the court’s analytic shift away from MARPOL, APPS, PWSA/PTSA, and the Coast Guard’s implementing regulations, to the NPDES provisions under the CWA. Even if the CWA was relevant to tanker ballast water discharges, the court would still need to consider in its conflict analysis the relationship between the CWA’s saving clause for international law and the MARPOL Annex I clean ballast provisions. The court must also weigh the importance of the fact that Congress excluded certain vessel discharges permitted by MARPOL from the CWA discharge prohibition and that APPS extends the application of MARPOL Annex I to both U.S. and foreign vessels located in the navigable waters of the U.S. Finally, by focusing on only one purpose—marine pollution prevention—while ignoring other important interests the national government may be seeking to protect through international agreement, the court skewed the conflict analysis. Under the test in Ray, state law that stands as an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress” is superseded. Any international or congressional rule or standard reflects a balance between safety and environmental protection, on the one hand, and feasibility, cost of compliance, the need for reciprocity, and the desire to facilitate commerce on the other. A complete conflict analysis must weigh each of these purposes.

In the end, the court’s decision in Hammond is undermined by its selective search for evidence of congressional and presidential intent on the need for actions within its own territory or territorial sea, and that those international agreements bind the entire nation.

894 See Henkin, Foreign Affairs, supra Part I, note 67, at 180–84 (describing circumstances under which the Senate may impose conditions on its consent).
895 Hines v. Davidowitz, 312 U.S. 52, 63 (1941); see also Restatement, supra Part I, note 19, § 111.
896 726 F.2d at 496.
898 33 U.S.C. § 1321(b)(3)(A). The exception for MARPOL discharges is applicable only in the waters seaward of the territorial sea, but nevertheless is evidence that Congress subordinated the strict ban on discharges under the CWA to the goal of conformity to MARPOL.
900 435 U.S. at 158 (quoting Hines, 312 U.S. at 67) (emphasis added).
national uniformity and consistency with international standards. The opinion examines only the isolated evidence of intent that supported the judgment; it does not evaluate the contrary evidence. Evidence of the Congress’ and President’s commitment to pursuing uniform international standards and regulations for merchant vessel safety and vessel source pollution prevention was abundant at the time of the Hammond decision, just as it is under the later 1990 OPA. In concluding that the PWSA evinced an intent that the “Nation was to speak with one voice with respect to tanker-design standards,” the Supreme Court acknowledged that the Act’s legislative history revealed a “decided congressional preference for arriving at international standards for building tank vessels.” The Supreme Court in Ray rejected the state’s argument that because Title II of the Act purported only to establish “minimum” standards, the states were free to enact more stringent requirements, and held that a state law on the same subject would “frustrate the congressional desire of achieving uniform, international standards.” The Senate Report cited by the Court concluded that “multilateral action with respect to comprehensive standard for the design, construction, maintenance and operation of tankers for the protection of the marine environmental would be far preferable to unilateral imposition of standards.” The foreign relations concerns of the Departments of State and Transportation over any decision to pursue unilateral action against foreign vessels were described earlier.

e. Is Hammond Still Relevant?

On its facts, the Ninth Circuit’s decision in Hammond has become largely irrelevant. Older vessels that were built without dedicated ballast tanks were being phased out even as the Ninth Circuit decided the Hammond case. As Justice Stevens pointed out in explaining why the Supreme Court denied the

\[901\text{See supra Part II, ¶ V.C.2 (describing presidential and congressional statements supporting international standards in the context of the PTSA). To be sure, the national government has not become a party to all of the conventions sponsored by the IMO (often rejecting conventions on liability), and it has entered exceptions or reservations to some of the conventions it did ratify. But these exceptions do not diminish the nation’s commitment to an international approach to vessel safety and pollution prevention.} \]

\[902\text{See, e.g., OPA 90 §§ 4106(b)(2) (provisions for reporting marine casualties are to be implemented “to the extent consistent with generally recognized principles of international law”), 4106(a), 4109 & 4110(b).} \]

\[903\text{Ray, 435 U.S. at 166.} \]

\[904\text{Id.} \]

\[905\text{Id. n.19.} \]

\[906\text{Id. at 168.} \]


\[908\text{See supra note 790; see also Ray, 435 U.S. at 167 n.18.} \]
petition for a writ of certiorari in the case, only one ship involved in the Alaska trade would be affected by the Alaska statute, and no other state had adopted similar laws.\footnote{Chevron U.S.A., Inc. v. Sheffield, 471 U.S. 1140, 1985 AMC 2395 (1985) (Stevens, J., respecting denial of petition for writ of certiorari). In its brief as amicus curiae, the United States argued against the Court granting certiorari to the Ninth Circuit in the case for the same reason, among others. See Brief of United States as Amicus Curiae, Chevron U.S.A., Inc. v. Sheffield, supra note 846, at 6.} Nevertheless, there is reason to be concerned over the opinion's sweeping language regarding the legal status of standards set by international agreements, as the court's 1998 decision in the 
\textit{Intertanko} case demonstrates. The suggestion that the IMO conventions set only minimum standards, which individual states within the U.S. are free to exceed if their judgment is different than the national government's, threatens the status of those international treaties as Law of the Land. Such a suggestion would almost certainly come as a shock to other nations' delegates at the IMO.

It is difficult to identify a principled distinction between the district court's reasoning that the Coast Guard regulations prescribed under Title II of the PWSA preempted the state regulation and the circuit's court judgment that the answer was to be found instead in the CWA. Certainly the CWA is where a court would look for a rationale to uphold the state rule if the judges believed, as the panel in \textit{Hammond} apparently did, that "the local community is more likely competent than the federal government to tailor environmental regulations to the ecological sensitivities of a particular area."\footnote{\textit{Hammond} may attract renewed interest as states legislate to combat vessel-source air emissions and aquatic invasive species. In 1997, the International Conference on Air Pollution Prevention adopted a new Annex VI to MARPOL, which, when ratified by a sufficient number of members, will prescribe international standards for vessel air emissions.\footnote{Delegates from the U.S. and other IMO-member nations on the Marine Environment Protection Committee are presently developing a draft Annex VII to MARPOL, to address the spread of aquatic pests through ballast water.\footnote{Should the U.S. ratify either Annex, the relationship between the international standards agreed to by the federal government and potentially stricter state standards would almost certainly resurface as a preemption issue.}} Despite its waning relevance to concerns over oil discharges, \textit{Hammond} may attract renewed interest as states legislate to combat vessel-source air emissions and aquatic invasive species. In 1997, the International Conference on Air Pollution Prevention adopted a new Annex VI to MARPOL, which, when ratified by a sufficient number of members, will prescribe international standards for vessel air emissions.\footnote{\textit{Hammond} may attract renewed interest as states legislate to combat vessel-source air emissions and aquatic invasive species. In 1997, the International Conference on Air Pollution Prevention adopted a new Annex VI to MARPOL, which, when ratified by a sufficient number of members, will prescribe international standards for vessel air emissions. Delegates from the U.S. and other IMO-member nations on the Marine Environment Protection Committee are presently developing a draft Annex VII to MARPOL, to address the spread of aquatic pests through ballast water.} Delegates from the U.S. and other IMO-member nations on the Marine Environment Protection Committee are presently developing a draft Annex VII to MARPOL, to address the spread of aquatic pests through ballast water.\footnote{Delegates from the U.S. and other IMO-member nations on the Marine Environment Protection Committee are presently developing a draft Annex VII to MARPOL, to address the spread of aquatic pests through ballast water. Should the U.S. ratify either Annex, the relationship between the international standards agreed to by the federal government and potentially stricter state standards would almost certainly resurface as a preemption issue.}
2. Intertanko v. Locke: Ninth Circuit Upholds State Agency's Tanker Regulations that are Stricter than International and Federal Standards

Following its 1984 decision upholding the Alaska ballasting statute in *Hammond*, the Ninth Circuit had four more occasions to consider preemption challenges to state or local government maritime regulations. In each of the first three cases, the court upheld the state regulations in full. *Intertanko v. Locke*, the court's most recent decision, involved what is arguably the most comprehensive state regulatory regime yet imposed on merchant vessels engaged in interstate and foreign commerce on the navigable waters of the U.S.

In 1991, two years after the *Exxon Valdez* disaster, and shortly after passage of the federal Oil Pollution Act of 1990 (OPA 90), Washington enacted the Oil and Hazardous Substances Spill Prevention and Response Act. The Act created a new state agency, the Office of Marine Safety (OMS), to implement and enforce the Act, and imposed a five cent/barrel tax on oil imports by tank ship or barge to fund the state's prevention and response program. Operators of tank vessels transporting oil in Washington waters are required by the Act to file with the state an oil-spill prevention plan that complies with the "Best Achievable Protection" (BAP) regulations promulgated by the OMS. The Act requires that any regula-

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913 On June 18, 1998, shortly after Part I of this article was finalized for publication, the Ninth Circuit Court of Appeals issued its decision in the *Intertanko v. Locke* case. See *Intertanko v. Locke*, 148 F.3d 1053, 1998 AMC 2113 (9th Cir. 1998). Following a request for a rehearing en banc, the original panel amended its decision on August 31, 1998. See 1998 WL 547205 (9th Cir. 1998).

914 See *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1991 AMC 2797 (9th Cir. 1990) (upholding application of state overtime pay law to seamen not involved in foreign, intercoastal, or coastwise trade while employed in territorial sea and on high seas adjacent to California), cert. denied sub nom. *Tidewater Marine Serv., Inc. v. Aubrey*, 504 U.S. 979 (1992); *Beveridge v. Lewis*, 939 F.2d 859, 1992 AMC 130 (9th Cir. 1991) (upholding Santa Barbara municipal ordinance governing anchoring, mooring, and movement of vessels); *Barber v. Hawaii*, 42 F.3d 1185, 1995 AMC 1763 (9th Cir. 1994) (upholding state regulation of vessel mooring andanchoring).

915 *International Ass'n of Indep. Tanker Owners (Intertanko) v. Locke*, 1998 WL 547205 (9th Cir. 1998). For clarity, the district court's decision will be referred to as *Intertanko I*, the circuit court's first decision as *Intertanko II*, and the circuit court's amended decision as *Intertanko III*.


918 Id. pt. IV.

919 Id. pt. VIII.

920 Washington waters include the adjacent ocean waters out to three nautical miles, much of the Columbia River, and the waters often collectively referred to as "Puget Sound." Washington borders the Province of British Columbia to the north, separated by a series of deep water international straits, and the State of Oregon to the south, separated by the Columbia River.

921 Wash. Rev. Code § 88.46.040. The agency's BAP regulations were promulgated at Wash. Admin. Code §§ 317–21–010 et seq. Other provisions require vessels to file oil spill contingency plans and proof
tions promulgated by the OMS must be consistent with federal law. At the same time that it created the BAP regime for tankers, the Washington legislature directed OMS to "screen" dry cargo and passenger vessels entering Washington waters, and to identify those vessels which present a substantial risk of harm to the public health and safety of the environment. The legislature prescribed civil and criminal penalties for violations and authorized the OMS to deny entry to any vessel that does not have a required oil-spill prevention or contingency plan or evidence of financial responsibility. Washington's BAP regulations went into effect on July 7, 1995. Although it is too early to determine whether Washington will be as aggressive in enforcing its regulations as it was in developing them, tank vessel operators trading to ports in Washington, Oregon (via the Columbia River), or British Columbia (via the boundary straits) must now add Washington's BAP regulations to the international, federal and, for Canada-bound vessels, Canadian legal standards with which they must comply.

a. The Preemption Challenge and the Court's Decision

The International Association of Independent Tanker Owners (Intertanko) challenged sixteen of the Washington BAP regulations in federal court. of compliance with the state's financial responsibility requirements. Wash. Rev. Code §§ 88.46.060 & 88.40.

922 Wash. Rev. Code § 88.46.020; see also id. § 90.56.070 (requiring that state's oil and hazardous substances spill prevention and response program be implemented in a manner consistent with federal law to the greatest extent practicable).

923 Id. § 88.46.050. The regulations for dry cargo and passenger vessels were not challenged in the Intertanko suit.

924 Id. § 88.46.080 & .090.

925 The Ninth Circuit adopted the district court's summary of the challenged regulations:

Event Reporting—WAC 317-21-130. Requires operators to report all events such as collisions, allisions and near-miss incidents for the five years preceding filing of a prevention plan, and all events that occur thereafter for tankers that operate in Puget Sound.

Operating Procedures—Watch Practices—WAC 317-21-200. Requires tankers to employ specific watch and lookout practices while navigating and when at anchor, and requires a bridge resource management system that is the "standard practice throughout the owner's or operator's fleet," and which organizes responsibilities and coordinates communication between members of the bridge.

Operating Procedures—Navigation—WAC 317-21-205. Requires tankers in navigation in state waters to record positions every fifteen minutes, to write a comprehensive voyage plan before entering state waters, and to make frequent compass checks while under way.


Operating Procedures—Prearrival Tests and Inspections—WAC 317-21-215. Requires tankers to undergo a number of tests and inspections of engineering, navigation and propulsion systems twelve hours or less before entering or getting underway in state waters.

Operating Procedures—Emergency Procedures—WAC 317-21-220. Requires tanker masters to post written crew assignments and procedures for a number of shipboard emergencies.
The Washington State Attorney General’s office, which had recently argued in favor of federal preemption of state laws when it represented its own state ferry system vessels, and was attempting to avoid application of more stringent state requirements to those vessels, argued against preemption in *Intertanko*, when the state sought to regulate what the Washington governor called “foreign” tanker owners. The district court upheld all sixteen of the regulations. On appeal to the Ninth Circuit, the United States government intervened, arguing that some, but not all, of the Washington regulations were preempted. The circuit court’s preemption analysis followed the

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Operating Procedures—Events—WAC 317-21-225. Requires that when an event transpires in state waters, such as a collision, allision or near-miss incident, the operator is prohibited from erasing, discarding or altering the position plotting records and the comprehensive written voyage plan.

Personnel Policies—Training—WAC 317-21-230. Requires operators to provide a comprehensive training program for personnel that goes beyond that necessary to obtain a license or merchant marine document, and which includes instructions on a number of specific procedures.

Personnel Policies—Illicit Drugs and Alcohol Use—WAC 317-21-235. Requires drug and alcohol testing and reporting.

Personnel Policies—Personnel Evaluation—WAC 317-21-240. Requires operators to monitor the fitness for duty of crew members, and requires operators to at least annually provide a job performance and safety evaluation for all crew members on vessels covered by a prevention plan who serve for more than six months in a year.

Personnel Policies—Work Hours—WAC 317-21-245. Sets limitations on the number of hours crew members may work.

Personnel Policies—Language—WAC 317-21-250. Requires all licensed deck officers and the vessel master to be proficient in English and to speak a language understood by subordinate officers and unlicensed crew. Also requires all written instruction to be printed in a language understood by the licensed officers and unlicensed crew.

Personnel Policies—Record Keeping—WAC 317-21-255. Requires operators to maintain training records for crew members assigned to vessels covered by a prevention plan.

Management—WAC 317-21-260. Requires operators to implement management practices that demonstrate active monitoring of vessel operations and maintenance, personnel training, development, and fitness, and technological improvements in navigation.

Technology—WAC 317-21-265. Requires tankers to be equipped with global positioning system receivers, two separate radar systems, and an emergency towing system.

Advance Notice of Entry and Safety Reports—WAC 317-21-540. Requires at least twenty-four hours notice prior to entry of a tanker into state waters, and requires that the notice report any conditions that pose a hazard to the vessel or the marine environment.


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927In his letter to President Clinton, urging the President to stay out of the *Intertanko* lawsuit, Governor Locke referred to *Intertanko* as “an association of foreign tanker owners.” See Letter from Gary Locke, Governor of Washington, to President Bill Clinton (Mar. 24, 1997), supra Part I, note 6, at 1. Those familiar with *Intertanko*, however, know that a number of U.S. flag tanker operators are *Intertanko* members. See <http://www.intertanko.com/about/framemain.htm> (listing members).

traditional approach, but omitted the "uniformity versus locality" step of the dormant Commerce Clause analysis. The court upheld all but one of the sixteen BAP regulations, relying almost entirely on the OPA 90 § 1018 saving clause and Hammond for its rule of decision. The court held that the Washington "technology" requirement for navigation and towing equipment constituted a "design" requirement, and was therefore preempted by Title II of the PWSA/PTSA.

b. The Court's Construction of § 1018: Does it Provide New Authority for Regulatory "Overlap"?

As discussed above, the Supreme Court in Ray explained its prior decisions upholding "reasonable, nondiscriminatory conservation and environmental protection measures" by noting that none of its earlier cases sustaining the application of state laws to federally licensed or inspected vessels involved an "overlap" between the federal and state laws. The Court also held that states were preempted by the PWSA/PTSA from prescribing higher safety equipment requirements or safety standards for

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929 Interestingly, despite the Supreme Court's decision in Ray striking down Washington requirements for navigation and collision avoidance equipment, the court in Intertanko began its analysis by citing the presumption against preemption of a state's historic police power. Intertanko III, 1998 WL 547205, at *3. The court did not examine whether regulations on tanker equipment, manning, training, watchstanding, and drug and alcohol testing fell within the state's "historic" police powers.

930 Id. at *14. In its Commerce Clause analysis in Ray, the Supreme Court concluded that "a requirement that a vessel take on a tug escort when entering a particular body of water is not the type of regulation that demands a uniform national rule." Ray v. Atlantic Richfield Co., 435 U.S. 151, 1978 AMC 527 (1978) (citing Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851)). The Ninth Circuit made no similar findings regarding the sixteen BAP regulations.

931 Section 1018 is codified at 33 U.S.C. § 2718, which provides in relevant parts: § 2718. Relationship to other law:
(a) Preservation of State authorities; Solid Waste Disposal Act
   Nothing in this chapter or the Act of March 3, 1851 shall—
   (1) affect, or be construed or interpreted as preemining, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to—
   (A) the discharge of oil or other pollution by oil within such State; or
   (B) any removal activities in connection with such a discharge; or
   
   (c) Additional requirements and liabilities; penalties
      Nothing in this chapter, the Act of March 3, 1851 (46 U.S.C. 183 et seq.), or section 9509 of Title 26, shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof—
      (1) to impose additional liability or additional requirements; or
      (2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;
      relating to the discharge, or substantial threat of a discharge, of oil.

933 Ray, 435 U.S. at 164.
vessels. The OPA 90 Conference Committee Report, Congress’ last statement of its legislative intent, made it clear that OPA 90 was not meant to disturb the Court’s decision in Ray. No one seriously disputes that the Washington BAP regulations “overlap” with federal laws and international conventions on the same subject. Accordingly, the validity of much of the Ninth Circuit’s Intertanko decision turns on the court’s conclusion that Congress intended that § 1018 would shield from preemption any state law on a subject addressed by OPA 90, without regard to whether the state law “overlapped” with federal law or constituted a safety or equipment standard.

The Supreme Court, in Medtronic, Inc. v. Lohr, characterized the court’s task in evaluating the effect of a preemption clause as one of identifying the “domain” of the clause. Similarly, a court tasked with determining the effect of § 1018 on the states’ authority to regulate merchant vessel safety and pollution prevention must determine the “domain” of § 1018. In undertaking the task, the courts have a number of sources that may provide guidance. As Chief Justice Marshall observed long ago, “[w]here the mind labours to discover the design of the legislature, it seizes on every thing from which aid can be derived.”

To be certain, Congress could have been clearer in drafting § 1018 to define the domain of state laws to be “saved” under the provision. In the two decades between 1970, when Congress first employed the phrase “any requirement or liability with respect to the discharge of any oil into any waters within such State” in the 1970 Water Quality Improvement Act, and 1990, when it drafted OPA 90, Congress had ample opportunity to refine its preemption, non-preemption, and saving clauses. On the other hand, despite the phrase’s linguistic shortcomings, there is something to be said for using familiar terminology. Marine hull insurers, for example, continue to

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934Id. at 171 & 176. Neither the district court nor the court of appeals addressed this aspect of Ray.
935See supra Part II, note 689 and accompanying text.
936One example with potential foreign policy implications is the state’s drug and alcohol testing requirement. The state rule overlaps with federal regulations on the same subject but extends to some foreign mariners that the federal rule exempted. The Coast Guard’s chemical abuse testing regulations for vessels contain a section avoiding “conflict with foreign laws.” 46 C.F.R. § 16.207. The rulemaking analysis cities, among other considerations, a statement by the Canadian government that a requirement to test Canadian citizens may violate the Canadian Human Rights Act. See 53 Fed. Reg. 47,064, 47,070 (DOT 1988). The Washington regulation, WAC 317–21–235(2), contains no such exemption, and the agency made it clear that it intended to apply its prevention plan requirements to all vessels, even those in transit through Washington waters en route to Canadian ports. See supra note 805.
939See supra Part II, note 691.
underwrite losses caused by “pirates, rovers, [and] assailing thieves,” not because rovers and assailing thieves are an easily understood peril, but because the American Institute drafters know that precedent is available to guide courts and arbitrators in applying such Elizabethan era terms to modern situations. It would not be extravagant to impute a similar “trust for the familiar language” to Congress, in its drafting of § 1018.

(1) Is the Domain of § 1018 Coextensive with All of the Subjects Addressed by OPA 90?

In its statutory preemption analysis, the Ninth Circuit considered whether the BAP regulations were preempted by OPA 90, the PWSA/PTSA, or the Tank Vessel Act (TVA) (presumably, by TVA, the court meant all of the Title 33 and Title 46 statutes not included in the first two statutes). The court concluded that § 1018 precludes preemption by any provision of OPA 90, but that it does not “explicitly address” whether the state regulations may be preempted by any other federal acts. The court’s discussion of the meaning and intent of § 1018 focuses on the location of that saving clause in Title I of OPA 90. The court examined only two segments of the actual language used in § 1018. First, the court analyzed whether the limiting phrase “Nothing in this Act” should be construed as applying only to Title I of OPA 90 (as Intertanko argued), or to all nine titles (as the state argued). The court concluded that § 1018 applied to all nine titles. The court skipped over the operative terms “liability or requirements with respect to the discharge of oil or other pollution by oil within such State.” The court simply concluded that “because the oil-spill prevention requirements set forth in the BAP Regulations clearly ‘respect’ the discharge of oil, they are not preempted by anything in OPA 90.” In effect, the court held that the domain of the § 1018 saving clause extends to any field addressed by any of OPA 90’s nine titles including the numerous spill prevention provisions in Title IV of the Act.

The legislative history lends no support to the court’s conclusion that § 1018 was intended to provide new state regulatory authority over tanker safety and pollution prevention. The Conference Committee report twice

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942 Id. at *4.
943 Id. In footnote 6 the court briefly examined the term “respect” and concluded that it extended to any subject covered by OPA 90: “[b]ecause one of the explicit ‘objectives’ of OPA 90 is oil-spill prevention, see OPA 90 §§ 2701–2718 (Title IV–Oil Spill Prevention), § 1018 prevents anything in OPA 90 from preempting state law in this field.” Id. n.6 (emphasis added).
speaks of "preserving" state authority.\textsuperscript{944} Section 310 of Senate Bill 686—the section that would have saved to the states the authority to regulate tanker safety—was deleted by the Conference Committee.\textsuperscript{945} The Ninth Circuit did not discuss the importance of this aspect of legislative history.

The operative § 1018 phrase "requirement or liability with respect to the discharge of oil or hazardous substances" language is identical in all relevant respects (other than its location)\textsuperscript{946} with saving clauses in the CWA,\textsuperscript{947} Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),\textsuperscript{948} Trans-Alaska Pipeline Authorization Act (TAPAA),\textsuperscript{949} and Deepwater Port Act (DPA).\textsuperscript{950} There is every reason to believe that Congress was aware of the prior treatment given to saving provisions incorporating that language when it drafted § 1018.\textsuperscript{951} Had it looked for judicial constructions of the saving clause in those other statutes, the Ninth Circuit would have found that no federal court has ever construed the language as extending beyond liability and removal activities.\textsuperscript{952} The CWA § 1321(o)(2) saving clause first appeared in the Water Quality Improvement Act, and was reviewed by the Supreme Court in \textit{Askew v. American Waterways Operators, Inc.}\textsuperscript{953} Significantly, the Court in \textit{Askew} expressed reservations about whether that saving clause would insulate the Florida oil spill equipment requirements from preemption.\textsuperscript{954} In \textit{Ray}, the Court rejected the state of

\textsuperscript{944}See supra Part II, note 708.
\textsuperscript{945}See supra Part II, notes 687–88 and accompanying text.
\textsuperscript{946}Section 1018(c) adds the words "or substantial threat of a discharge," but nothing in the court's opinion suggests that the addition was material to the court's prevention rationale.
\textsuperscript{947}33 U.S.C. § 1321(o)(2) ("Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State").
\textsuperscript{948}42 U.S.C. § 9614(a) ("Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances in such State").
\textsuperscript{949}43 U.S.C. § 1656(e)(1) ("Nothing in this section shall be construed or interpreted as preempting any State or political subdivision thereof from imposing any additional liability or requirements with respect to the discharge, or threat of discharge, of oil or other pollution by oil").
\textsuperscript{950}43 U.S.C. § 1517(k) ("This section shall not be interpreted to preempt the field of liability or to preclude any State from imposing additional requirements or liability for any discharge of oil of a deepwater port or a vessel within any safety zone").
\textsuperscript{951}The Supreme Court imputes to Congress an awareness of the courts' treatment of federal statutes. See Douglas v. Seacoast Products, Inc., 431 U.S. 265, 279, 1977 AMC 566 (1977) (reasoning that "we can safely assume that Congress was aware of the holding" of cases construing the federal licensing law).
\textsuperscript{954}Id. at 336–37 ("Nor can we say at this point that [Florida's] regulations . . . requiring 'containment gear' pursuant to § 7(2)(a) of the Florida Act would be per se invalid because the subject to be regulated requires uniform federal regulations . . . Resolution of this question, as well as the question whether such regulations will conflict with Coast Guard regulations . . . should await a concrete dispute. . . .")
Washington’s argument that anything in the CWA authorized the state’s Tanker Act. The state conceded in that case that the equipment requirements in its tanker act were preempted.\textsuperscript{955} Similarly, in \textit{Chevron U.S.A., Inc. v. Hammond},\textsuperscript{956} the state of Alaska conceded at trial that its tanker equipment requirements were preempted. The state did not argue that the § 1321(o)(2) saving clause “saved” state authority to regulate vessel equipment from preemption by the PWSA/PTSA. In the later appeal of the district court’s decision on the Alaska ban on deballasting water from cargo tanks in state waters, even the Ninth Circuit declined to base its decision on the “express” saving clause in § 1321(o)(2).\textsuperscript{957} Despite the fact that the “liability and requirements with respect to the discharge of oil” language had never before been interpreted as authority for state prevention programs, the Ninth Circuit in \textit{Intertanko} concluded that Congress intended, when it transplanted the operative language into Title I of OPA 90, to give the phrase new meaning.

\textbf{(2) Does § 1018 Shield State Regulations From Preemption by Federal Laws Other than OPA 90?}

Taking § 1018’s limiting language “Nothing in this Act” at face value, the court concluded that § 1018 does not explicitly address whether state oil-spill prevention rules may be preempted by federal “Acts” other than OPA 90.\textsuperscript{958} Accordingly, the court turned to consider whether the BAP regulations were preempted by acts such as the PWSA/PTSA, as construed by the Supreme Court in \textit{Ray} and the Ninth Circuit in \textit{Hammond}. In considering preemption under the PWSA/PTSA, the court appeared to read the Supreme Court’s decision in \textit{Ray} as recognizing only three relevant classifications of tank vessel regulations under the acts. A given regulation constitutes a “design and construction” requirement, an “operational” requirement, or a “tanker traffic” regulation.\textsuperscript{959} The court apparently rejected the more discriminating international and federal classification scheme, which distinguishes vessel CDEM\textsuperscript{960} standards, crewmember training,

\textsuperscript{955}Ray, 435 U.S. at 178 n.28.


\textsuperscript{958}\textit{Intertanko III}, 1998 WL 547205, at *5. It is not clear why the court limited the observation to federal “Acts,” rather than including all of the sources of law set out in Article VI.

\textsuperscript{959}Id. at *6. ("Title I of the PWSA focuses on tanker traffic, Title II of the Act is concerned with tanker design, construction, and operation"). It is not clear from the court’s opinion whether the court believed that there exists a category of equipment requirements that are not also design requirements.

\textsuperscript{960}See supra Part II, note 414 (describing construction, design, equipment, and manning regime under the LOS Convention) and 46 U.S.C. § 3703 (requiring Secretary to prescribe regulations for tanker design, construction, operation, equipping, personnel qualification, and manning).
qualification and watchstanding requirements, and safety management systems, from those rules governing vessel operations. Under the Ninth Circuit's simplified classification, the entire subject matter of the STCW convention would be analyzed as vessel operations rules, as would the ISM Code and the marine casualty reporting system.

Despite the repeated emphasis by the Ninth Circuit in Hammond that the Alaska ballasting statute was an "ocean pollutant discharge" regulation, and that the case was distinguishable on that basis from Ray, the same court in Intertanko characterized the Alaska statute as an vessel "operation" regulation.961 The court in Intertanko then concluded that "virtually all" of the challenged BAP regulations were operational requirements, and that their validity was therefore controlled by the court's holding against preemption of state vessel operational rules in Hammond.962 The only exception the court found was the BAP "technology" regulation requiring global positioning system (GPS) receivers, twin radars with ARPAs, and emergency towing equipment, all of which the court concluded were "design" requirements.963

The circuit court's original opinion glossed over the question whether the fifteen surviving Washington "operations" regulations for tankers fell within the class of tanker operations rules required by Title II of the PWSA/PTSA, or the local operations rules addressed to the "peculiarities of local waters" within Title I of the Act, even though Ray teaches that the distinction is critical in a PWSA/PTSA preemption analysis. Close examination of Ray reveals that the Court's discussion of the Washington tug escort rule characterized the rule as "an operating rule arising from the peculiarities of local waters that call for special precautionary measures."964 The difference is an important one. Internal vessel "operating" rules regarding activities such as ship safety management systems, drug and alcohol testing, crew rest periods, and equipment testing are properly subjects for national rules under Title II of the PWSA. By contrast, the need for a local harbor pilot in the Port

961 Intertanko III. 1998 WL 547205, at *11. ("Because the discharge of ballast involves an 'operation' directly relating to the sailing of a tanker, [Hammond] undermines Intertanko's argument that the Ray court used 'design and construction' as 'shorthand' for 'design, construction and operations.'"). Of course, the court in Hammond characterized the Alaska ballasting law as an "ocean pollutant discharge" regulation, not as a vessel operation regulation. Had the Hammond court characterized it as an operations regulations, as did the Coast Guard (see supra note 850) and as Justice White argued (see supra notes 881–84), the relevance of the NPDES provisions of the CWA would have been further cast into doubt. 9621998 WL 547205, at *11. The opinion provides no rationale for the court's conclusion that the vessel manning, crew training, random drug and alcohol testing, and English language capability regulations constituted "operational" requirements.

963Id. at *12.

964435 U.S. at 171. Accordingly, the Court concluded that the test for whether the state rule was preempted was whether "the Secretary has either promulgated his own requirement for Puget Sound tanker navigation, or has decided that no such requirement should be imposed at all." Id. at 171–72.
of Philadelphia or an escort tug in the narrow waters of Rosario Strait are not. The fact that the Washington BAP regulations were to be measured against a “best available protection,” standard, and are to be applied throughout Washington waters, including the coastal waters of the Pacific Ocean, the Columbia River, and the waters of Puget Sound and the boundary straits, demonstrate that the BAP regulations are not based on the “peculiarities of local waters,” but rather on the state’s judgment regarding acceptable risk levels for all state waters.

(3) Does § 1018 Override An Agency’s Authority to Preempt State Law Under Other Federal Statutes or Treaties?

One of the more puzzling conclusions in the Ninth Circuit’s original Intertanko decision was relegated to a footnote, where the court concluded that § 1018 stripped the Coast Guard of delegated authority to preempt state laws that it would otherwise have under statutes other than OPA 90. Whatever the court’s views may be on agency preemption, § 1018 does not seem like an appropriate authority to curtail it. Moreover, the court’s construction of § 1018 creates an inconsistency the court failed to resolve. At one point the court held that § 1018 “does not explicitly address whether state oil-spill prevention rules may be preempted by federal ‘Acts’ other than OPA 90” and that “§ 1018 by its plain language has no automatic impact on preemption caused by those [other] statutes.” This appears to be the only reasonable interpretation of the clause’s “Nothing in this Act”
domain-defining language. However, the court then went on to conclude that § 1018 precludes agency regulations from preempting state laws or regulations even if the legal basis for the regulation is a statute other than OPA 90. 971 Nothing in the legislative history suggests that Congress intended § 1018 to limit the preemptive effect of agency regulations promulgated under authorities other than OPA 90. 972 In Askew, the Supreme Court suggests that Coast Guard regulations might preempt state requirements for pollution containment gear, notwithstanding the similar saving clause now incorporated into the CWA. 973

c. May States Now Impose Standards Stricter Than Those Set by Treaties?

As the overlap between international standards and the Washington tanker regulations became apparent, it was inevitable that the Ninth Circuit would be called upon to revisit its conclusion in Hammond 974 regarding the force of the IMO-sponsored conventions. Fourteen nations and the Commission of the European Community protested the Washington regulations, warning that differing regimes in different parts of the U.S. create uncertainty and confusion for foreign vessels and set an “unwelcome precedent” for other federally-administered nations. 975 The United States urged the Ninth Circuit to reverse the district court’s judgment because the lower court had “failed to pay adequate attention to the immense foreign affairs interests of the United States in the international maritime field.” 976 The overlap between the state laws challenged in Intertanko and the IMO conventions went far beyond the single ballast water regulation in MARPOL Annex I at issue in

971Id. at *14 n.15.
972In its original decision, the court sought to explain the apparent inconsistency by observing that:
Although § 1018 expressly applies only to OPA 90, it shapes the “full purposes and objectives” of Congress, Hines, 312 U.S. at 67, with respect to the entire legislative field of oil-spill prevention. . . . Accordingly, we hold that the Coast Guard impermissibly acts beyond its “congressionally delegated authority” . . . not only when it purports to preempt state oil-spill prevention laws under the authority of OPA 90, but also when it purports to do so under the authority of other federal statutes.
Intertanko II, 148 F.3d at 1068 n.14. Nothing in the Hines passage cited provides any insight into how a saving clause in one statute, which had never before been used or construed to address anything other than liability and removal laws, “shapes” the full purposes and objectives of Congress with respect to the entire field of oil spill prevention. The court’s amended decision reaches essentially the same conclusion, but omits any reference to the Coast Guard’s rulemaking authority. Intertanko III, 1998 WL 547205, at *14 n.15.


975See supra Part I, notes 1–3.

Washington’s BAP regulations allegedly overlapped with numerous provisions of the SOLAS (including its coming ISM Code) and STCW conventions, and encroached on foreign vessel transit rights under the LOS Convention and the VTMS Agreement with Canada. Additionally, Washington’s enforcement of the BAP regulations against foreign tankers directly implicated the port State control articles of all three IMO conventions, a key distinction between Hammond and Intertanko.

1) The Hammond Decision is Treated as a Rule of Law

The Intertanko court avoided any analysis of the preemptive effect of SOLAS, MARPOL, and various other international agreements, or the effect of the conventions’ port State control articles, when it ruled that the “argument that the BAP Regulations are preempted by these international treaties is undermined by our decision in” Hammond. The court then explained that the enactment of OPA 90 by Congress “only reinforces this court’s conclusions in [Hammond] that ‘strict international uniformity’ with respect to the regulation of tankers is not ‘mandated’ by federal law and that ‘international agreements set only minimum standards.’” To reach any other conclusion, the court explained, “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.” The court’s conclusion again fails to accord treaties their preemptive effect under Article VI of the Constitution. By its own terms, § 1018 saves state laws from preemption only by OPA 90. As such, § 1018 could not “save” state laws against preemption by valid U.S. treaties, which, no less than federal statutes, are the Law of the Land.

Nothing in the Intertanko II decision suggests that the court looked at the provisions of any of the treaties involved (or the implementing statutes or regulations) to determine whether they occupied any of the fields addressed by the state regulations. Nor does the opinion indicate that the court examined the nature of the treaties to determine whether they manifested an intent to displace non-uniform state or local laws within the nations party to them. The court does not discuss the port State control regime or the treaty

977 The SOLAS and STCW overlaps are listed in Appendix A to the Brief for Intervenor-International Chamber of Shipping, Intertanko v. Locke, 1998 WL 547205 (9th Cir. 1998) (No. 97-35010).
979 id.
980 For example, had the court examined the SOLAS and STCW conventions, it would have found that each limits the extent to which parties to the convention may enact additional laws on the subject. See, e.g., SOLAS, supra Part II, note 420, art. VI(d) (“All matters which are not expressly provided for in the present Convention remain subject to the legislation of the Contracting Governments”) (emphasis added).
requirement for parties to accept valid certificates from other parties as evidence that the vessel complies with the applicable standards. Finally, the court does not appear to have examined the purposes and objectives of the President and Congress in entering into those treaties, thereby agreeing to limit U.S. control over foreign vessels in U.S. ports and waters.

The court in Intertanko uncritically applied Hammond's sweeping generalization that international agreements set only minimum standards, despite critical differences between the underlying treaty provisions involved in the two cases. The court in Hammond repeatedly emphasized the unique subject matter of the case as "ocean pollutant discharges." The only treaty Hammond examined was the 1978 MARPOL Protocol, which the court concluded was not yet in effect. The Hammond decision apparently assumes, without analysis, that the MARPOL regulation permitting the discharge of clean ballast did not apply within the territorial waters of the U.S., and did not examine the port State control and enforcement articles. By contrast, the international CDEM standards prescribed by SOLAS and MARPOL, and the training, qualification, and watchkeeping standards prescribed by the STCW Convention, along with the port State control limitations contained in each of those conventions, are intended to apply to foreign vessels flying the flag of any party while those vessels are within U.S. ports and waters. Those standards go far beyond "ocean pollutant discharges."

The court in Intertanko also appears to confuse the question of whether uniform international laws are wise or necessary (a policy question) with whether a treaty to which the U.S. is party is the supreme Law of the Land (an Article VI question). As with its earlier decision in Hammond, the court's preemption analysis in Intertanko seems to weigh the need for uniformity in one context (uniformity is "critical" in vessel design) against the needs in another context (local environmental regulations can "co-exist" with federal law). Whatever the court may think about the judgment of the President and Congress to enter into treaties or international agreements that limit port State control authority and provide reciprocity and mutual recognition of compliance with internationally agreed-upon standards, once those agreements are perfected they carry the full preemptive

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[981] 726 F.2d at 494 n.14.
[983] Hammond, 726 F.2d at 493.
[984] Id.
effect of any other federal law. This confusion in the court's reasoning may explain why, in the fourteen years since *Hammond* was decided, no other circuit has cited the case as authority for its holding that international agreements set only minimum standards.

With respect, the *Intertanko* court's Article VI analysis is off course and its reliance on *Hammond* inappropriate. Because congressional (and presidential) intent to preempt state law is the ultimate touchstone in any preemption analysis, the question the court should have asked is not whether Congress and the President have (or had in 1984, when *Hammond* was decided) some generalized intent to pursue "strict uniformity" between federal law and the standards and procedures established by the treaties they entered into. The correct question in an Article VI analysis is whether the President and the Congress intended, when they entered into a particular treaty, agreed to limit U.S. authority as a port State, and conferred on the Secretary authority to accept a foreign vessel's compliance with the treaty as satisfaction of the requirements for entry into U.S. waters, to displace state laws on the subjects covered by that treaty. In determining whether Congress and the President explicitly or implicitly intended to occupy a field addressed by a treaty, the differences between treaties and statutes is critical. Absent an exception or reservation by the President at the time of ratification or accession, or treaty language permitting local variation among political subdivisions of the parties, a treaty presumptively binds the entire nation, or it is not binding at all. Accordingly, any analysis of the preemptive effect of the IMO-sponsored treaties on state regulation of foreign vessels must begin with the treaties' port State control articles. As the fourth part of this article will more fully discuss, it may be time to consider whether the presumption against preemption should be eliminated or even reversed in cases where state regulations overlap with a treaty on a subject matter that the states have not traditionally regulated under their police powers.

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985 The analysis should not confuse treaty provisions in SOLAS, MARPOL, and STCW that require States-party to the conventions to implement the treaty standards by prescribing laws—for the nation's own vessels—that are no less strict than those established by the convention. When a nation acts as a flag State, it is free to prescribe stricter standards for its own vessels. By contrast, when a party acts in its capacity as a port State or a coastal State, it is not free to prescribe stricter standards than those agreed to in the treaty, unless the treaty otherwise permits. Foreign vessels arriving in a nation's ports or waters that meet the international standards, as evidenced by the vessel's certificates, satisfy the conventions' requirements on that standard. This recognition lies at the heart of the quid pro quo aspect of the conventions.

986 See supra Part I, ¶ Il.B.2(e) and note 736.
Did Congress Abandon Its Commitment to International Standards for Vessel Safety and Pollution Prevention in OPA 90?

If in conflict with standards or procedures governed by an international treaty of the U.S., the Washington regulations must yield to the treaty unless state regulatory authority over the subject is "saved" by some other federal law. Under the familiar canons of construction, the courts must construe § 1018 consistently with U.S. treaty obligations, absent clear congressional intent to supersede those treaties. Nothing in OPA 90 or its legislative history, and no authority cited by the court in Intertanko II, demonstrates a congressional intent to relieve the states of the preemptive effect of the IMO-sponsored marine safety or pollution prevention conventions. Nevertheless, Intertanko II appears, like its Hammond predecessor, to impute to the U.S. Congress a view that treaties represent only "minimum standards." The suggestion cries out for a response.

The Ninth Circuit did not reveal the basis for its conclusion that OPA 90 "reinforced" its conclusions in Hammond that "international agreements set only minimum standards." The district court reached the same conclusion, largely upon its understanding of Congress' decision to phase out single hull tankers without waiting for the other IMO members to amend the MARPOL convention. According to the district court:

Intertanko's assertion that applying the savings clause to the prevention requirements would run afoul of international standards is undermined by other provisions of the Act. Foremost is the requirement that oil tankers have double hulls. 46 U.S.C. § 3703a. This contradicts the international standards imposed by Regulation 13F to Annex I of MARPOL, and demonstrates that Congress was not overly concerned with maintaining uniformity with such standards.

The district court is confused on chronology and failed to distinguish between the national government making exceptions to individual treaty provisions and state governments legislating contrary to a U.S. treaty. The relevant MARPOL standard to which the court refers (Regulation I/13F) was

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987 Weinberger v. Rossi, 456 U.S. 25, 32 (1982) ("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').

988 It is true that, in enacting OPA 90, Congress implicitly rejected the CLC and Fund international conventions on oil spill liability. See Jones, Oil Spill Compensation and Liability Legislation, supra Part II, note 685. But the Act does not purport to renounce or supersede any of the safety and pollution prevention conventions.


990 Intertanko I, 947 F. Supp. at 1492.

991 Id. The court also cites OPA 90 § 3001 to support its conclusion, even though it acknowledges that § 3001 applies only to the international liability and removal regimes. Id. at 1492 n.4.
adopted by the IMO members through tacit amendment on July 5, 1991; in other words, one year after OPA 90 was enacted. Thus, when Congress enacted 46 U.S.C. § 3703a (OPA 90 § 4115) it did not “contradict” MARPOL. Like § 4115 of OPA 90, MARPOL Regulation I/13F calls for a phase-out of single hull tankers over a period of years. Unlike § 4115, which will require all vessels to be designed with double hull construction, MARPOL Regulation I/13F also authorizes vessels built to an alternative design that provides the same level of protection against oil outflow as the double hull design. MARPOL contains explicit procedures by which a party to the convention may except to amendments. The U.S. followed the established procedures in making known its intent to not be bound by MARPOL amendments permitting alternatives to the double hull requirement. Accordingly, even now, the U.S. has no obligation under international law to permit vessels meeting the alternative design regulations to enter U.S. waters (other than those in innocent or transit passage). Had the district or circuit courts examined the multitude of international vessel safety and pollution prevention standards to which the nation has agreed—and which the nation is now bound to follow—rather than the single example where the U.S. adopted a stricter national standard, its seems more likely that the court would have realized—as did the National Research Council—that for nearly all of the standards established by the SOLAS, MARPOL, and STCW Conventions, the U.S. government favors the international standards and is extremely selective in its decisions to take unilateral action.

(3) Saving the “Transit Protests” for Another Day

Owners and masters of vessels transiting through Washington waters in innocent passage or in passage to or from a port in Canada face two concerns over the Washington BAP regulations. The first concern for vessel operators

992See Double Hull Standards for Tank Vessels Carrying Oil, 56 Fed. Reg. 44,051, 44,051–52 (DOT 1991). MARPOL reg. I/13G was similarly amended, but the district court did not discuss that provision.
993See supra part II, note 541 and accompanying text.
994See supra Part II, notes 542–43.
995Id.
996MARPOL, supra Part II, note 388, art. 16(4)(b) (“Any party to the convention which has declined to accept an amendment to an Annex shall be treated as a non-Party only for the purpose of application of that amendment.”). In accordance with MARPOL art. 16(2)(f)(ii), the U.S. notified the Secretary-General of the IMO that the regulation I/13F and I/13G amendment would not enter into force in the U.S. until the U.S. provided its “express approval” of the amendment. See supra Part II, note 543.
997In 1994, the National Research Council examined the United States’ practice as a port State. The U.S. reservation to the MARPOL alternative to double hull construction on tankers was the only example the study could identify in which the United States had taken unilateral action to promulgate standards more rigorous than the international standards. National Research Council, Minding the Helm 38–39 (1994).
is the potential tort liability that may flow from a failure to comply with any applicable state regulations—including the BAP regulations. At least one court has held that a violation of a state statute may constitute negligence in a claim within the federal admiralty and maritime jurisdiction. The tort liability risk arises without regard to whether the state actually enforces its regulations against such vessels. Second, Washington has made it clear that it intends to enforce its tanker regulations against foreign vessels passing through Washington waters en route to Canadian ports in British Columbia. Washington’s regulation of vessels transiting through U.S. waters en route to a British Columbia port may conflict with the U.S.-Canada Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region (VTMS Agreement), which exempts such vessels from U.S. requirements if they comply with applicable Canadian laws.

The Ninth Circuit declined to reach the question whether the Washington BAP regime conflicted with the VTMS Agreement or a related challenge based on the state’s alleged encroachment on the right of innocent passage. After concluding that the issues had not been raised in the court below, the circuit court indicated that “the state defendants have not had the opportunity to develop the record concerning whether the BAP Regulations practically impair the right of innocent passage or are enforced in a manner that is inconsistent with the bilateral agreement with Canada covering traffic in the Strait of Juan De Fuca.” The state’s complaint about the need to develop a “record” seems disingenuous, given the state’s announced intent to apply its regulations to all vessels in state waters. Moreover, the Canadian protest that Washington’s actions violate the VTMS Agreement certainly presents a foreign relations challenge to the Washington regulations. The question whether state action undermines the foreign affairs of the nation is one for the President and Congress, whose judgments are generally binding on the judiciary. The relevance of the state’s “record” to the resolution of such questions seems questionable, given the state’s announced intent to apply its regulations to all vessels in state waters and the representations by

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999 See supra note 805.
1000 See supra Part II, note 458 and accompanying text.
1001 See supra Part II, in ¶ IV.B.
1003 See supra note 805.
the United States regarding the protests by Canada. Nevertheless, by declining to examine the preemptive effect of those agreements or the international law right of innocent passage, the court has left both issues for another day.

d. Does OPA 90 Embody All of the Federal Legislative and Foreign Policy Purposes and Objectives on Tanker Regulation?

In conducting the "conflict" inquiry in its preemption analysis, in which the court must determine whether the state law stands as an obstacle to accomplishment and execution of the "full purposes and objectives of Congress,"1005 the Ninth Circuit reasoned that it "must look not to the purposes and objectives of any single Act, but instead to Congress's overarching purposes and objectives in the relevant legislative field."1006 The court then concluded that in the field of tanker regulation, "the overarching purposes of Congress" are best revealed by OPA 90, rather than by the PWSA/PTSA or Tank Vessel Act, because it was the most recent federal statute in the field and it was designed to "complement the other acts."1007 By concluding that all of the relevant congressional purposes and objectives were embodied in OPA 90, and that nothing in OPA 90 would be frustrated by the BAP regulations, the court was spared the need to consider any legislative or foreign policy objectives that Congress and the President may have sought to obtain through all of the remaining chapters of Titles 33 and 46 of the U.S. Code, the numerous reciprocity and comity statutes,1008 the SOLAS, MARPOL, and STCW Conventions, the various Treaties on Friendship, Commerce and Navigation, or the LOS Convention. Just as the court cut short its analysis of preemption by international law by invoking Hammond's "treaties set only minimum standards" rule, the court also cut short any purposes and objectives analysis by concluding that only a single statute was relevant to the analysis.

1005Hines, 312 U.S. at 67.
1006Intertanko III, 1998 WL 547205, at *7 (citations omitted).
1007Id. (citing Hines, 312 U.S. at 67). It is not clear what support the Supreme Court's decision in Hines lends to the Intertanko court's conclusion.
1008See, e.g., 46 U.S.C. § 3303, which Congress has noted "acknowledges the international concept of comity with respect to recognizing inspections laws and standards for foreign flag vessels that are similar to those of the United States," supra Part II, note 560 and accompanying text (quoting H.R. Rep. No. 98–338, at 130 (1983)).
e. Where the Court's Interpretation of § 1018 Might Lead

If the Ninth Circuit's construction of § 1018 stands, and Congress takes no action, several conclusions might follow. First, states might now be free to prescribe their own oil spill prevention rules on any subject addressed by OPA 90. For example, § 4115 of OPA 90 established a phase-out period for single hull tank vessels in U.S. waters (with an exception for vessels in innocent passage). Whether a vessel is constructed with a single or double hull is plainly a "design" requirement; a field that the Supreme Court determined the federal government has occupied under Title II of the PWSA/PTSA. Might it now be argued, however, that § 1018 "de-occupied" vessel design requirements if the design is also addressed by OPA 90? At least one state has enacted a ban on single hull tank barges from state waters, or will require that such barges be escorted by a second towing vessel, earlier than the dates called for by OPA 90. Does the Intertanko court believe that Congress intended when it put § 1018 in Title I of OPA 90 to permit vessels to ban single hull tankers from state waters sooner than federal law provides?

Second, the IMO treaty implementation process may be undermined. The PWSA/PTSA expressly authorized the Secretary to modify any federal regulation or standard prescribed under § 5 of the PWSA "to conform to the provisions of an international treaty, convention, agreement or an amendment that is ratified by the U.S." The "technical" provisions of the principal IMO conventions may now be amended by a tacit acceptance procedure. Congress has expressly recognized the procedure and provided the Secretary with authority to implement amendments to some conventions. However, new regulations implementing changes to the international conventions will likely face a cool reception in any subsequent preemption challenge in the Ninth Circuit, which has concluded, based on its construction of a well-worn saving clause in Title I of OPA 90 (and the NPDES saving clause in Hammond), that (1) Congress intended that international agreements set only minimum standards, which the states are free to exceed, (2) in the field of "tanker regulation" all of Congress' purposes and objectives are revealed in OPA 90, so none of the purposes or

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1010 R.I. Gen. Laws § 46-12.6-10 (1996). The Rhode Island law goes into effect on January 1, 2001. By contrast, the federal law phases such vessels out over a period based on the vessel's age, but not later than 2015.
1011 See supra Part II, note 629.
1012 See SOLAS, supra Part II, note 420, art. VIII; STCW, supra Part II, note 388, art. XII; MARPOL, supra Part II, note 388, art. 16.
1013 PTSA, supra Part II, note 613, § 5(12); APPS, 33 U.S.C. § 1909 (MARPOL); 33 U.S.C. ch. 30; 33 U.S.C. § 1602(c) & (d).
objectives of vessel safety and pollution prevention conventions need be considered in a conflict analysis, and (3) Congress intended that any Coast Guard regulations issued under the authority Congress delegated to the agency to prescribe regulations implementing amendments to the convention are not binding on the states. Two examples may help demonstrate the problems inherent in the court’s conclusion.

In OPA 90 legislative history not mentioned by the Ninth Circuit, the Conference Committee announced that it intended the Coast Guard to look to the STCW convention in setting the manning, training, qualification, and watchkeeping standards for foreign tank vessels.1014 The STCW convention was substantially amended in 1995. The amendments, which are discussed in Part II of this article,1015 prescribe extensive requirements for officer and crew training, certification, watchstanding practices, rest periods, and voyage planning.1016 The Convention—a treaty under Article VI of the Constitution—expressly provides that no party to the convention may require foreign vessel officers or crews to meet requirements that go beyond those set by the STCW Convention.1017 Nevertheless, under the Ninth Circuit’s ruling in Intertanko, the STCW will be seen as setting only “minimum standards,” that the states are free to exceed, as does Washington,1018 even though such state regulations would place the U.S. in violation of the treaty prohibition against stricter port State standards.

A 1994 amendment to SOLAS—also a treaty under Article VI—added Chapter IX to the convention, requiring operators of certain seagoing vessels to implement the ISM Code by July 1, 1998.1019 In 1996, Congress enacted enabling legislation for the ISM Code, which prescribed effective dates identical to those the nation had agreed to in the SOLAS convention.1020 The Coast Guard enforces ISM Code requirements for U.S. vessels as the flag

1015See supra Part II, ¶ IV.C.3.
1016STCW Code, supra Part II, note 388, ch. VIII.
1017STCW, supra Part II, note 388, reg. I/3. The regulations permit stricter rules only for seafarers on vessels engaged in “near coastal voyages,” not on foreign voyages.
1018Washington’s ambitions were revealed in a colloquy between the court and counsel for the state-defendants during oral argument before the Ninth Circuit. The court asked counsel whether they believed that OPA 90 would permit them to promulgate regulations applicable to foreign tank vessels entering Washington waters requiring that all of the vessel’s officers attend a training course at a Washington college. Counsel responded that they believed they had such authority. Nothing in the court’s opinion indicates that the court did not agree.
State Administration,\textsuperscript{1021} and for foreign vessels navigating in U.S. waters\textsuperscript{1022} as the port State control authority under SOLAS.\textsuperscript{1023} The ISM Code legislation directed the Coast Guard to promulgate regulations that would be consistent with the Code developed by the IMO.\textsuperscript{1024} Congress made clear that nothing in the Act "lessens the need for the Secretary to . . . harmonize, to the maximum extent feasible, U.S. requirements with those applying to foreign-flag vessels operating in our waters."\textsuperscript{1025} Together, these statements demonstrate Congress' intent that U.S. rules on the ISM Code, both for U.S. and foreign vessels, are to conform to SOLAS requirements. In promulgating the ISM Code regulations, the Coast Guard conformed to SOLAS and concluded that state regulations prescribing “different or higher” standards were preempted.\textsuperscript{1026} Even though the Coast Guard’s regulations were based on a statute issued after OPA 90 was enacted, and required that the regulations be consistent with international standards, under the Ninth Circuit’s ruling in \textit{Intertanko}, the federal rules may not preempt the states from prescribing stricter rules.


Following the accidental sinking of an oil barge in New York in 1990, the New York State Department of Environmental Conservation (DEC) Commissioner ordered the Delaware corporation that owned the vessel to cease operation of all its vessels involved in petroleum transportation in New York waters.\textsuperscript{1027} The DEC Order also suspended the operating licenses for fourteen vessels that had been issued to the same owner under the New York Navigation Laws.\textsuperscript{1028} While abstaining from making a determination regard-

\textsuperscript{1021}See 46 U.S.C. § 3205.
\textsuperscript{1022}See 33 C.F.R. §§ 96.110(c), 96.210(a)(3) & 96.310(c) (applying requirements to foreign vessels navigating in U.S. waters if “bound for ports or places under the jurisdiction of the U.S.”). The regulations do not apply to foreign vessels in innocent passage. See 62 Fed. Reg. 67,492, 67,494 (DOT 1997).
\textsuperscript{1023}SOLAS, ch. I, reg. 19.
\textsuperscript{1026}62 Fed. Reg. at 67,506.
\textsuperscript{1028}As described by the court, Article 12 of the New York Navigation Laws (“Oil Spill Prevention, Control and Compensation”), codified at §§ 170–197, prohibits the operation of any “major facility” without a state license. The definition of “major facility” includes vessels which transfer petroleum products to other vessels. N.Y. Nav. L. § 172(11).
ing the DEC Commissioner’s authority under state law to revoke the company’s state licenses, the federal district court examined the question whether the New York action was preempted by the PWSA or Title 46 of the U.S. Code.

The district court applied a traditional preemption analysis and held that the New York law was not preempted. The court based it decision largely on its understanding of the Supreme Court’s decision in Ray v. Atlantic Richfield Co. Although the court examined the § 1018 saving clause in OPA 90, it did so only as supplemental support for its decision. The court instead relied primarily on Professor Tribe’s interpretation of the Supreme Court’s holding in Ray, and concluded that the Supreme Court has “steadfastly refused to infer preemption in the field of environmental protection, an area that lies at the core of the states’ police powers.” The court’s decision to focus on the state’s regulatory purpose (environmental protection) rather than the subject governed by the relevant federal and state laws (vessels) apparently enabled the court to ignore the fact that, notwithstanding the presumption against preemption, the Supreme Court did conclude in Ray that Congress has impliedly preempted state laws on tank vessel safety standards and, by Title II of the PWSA, has occupied the field of tank vessel construction and design.

The extraordinary aspect of the court’s decision in Berman was the court’s failure to reconcile its decision to uphold the state agency’s banishment order with prior Supreme Court decisions holding that states may not completely prohibit the holder of a federal license from engaging in the activities that the federal license authorizes. All barges transporting oil in

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1029 Berman, 793 F. Supp. at 414.
1030 An earlier state court decision similarly held against preemption. See Mobil Oil Corp. v. Town of Huntington, 380 N.Y.S.2d 466 (Sup. Ct. 1975) (upholding, against preemption and Commerce Clause challenges, a township ordinance that required that persons loading or unloading fuel or oil from vessels obtain a permit, give advance notice of unloading, and pay into a special fund to provide for cleanup costs of possible oil spills).
1032 Berman, 793 F. Supp. at 416.
1033 Tribe, supra Part I, note 204, § 6-26, at 487 (concluding that “the basic teaching of the [Ray] decision is that state pressure to act in derogation of a federal statutory scheme is not to be inferred lightly”).
1034 Berman, 793 F. Supp. at 416. The district court apparently equated the Supreme Court’s presumption against preemption of a state’s historic police powers with a “steadfast” refusal to infer preemption. Closer examination of Ray would have revealed that the Court concluded that Congress had implicitly preempted state regulation of vessel equipment and safety standards and vessel design and construction standards. 435 U.S. at 163–64 & 174.
1035 See supra Part II, notes 638–40 and accompanying text.
the coastwise trade must be documented and inspected by the federal government.\footnote{\ref{footnote1037}} Beginning with its decision in \textit{Gibbons v. Odgen},\footnote{\ref{footnote1038}} the Supreme Court has repeatedly held that a vessel's federal license to engage in the coastwise trade entitles the vessel to navigate in state waters and to carry out the activity endorsed on its license, and that state laws that deny those rights are preempted by the federal licensing statute.\footnote{\ref{footnote1039}} In \textit{Ray}, the Court reaffirmed the principle that states may enforce reasonable, non-discriminatory conservation and environmental protection measures on federally licensed vessels,\footnote{\ref{footnote1040}} but nothing in the \textit{Ray} decision or the cases cited in \textit{Ray} condones a state's complete exclusion of federally licensed vessels from state waters.

Oddly, in upholding the New York law, the court based its decision in part on findings that there was no evidence that the New York law discouraged navigation or barred any particular class of vessels from New York harbors.\footnote{\ref{footnote1041}} Apparently, the court chose to examine the law as written by the legislature, not as enforced by the DEC through its banishment order. Finally, the court also understood the Supreme Court's decision in \textit{Ray} as establishing a principle that "commerce clause challenges to environmental protection statutes should not be entertained lightly."\footnote{\ref{footnote1042}} Nothing in the Supreme Court's decision in \textit{Ray} supports that characterization. The Court's Commerce Clause analysis in \textit{Ray} addressed the questions whether the Washington tug escort requirement fell within the "maritime but local" exception in \textit{Cooley} and whether the cost of complying with the escort tug requirement imposed an undue burden on commerce.\footnote{\ref{footnote1043}} A state order banishing certain vessels operating in interstate commerce from the state's waters presents a far different kind of burden on commerce.

Though many will applaud the DEC for banishing the Berman family\footnote{\ref{footnote1044}} from New York waters, it is well to remember that federal precedents are not

\footnote{\ref{footnote1037}}See 46 U.S.C. §§ 3301(10) & 12104(2).
\footnote{\ref{footnote1038}}\see{\ref{footnote1039}}\textit{2 U.S. (9 Wheat.) 1} (1824).
\footnote{\ref{footnote1039}}\see{\ref{footnote1040}}\textit{Douglas v. Seacoast Products, Inc.}, 431 U.S. 265, 280–81, 1977 AMC 566 (1977) (holding that \textit{Gibbons v. Odgen} established the principle that a vessel's federal license implies a grant of a right to navigate in state waters and to carry on the activities listed in the license).
\footnote{\ref{footnote1041}}\textit{Ray}, 435 U.S. at 164.
\footnote{\ref{footnote1042}}\textit{Berman}, 793 F. Supp. at 416.
\footnote{\ref{footnote1043}}Id. at 417 (citing \textit{Ray}, 435 U.S. at 179–80).
\footnote{\ref{footnote1044}}\textit{Ray}, 435 U.S. at 179–80 (observing that the estimated cost of complying with the state requirement for tug escort was less than one cent per barrel of oil transported).
\footnote{\ref{footnote1044}}\textit{The Berman family controlled the corporation that owned the vessels affected by the DEC order. The family's tug and tank barge operation attracted national attention following the grounding of the tank barge \textit{Morris J. Berman} off San Juan, Puerto Rico, and the resulting spill of 798,000 gallons of diesel oil into Puerto Rican waters. See B. Ornitz, \textit{Oil Crisis in Our Oceans} 5–8 (1996).}
so easily explained away. That the decision has implications well beyond the notorious Berman family is clear. Substitute the name "China Ocean Shipping Company" or "Maersk" for the Berman family, and the decision's far-reaching implications become clear. The vessels banished from New York waters were not involved in the sinking. The court cited no evidence that any of the fourteen banished vessels were not in compliance with all relevant federal laws. The decision can thus be read as one upholding the authority of a state to prohibit a vessel owner from operating a fleet of vessels within state waters, even if those vessels hold all federally-required documents and inspection certificates. Even more troubling for many will be the "practical considerations" which informed the court's judgment. The federal district court concluded that:

Plaintiffs in effect are asking the federal courts to tell New York that it may not, in the exercise of its police powers, plan against the desecration of its waters and coasts that would otherwise surely result from the high volume of oil barge traffic on the state's waterways. Plaintiffs would instead have the state rely entirely on distant and overextended officials in Washington, D.C. for basic environmental protections. Such an ineffective scheme is not contemplated by the federal Constitution.

Nothing in the court's findings of facts indicates how the court determined that the state's waters would "surely" be desecrated by spills from a "high volume of oil barge traffic," unless New York was permitted to ban vessel operators from its waters, or its conclusion that the "overextended" federal officials provide only an "ineffective scheme" for protecting the nation's waterways. In Castle v. Hayes Freight Line, Inc., the Supreme Court rejected the state's argument that without the power to suspend a highway carrier's privilege to operate in the state, the state would be "without appropriate remedies to enforce their laws against recalcitrant motor

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1045 Justice Black expressed similar concerns regarding state forfeiture actions in his dissent in C.J. Hendry Co. v. Moore, 318 U.S. 133, 1943 AMC 156 (1943). He warned that:

"Today's in rem action is against a fishnet used in patently illegal fashion; tomorrow's may be an action against a tramp steamer or ocean liner, which violates a harbor regulation or otherwise offends against the police regulations of a state or municipality."

Id. at 154 (Black, J., dissenting).

1046 Berman, 793 F. Supp. at 410. The DEC Commissioner "claimed that the [corporate owner's] past violations of New York Navigation Law indicated that the continued operation of the vessels would likely result in" future environmental harm.

1047 Id. at 416-17.

1048 Coast Guard authorities actually worked closely with the State of New York in its investigation of the Berman/Frank companies and had already taken a number of enforcement actions against the companies. See Omitz, supra note 1044, at 5–6.
carriers." The Court responded that "we know of no reason that the [Interstate Commerce] Commission may not protect the state's interest, either on the Commission's own initiative or on complaint of the state."

When the *Berman* decision is read together with the Ninth Circuit's decisions in *Hammond* and *Intertanko*, the problems with the traditional approach and its application come into focus. The decisions point the way for a possible new federal maritime regulatory regime in which states are free to prescribe any rules that fall within the rubric of "oil spill prevention measures," so long as they do not constitute "design requirements"; apply those rules to U.S. and foreign flag merchant vessels that hold all necessary federal and flag State licenses and inspection certificates to engage in foreign and interstate commerce, even if the state rule is stricter than or different from the governing international or federal standard; and banish those vessels from state waters if they violate state law. Was this really the Framers' design or Congress' intent?

1049 U.S. 61, 63 (1954) (holding that a state's interest in punishing motor carriers for violations of its road regulations does not justify disruption of federally authorized activities).

1050 Id.