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FEDERAL PREEMPTION OF STATE SAFETY REGULATIONS: INTERNATIONAL ASS’N OF INDEP. TANKER OWNERS V. LOCKE

INTRODUCTION

This Note will focus on recent trends in federal preemption of state and local regulation of maritime commerce. In particular, it will discuss the extent to which federal authority may preempt environmental and safety regulations related to oil pollution. States have established standards to achieve the best achievable protection ("BAP") against oil spills in response to the Exxon Valdez oil spill. The Exxon Valdez spill exposed the public to oil-stained beaches and dead wildlife prompting support for oil spill legislation. State standards for tankers transporting oil within state waters conflict with the interest of federal uniformity of international and interstate maritime commerce. This Note will review a federal preemption case reviewed by the Supreme Court in light of preemption doctrine that has been developed by the Court.

Part I will discuss the problem of oil spills within a state’s waters, focusing on the Exxon Valdez oil spill. It will provide a broad synopsis of the basic methodology used for federal preemption, and its application to state and local environmental and safety regulations. Part II will examine the key federal case, International Ass’n of Indep. Tankers Owners v. Locke (Intertanko). This case concerns state and local environmental and safety regulations dealing with maritime activities in the context of constitutional and statutory sources of federal preemption. Federal preemption sources, such as applicable federal law and international treaties, and BAP regulations will be discussed through the principal cases.

Part III will discuss the practical issues at stake in the Intertanko decision. Part IV suggests that federal law, regulations, and treaties do not fully preempt BAP regulations, and offers a proposal for accommodating national and state interests in this area. It will further discuss whether
preemption is a necessary doctrine in the context of oil spills within state waters. The conclusion will summarize preemption analyses in light of the offered proposal.

I. OIL SPILLS AND HISTORICAL BACKGROUND

A. The Oil Spill Problem

Oil spills cause environmental, human and economic disaster. A majority of oil spills occur in the marine environment, typically around loading and unloading ports. For example, the State of Maine is attempting to safeguard its coast and Portland Harbor, one of the largest East Coast oil importers. The extent of the damage corresponds to the amount of oil spilled, which varies annually. Since 1989, the number of gallons of oil spilled annually has decreased from 24.6 million to 5.9 million in 1992. The number of


3 See State Eyes Updating Oil Tanker Statutes, PORTLAND PRESS HERALD, Oct. 21, 1999, available in 1999 WL 2628729. This article states that Portland Harbor had suffered from one oil spill of 180,000 gallons of oil. Currently, the harbor suffers from more than 100 spills every year. Efforts were made to amend regulations to provide restrictive safety rules for vessels entering and leaving Maine refineries and terminals. The article further reports that the Department of Environmental Protection's concerns for oil shipments to Portland Harbor, which reach 106 million barrels per year. See id.

4 See State Eyes Updating Oil Tanker Statutes, supra note 3, at 1 (discussing probability for more and larger oil spills in future); see also Millard, supra note 1, at 369 n.3 (detailing amounts spilled in major oil disasters); Peterson, supra note 2, at 273 (explaining how number of oil spills vary and how one spill can make significant impact on figures); see, e.g., Jay Schoenfarber, Capitalizing on Environmental Disasters: Efficient Utilization of Green Capital, 9 TUL. ENVTL. L.J. 147, 150 (1995) (describing Exxon Valdez spill in detail).

5 See Peterson, supra note 2, at 273 (citing results of Oil Spill and discussing U.S. Law Report); see also Data Show Decrease in Amount of Oil Spilled in U.S. Since 1989, 3 OIL SPILL US LAW REPORT, April 1, 1993, available in 1993 WL 2755615 (outlining decrease in amount of oil spilled in U.S. since 1989 Exxon Valdez accident); cf. State Eyes Updating Oil Tanker Statutes,
gallons of oil spilled should be considered in light of the typical clean-up, which only recovers about eight percent of the oil spilled. The Exxon Valdez oil spill of 1989 in Alaska was a massive oil spill, and indeed was the largest spill in the history of the United States, prompting a national outcry. As a result of the Exxon Valdez spill, states enacted strict safety regulations for oil tankers that conflict with federal law. State regulations generally fell into categories, including design, construction, technology, and vessel operations. Many of the regulations overlapped and exceeded federal laws and international treaties, including Washington’s requirements for foreign vessels that are already in compliance with federal laws. In an effort to

supra note 3, at 1 (commenting on oil spills within Maine). See generally Schoenfarber, supra note 4, at 149-50 (discussing Exxon Valdez spill in light of other environmental crises).

6 See Peterson, supra note 2, at 273 (explaining how 92% of oil spill is not recovered and instead is left to evaporate, burn, or be dispersed into water column or sediments); see also Chris Chivers, Troubled Waters: Despite a Wake Up Call Named Exxon Valdez, Oil Tankers Continue to Foul the World’s Waterways, 88.46.010 (providing restrictive regulations for vessels transiting through Maine).

6 See Peterson, supra note 2, at 273 (explaining how 92% of oil spill is not recovered and instead is left to evaporate, burn, or be dispersed into water column or sediments); see also Chris Chivers, Troubled Waters: Despite a Wake Up Call Named Exxon Valdez, Oil Tankers Continue to Foul the World’s Waterways, E. VOL. 7, NO. 3, May 15, 1996, available in 1996 WL 9824903 (contemplating failure of oil spill clean up efforts); Millard, supra note 1, at 340-46 (discussing factors contributing to unpreparedness of efforts to clean up Exxon Valdez spill); Scientists Reveal Impacts of Exxon Valdez Oil Spill, OIL SPILL INTELLIGENCE REPORT, Feb. 11, 1993, available in 1993 WL 2755338 (describing symposium convened to discuss fate and effects of oil spilled by Exxon Valdez).

7 See Matthew Harrington, Necessary and Proper, But Still Unconstitutional: The Oil Pollution Act’s Delegation of Admiralty Power To The States, 48 CASE W. RES. L. REV. 1 (1997) (discussing national attention focused on problem of oil spill liability in response to public’s exposure to oil-stained beaches, dead wildlife, and dying wildlife in Alaska); see also Chivers, supra note 6 (noting that although tanker and barge spills attract most public attention, they are not largest source of spilled oil in world’s oceans); Peterson, supra note 2, at 274 (estimating 50 percent of oil spills are caused by tanker collisions and groundings); Schoenfarber, supra note 4, at 150 (discussing how Exxon Valdez tragedy galvanized public support and served as catalyst for comprehensive bill regarding oil pollution legislation).


9 See WASH. REV. CODE. ANN §§ 88.46.010 to 88.46.927 (regulating areas of design, construction, and operations); see also International Ass’n of Indep. Tankers Owners (Intertanko) v. Locke, 148 F.3d 1053, 1060-62 (9th Cir. 1998) (discussing state regulation of tank vessels); Petitioner’s Brief at 9, Intertanko v. Locke, 148 F.3d 1053 (9th Cir. 1998) (No. 98-1701, 98-1706) [hereinafter Petitioner’s Brief] (discussing state efforts for oil spill prevention, removal, liability, and compensation); see e.g., State Eyes Updating Oil Tanker Statutes, supra note 3, at 1 (providing restrictive regulations for vessels transiting through Maine).

10 See WASH. ADMIN. CODE § 317-21-240 (imposing personnel performance review for all crew members); WASH. REV. CODE. ANN. §§ 88.46.010-927 (imposing safety regulations that often exceed required regulations); see also Laurie L. Crick, The Washington State BAP
resolve this conflict, legal scholars have suggested that the doctrine of federal preemption be employed.11

B. Preemption Background

Preemption provides that federal law may supercede state law as a means of effectuating the intent underlying the state law.12 The most direct form of preemption exists when Congress has expressly provided for it.13 This is classified as express preemption as opposed to implied or field preemption, in which state law is preempted by implication of a statute which regulates a field Congress intended to be exclusively federal.14 Contrary to express and implied preemption, conflict preemption allows state law to be preempted to the extent it conflicts with federal law.15 Each type of preemption

Standards: A Case Study in Aggressive Tanker Regulation, 27 J. MAR. L. & COM. 641, 645 (noting Congress has chosen not to impose drug and alcohol testing on foreign vessel crews in U.S. waters); Petitioner's Brief, supra note 9, at 5 (noting that regulations applied to vessels traveling through Washington to reach Oregon and Canada). See generally Loble, supra note 8, at 42-43 (discussing legislation enacted under OPA to prevent oil spills).

11 See Charles L. Coleman, Federal Preemption of State “BAP” Laws: Repelling State Borders In The Interest of Uniformity, 9 U.S.F. MAR. L.J. 305, 313-27 (1997) (describing how courts have applied federal sources to decide whether state laws or regulations are preempted); see also Millard, supra note 1, at 369 n.56 (discussing congressional efforts to pass comprehensive oil spill legislation, and how these efforts were thwarted by differing views of House and Senate over preemption).

12 See William W. Schwarzer, Federal Preemption: A Brief Analysis, SE28 ALI-ABA 453, 455 (1999). This article explains the rationale of preemption and discusses three categories of preemption with illustrations. Mr. Schwarzer also considers the effect of the Supremacy Clause within the preemption analysis. Further, the article provides that courts find preemption in an unpredictable fashion after a text-specific exercise of statutory interpretation, considering the federal regulatory scheme. See id.

13 See Schwarzer, supra note 12, at 455 (explaining application of express preemption); see also Cipollone v. Liggett Group, Inc., 505 U.S. 504, 520-528 (1992) (preempting state claims based on failure to warn only due to express limitation imposed by Congress); see, e.g., Medtronic, Inc. v. Lohr, 518 U.S. 470, 503-04 (1996) (following Cipollone reasoning in holding that there is presumption against preemption in field traditionally operated by state law). See generally Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) (considering specific prohibitions imposed in Airline Deregulation Act (ADA) (49 U.S.C. §§ 1331-1341)).


15 See Schwarzer, supra note 12, at 460. The article describes the two prong test of conflict preemption as provided in Hines v. Davidowitz, 312 U.S. 52, 67 (1941), noting that conflict preemption exists where state law either: (1) makes it "impossible...to comply with both federal and state law" or (2) would frustrate "the accomplishment and execution of the full purposes and objectives of Congress." See id. Conflict preemption is demonstrated in a variety
usually results in defensive or complete preemption, barring application of state law, and allowing the claim to be characterized as a federal claim.16

C. Sources for Preemption

The first source for federal preemption and its application to state and local environmental and safety regulations of international maritime commerce is the Constitution itself.17 Relevant clauses of the Constitution include the Commerce Clause,18 the Admiralty Clause,19 the Supremacy Clause,20 and the Treaty Clause.21 The of cases involving federal laws, such as the Federal Election Law (2 U.S.C. §1, §7). See Foster v. Love, 522 U.S. 67 (1997). Conflict is evident when a statute limits governmental recovery claims. See Cox v. Shalala, 112 F.3d 151, 155 (4th Cir. 1997). In addition, conflict preemption applies in cases involving parties who find it impossible to comply with the law in question. See United States v. Denver. 100 F.3d 1509, 1512-13 (10th Cir. 1996).

16 See Schwarzer, supra note 12, at 461 (explaining that defensive preemption operates as defense to state law claims, and does not create subject matter jurisdiction, thereby, prohibiting removal of action to federal court); see also Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 403-04 (1988) (displacing state law in interest of national uniformity); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54-55 (1987) (displacing state law in context of ERISA claim due to effect of complete preemption); Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 817 (1986) (stating that defensive preemption cannot be basis of federal jurisdiction in context of Federal Food, Drug and Cosmetic Act, unless Congress completely preempts state law); Franchise Tax Board v. Constr. Laborers Vacation Trust, 463 U.S. 1, 28 (1983) (holding that defensive preemption does not create federal subject matter jurisdiction); Bruneau v. FDIC, 981 F.2d 175, 179 (5th Cir. 1992) (applying exception to allow state law claim to be characterized as federal claim).

17 See Marva Jo Wyatt, Navigating the Limits of State Spill Regulations: How Far Can They Go?, 8 U.S.F. MAR. L.J. 1, 4-6, 10 (1995) (discussing formation of federal system and evolution of preemption under Supremacy Clause in context of interstate transportation, maritime, and non-maritime matters); see also Coleman, supra note 11, at 311-13 (discussing constitutional sources that have been used in certain areas of maritime commerce).

18 See U.S. CONST. art. I, § 8, cl. 3. Express authority is granted to “regulate Commerce with foreign Nations, and among the several States.” Article I forbids non-uniform “Regulation of Commerce” between ports in the several states. See id. Some scholars believe the non-preemption provision of OPA does not offend the federal government’s Commerce Clause power. See Harrington, supra note 7, at 21. In the context of ocean ranching, some scholars argue that Congress’ power may come from the Commerce Clause. See, e.g., Emil R. Berg, Private Ocean Ranching of Pacific Salmon and Fishery Management: A Problem of Federalism, 12 ENVTL. L. 81, 112-13 (1981).

19 See U.S. CONST. art. III, § 2, cl. 1 (stating that judicial power extends “to all Cases of admiralty and maritime jurisdiction”); see also Harrington, supra note 7, at 4 (arguing that Admiralty Clause bars any delegation of maritime power from federal government to states); see, e.g., Berg, supra note 18, at 112 (noting that Admiralty Clause has been used as source of federal preemption of ocean ranching regulation). But cf. Ernst A. Young, Preemption at Sea, 67 GEO. WASH. L. REV. 273, 277 (1999) (asserting that clause is not valid basis for federal preemption rights in maritime law).


21 See U.S. CONST. art. I, § 10, cl. 1 (providing that “No State shall enter into any Treaty”);
Commerce Clause is the primary tool used by courts regulating interstate and foreign commerce and deciding issues of vessel design and operational requirements. Interstate carriers, such as vessels, fell under the control of the federal government through the power derived from the Commerce Clause. Courts have held the preemption doctrine is appropriate in cases where the commerce clause was dormant, but uniformity was needed. An alternative commerce clause analysis provides states with power to enact laws for local as opposed to national concerns, because local matters do not require uniformity.

The Framers of the Constitution foresaw that there may be confusion if vessels were required to comply with local statutes, and established the Admiralty Clause, which provided uniformity in maritime law at a time when the predominant mode of transportation for the shipment of commercial goods was by sea. See also Missouri v. Holland, 252 U.S. 416 (1920) (holding that federal law enacted pursuant to valid exercise of Congress’ power under the Treaty clause may preempt state law); Michael P. Van Alstine, Dynamic Treaty Interpretation, 146 U. Pa. L. Rev. 687, 700 (1998) (analyzing how private law treaties, as products of federal preemption, derive their authority from Treaty Clause). See generally Robert Stumberg, Direct Investment: Sovereignty by Subtraction: The Multilateral Agreement on Investment, 31 CORNELL INT’L L.J. 491, 500 (1999) (stating how federal power to preempt state law under Treaty Clause has been well-established).


22 See Gibbons, 22 U.S. at 1. In this seminal case, the Supreme Court acknowledged the federal grant over the state grant. As a result, the holder of the federal license was authorized to engage in commerce. See id. at 21. The New York law conferred exclusive rights to operate steamboats in NY waters. The Supreme Court held the state law was invalid. See id.

23 See Kelly v. Washington, 302 U.S. 1 (1937). In Kelly, Congress did not regulate a certain class of boats. As a result, the Court allowed the state to enact its own vessel regulations. An important factor in the Court’s decision was that the federal government did not exclusively occupy this area of law. The Court noted that their decision would have been different, providing the case involved regulations that needed to become uniform. See id. at 9.

water.\textsuperscript{26} The Supremacy Clause also disfavors local control and serves to invalidate conflicting state laws, providing: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made . . . shall be the supreme Law of the Land . . ."\textsuperscript{27} International treaties are given the same "supreme" treatment as federal law under the Supremacy Clause.\textsuperscript{28} Moreover, the Treaty Clause provides that the President of the United States: "[S]hall have Power, by and with the Advice of the Senate, to make Treaties, provided two thirds of the Senators present concur."\textsuperscript{29} The Constitution clearly delegates power to the executive, with respect to foreign affairs, to serve as an international representative.\textsuperscript{30}

The second source of preemption is statutory.\textsuperscript{31} The Ports and

\textsuperscript{26} See Nicholas, supra note 22, at 2071 (analogizing interstate highway system to belief held by Founding Fathers favoring uniformity in maritime law); see also Petitioner's Brief, supra note 9, at 20 (arguing that maritime commerce was always viewed as national subject, and due to its history, maritime commerce is area intolerable of local control).

\textsuperscript{27} See U.S. CONST., art. VI, cl. 2; McCulloch v. Maryland, 17 U.S. 316 (1819) (holding that any state law conflicting with federal law is, by virtue of Supremacy Clause, simply without effect since Congress legislates in national interest and states or localities should not legislate in way that frustrates congressional intent); see also Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (noting that Congress has authority to enact appropriate legislation contrary to states' legislation in order to effectuate Fourteenth Amendment); Johnson v. Maryland, 254 U.S. 51, 55 (1920) (recognizing lack of state authority to touch instrumentalities of United States); White's Bank v. Smith, 74 U.S. (7 Wall.) 646 (1869) (providing that state ship mortgage law in conflict with federal vessel statutes have been invalidated under the Supremacy Clause).

\textsuperscript{28} See Sinnot v. Davenport, 63 U.S. (22 How.) 227, 241-43 (1859) (stating that congressional acts and treaties are supreme, and state law "though enacted in the exercise of powers not controverted, must yield to it"); see also U.S. CONST. art. VI, cl. 2 (stating "all Treaties made . . . shall be the supreme Law of the Land"); Coleman, supra note 11, at 311 (discussing how maritime cases involve Supremacy Clause in conjunction with Commerce Clause or Treaty Clause). See generally Devine & Johnston, supra note 20, at 377 (noting Intertanko's argument that regulations in conflict with international treaties intrude upon foreign affairs power of federal government).

\textsuperscript{29} See U.S. CONST. art. I, § 10, cl. 1 (providing that "no State shall enter into any Treaty"); see also U.S. CONST. art. II, § 2, cl. 2 (delegating authority to make treaties to President, provided two thirds of Senate concurs); Coleman, supra note 11, at 310 (distinguishing two constitutional sources, namely Treaty and Commerce Clauses, and concluding that Treaty Clause unlike Commerce Clause, cannot be exercised concurrently by both state and federal government).

\textsuperscript{30} See U.S. CONST. art. I, § 10, cl. 1 (establishing federalism and preserving separation of powers); see also Coleman, supra note 11, at 311 (discussing how preemption analysis under Treaty Clause is well-founded although, within context of maritime cases, preemption analysis has slowly evolved).

Waterways Safety Act ("PWSA"), requires the Secretary of the United States Department of Transportation to issue regulations for tank vessels.\(^{32}\) Similarly, the Oil Pollution Act of 1990 ("OPA") creates standards to increase liability and to encourage oil spill prevention.\(^{33}\) That is, federal preemption is derived from federal statutes, regulations, and treaties, all of which can be given preemptive effect pursuant to the Supremacy Clause of the Constitution.\(^{34}\) Preemption provides that a Federal Act may not supercede the historic police powers of states unless it is "the clear and manifest purpose of Congress."\(^{35}\)

D. Preemption Development in Case Law

Beginning with Ray v. Atlantic Richfield Co.,\(^{36}\) courts developed federal preemption in a variety of maritime cases.\(^{37}\) In Ray, the State of Washington attempted to impose standards on vessel regulations.\(^{38}\) The standards conflicted with mandatory federal

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\(^{32}\) See PWSA, 46 U.S.C. § 3703. The act delegates authority to the Secretary to prescribe certain regulations. The agency is authorized to regulate in areas of design, construction, alteration, repair, and maintenance. They further extend to regulations concerning operation, equipping, personnel qualification, and manning of vessels. The regulations may be prescribed as deemed necessary. Certain triggering concerns include the need for increased protection against hazards to life and property, for navigation and vessel safety, and for the enhanced protection of marine environment. See id.

\(^{33}\) See OPA, 33 U.S.C. §§ 2701-2761 (1994). The federal government passed the OPA to establish a uniform scheme preventing oil spill pollution. Moreover, states are permitted under OPA's savings clause to enact their own legislation, such as liability designs. See id. at § 2718. The state of Washington interpreted the statute as a delegation of authority included within their state police power to enact broad regulations. See Intertanko v. Locke, 148 F.3d 1053, 1060-62 (9th Cir. 1998). The Washington regulations went beyond liability plans and extended to vessel design, construction, and equipment regulations. See id.

\(^{34}\) See U.S. CONST. art. VI, cl. 2; see also Coleman, supra note 11, at 310-312 (discussing Supremacy Clause and sources of preemption extensively); cf. Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978) (noting PWSA may not preempt state police powers without clear and manifest congressional intent). See generally Joshua D. Sarnoff, Cooperative Federalism, the Delegation of Federal Power, and the Constitution, 39 ARIz. L. REV. 205, 270 (1997) (noting Supremacy Clause is basis for federal preemption of state law in denial of NPDS permits once legislative standards for preemption are set).

\(^{35}\) See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (establishing premise applied to cases concerning doctrine of preemption and federalism).


\(^{37}\) See Ray, 435 U.S. at 153-57 (noting that Supremacy Clause's purpose was to "dictate that the federal judgment that a vessel is safe to navigate United States waters prevail over the contrary state judgment"); see also Conference Committee Report of OPA, 90 H.R. Conf. Rep. No. 101-653, at 122 (1990) (noting Ray decision withstood OPA Conference Committee); Intertanko, 148 F.3d at 1060-64 (relying on interpretation of Ray in its analysis).

\(^{38}\) See Ray, 435 U.S. at 155-57. The case discusses state tanker law regulating tank design,
vessel design, movement, and tanker size regulation. Oil tankers were forced to comply with state laws or in the alternative, to use a tug. Oil tanker owners, under the Ports and Waterways Safety Act ("PWSA"), challenged the state law on preemption grounds. After an analysis of the detailed provisions set forth in the PWSA, the Supreme Court held that the federal law preempted conflicting state design requirements through implication. Moreover, the Court noted the congressional intent to create national uniformity for design and construction of oil tankers.

The preemption doctrine was again the central focus when Alaska legislated in the area of maritime law. Chevron U.S.A., Inc. v. Hammond arose as a result of the opening of the Trans-Alaska movement, and size in Puget Sound. The regulations did not include tug regulations, expressly stating that "no such regulation should be imposed" on tug boats guiding tankers. See id. at 158-160. The tug exception was a direct method of requiring tanker owners to comply with standards. See id. 39

See Ray, 435 U.S. at 154-55 (discussing PWSA design requirements compared to stricter state design requirements); see also 33 U.S.C. §§ 1221-1227 (1970) (setting forth federal design regulations); 46 U.S.C. § 391 (a) (1970) (discussing extent of design regulations); cf. PWSA, 46 U.S.C. § 3703 (referring to design regulations which preempt state law).

40 See Wash. Rev. Code. Ann. § 88.16.190 (2) (providing alternative tug escort provision); Ray, 435 U.S. at 158-60 (discussing demands of state standards); cf. Intertanko, 148 F.3d at 1061-65 (setting forth standards, including double hull requirement).

41 See Ray, 435 U.S. at 155 (providing arguments by oil tanker refiners); see also 33 U.S.C. §§ 1221-1227 (1970) (establishing detailed requirements for vessel design); Wash. Rev. Code. Ann. §§ 88.46.010 to 88.46.927 (referring to design requirements and technology requirements that may be interpreted to be design regulations); Intertanko, 148 F.3d at 1053 (representing views of organization of thousands of vessel owners).

42 See Ray, 435 U.S. at 168. The Court found the detailed regulation was evidence of a congressional intent to preserve uniform design and construction standards. The regulations prescribed by the Secretary, under Title II, set minimum standards. See id. In one case, however, the Court has held that a state regulation withstood preemption arguments. See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963). The Court emphasized that preemption issues were not decided solely by statutory reference and weighed the importance of order within the state regulations. See id.

43 See Ray, 435 U.S. at 163-165. The Court discussed the importance of uniformity in vessel regulation and the role of the Supremacy Clause. Congress promulgated the regulations on a national level, intending national enforcement. The Court noted that because it was the duty of the Secretary to determine which tanker was safe, national uniformity was needed within the standards. These national standards were intended to "foreclose the imposition of different or more stringent state requirements." See id. at 163.

44 See Howard M. McCormack, Uniformity of Maritime Law, History, and Perspective From the U.S. Point of View, 5 Tul. L. Rev. 1481, 1496-97 (1999). McCormack analyzes the preemption battle and growth in maritime case law. See id. at 1495. The "battle" has occurred in the area of regulation. The article discusses the Washington state regulations of safety features. McCormack notes that the Washington design and construction requirements were preempted. The article also addresses the tug escort requirement, which was found not to conflict with federal law. See id.

45 726 F.2d 483 (9th Cir. 1984); see Petitioner's Brief, supra note 9, at 14 (defining Chevron as "troubling" case because of its treatment of preemption issues); see also Intertanko, 148 F.3d at 1060-63 (relying on interpretation of Chevron in their argument).
Pipeline in the state of Alaska. Concerned over transportation risks, the state legislature enacted a statute requiring oil tankers to obtain a "risk avoidance certificate" from the state and to pay a "risk charge" to the state's Coastal Protection Fund. Higher risk charges were imposed on vessels without certain navigation and collision avoidance equipment. Alaska admitted the state regulation underlying the "risk charge" system was essentially direct vessel regulation. The regulations further prohibited the discharge of ballast, once stored in oil cargo tanks in the vessel, into state waters. The United States argued that the Ports and Waterways Safety Act preempted the state law, because it attempted to regulate vessel construction and equipment. Contrary to Ray, the court did not find implied preemption, holding that there was no congressional intent to exclude states from enacting laws regarding the discharge of ballast. The court also determined that there was

46 See Chevron, 726 F.2d at 485 (citing passage of Alaska Tanker Law); see also ALASKA STAT. § 46.03.750 (e) (1976) (prohibiting oil tankers from discharging ballast into territorial waters of Alaska if ballast was stored in vessel cargo tanks); Allen, supra note 25, at 35-37 (discussing Chevron background and decision in light of Ray decision); cf. Ray, 435 U.S. at 160 (providing conflicting decision).

47 See Chevron U.S.A., Inc. v. Hammond, 1978 AMC 1697, 1699 (D. Alaska 1978). The case set forth a system regulating tank vessels and oil terminals. There are state requirements for obtaining risk avoidance certificates and penalties of risk charges. The statute makes the operation of tank vessels, and terminal facilities, without a risk certificate unlawful. Further, the annual risk charge payment is required as a condition to the issuance or renewal of the certificate. See id.

48 See Chevron, 1978 AMC at 1699-1700. The plan imposed higher charges for vessels lacking specific bow-thrusters, navigation, and collision avoidance equipment. Risk charges are incentives to owners or operators of tank vessels to incorporate state standards. The risk charge increases according to the makeup of the vessel. For example, the charge will be reduced if the vessel is equipped as required by law. Aggregate annual risk charges are amounts that are sufficient to cover anticipated disbursements from the Coastal Protection Fund. See id.

49 See Chevron, 1978 AMC at 1701 (discussing intention to create Coastal Protection Fund in order to insure speedy oil spill cleanups and that Alaska agreed that PWSA preempted navigation requirements); see also Allen, supra note 25, at 35-36 (stating how Alaska failed to avoid preemption by classifying requirement as "risk factor" instead of regulation).

50 See Chevron, 726 F.2d at 485. On appeal, the case discussed the congressional intent of ballast regulation. Ballast held in empty oil tanks contain oil residue, a substance that endangers the marine environment. State and federal governments intend to alleviate the danger to the marine environment caused by regular pumping of large quantities of oil-polluted ballast into the ocean. See id. The Alaska statute provided that "all ballast placed in cargo tanks shall be processed by or in an onshore ballast water treatment facility and may not be discharged into the waters of the state." See ALASKA STAT. § 46.03.750(e) (1976).

51 See Chevron, 726 F.2d at 495-501. The case held that the PWSA was supreme over state law. The PWSA/PTSA refers to the same subject matter as the international agreement and amendments. This same subject matter was the focus of the OPA. Except where there is explicit language to the contrary, the PWSA/PTSA is construed as consistent with international agreements. These agreements include MARPOL and the MARPOL Protocol. See id.

52 See Chevron, 726 F.2d at 495-97. The court found that Congress did not intend to occupy
no conflict between the PWSA and the discharge regulations. Without a conflict, the Supremacy Clause does not apply.

Ray and Chevron set forth the importance of classifying regulations as pollution prevention or direct design and construction regulations. In Ray, for example, Washington directly attempted to enact vessel design and construction regulations. This straightforward approach was struck down on preemption grounds. The regulations in Chevron, however, were classified as regulations concerning marine pollution, a subject outside the exclusive reach of the federal government. Thus, the definition of the regulation or the "field" regulated may be the decisive factor in determining preemption. One commentator has predicted that

field of discharge into state waters. The "test of whether both federal and state regulations may operate, or the state regulations must give way, is whether both regulations can be enforced without impairing the federal law superintendence of the field." See id. at 497. The test was noted not to be "whether they are aimed at similar or different objectives." See id. Regulations, such as the Washington State safety measures in Ray, were held to be void because "they aimed precisely at the same ends." See id.

See Chevron, 726 F.2d at 501. The court failed to discover a conflict between Alaska's law and the PWSA. Alaska was considered to be distinguished due to its expansive on-shore processing facilities. It was noted that the enforcement of the deballasting regulation would create negative results, including overloaded facilities. This was considered to be evidence that there was no conflict. See id.

See U.S. CONST. art. VI, cl. 2 (operating to resolve conflicts between state and federal laws); see also Chevron, 726 F.2d at 501 (providing that prohibition of discharge of ballast under Alaskan law was not preempted by federal law, nor was it considered void under Supremacy Clause).

See Nicholas, supra note 22, at 2061. The author discusses how commentators have noted congressional intent analysis depends on the definition of the field. The author cites as an example the Chevron regulations, which were not defined as vessel operations. It is predicted that Ray would not have been decided as it was if the regulations in question were not operational. Modern proponents of the Best Achievable Protection Laws seek to classify the regulations as preventive. See id.

See Ray v. Atlantic Richfield Co., 435 U.S. 151, 155-57 (1978) (attempting to directly enact vessel regulation); see also Intertanko v. Locke, 148 F.3d 1053, 1064-67 (9th Cir. 1998) (providing argument that distinguished from design and construction, and operational requirements in light of Ray). See generally Nicholas, supra note 22, at 2064 (providing that Ray is "the leading case on the subject of field preemption of state statutes that regulate tankers," and discussing implied preemption of regulations).

See Ray, 435 U.S. at 168. The Court reserved power over vessel design and construction for the federal government. Evidence included the congressional preference for international treaties. The treaties included design requirements, similar to Title II of the PWSA. The states were left with "no room... to impose different or stricter design requirements." See id.

See Chevron, 726 F.3d at 495 (using preventive type of classification and holding that regulations were not preempted by PWSA); see also Coleman, supra note 11, at 333-35 (discussing Chevron definition of an "occupied" field and arguing that field should be treated as water pollution as opposed to vessel regulation because federal scheme did not prohibit stricter state standards regulating water pollution within state waters).

See Allen, supra note 25, at 30-32 (discussing how classification determines domain of relevant federal laws and providing extensive analysis of "subject matter characterization" and its consequences); see also Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (considering whether field affected international relations). See generally Florida Lime & Avocado Growers,
future proponents of the Best Achievable Protection, ("BAP"), laws will attempt to characterize regulations as pollution prevention in order to escape the dangers of federal preemption.60

II. FEDERAL PREEMPTION ANALYSIS

A. The Oil Pollution Act of 1990

In response to the Oil Pollution Act of 1990, ("OPA"), many states have followed Congress' lead, enacting their own oil spill regulations. As the most recent statute concerning oil tanker safety, OPA was found to accurately reflect congressional intent and is given significant deference.61 The United States Congress enacted OPA to create a uniform and clearly organized set of standards and procedures.62 Effectively, the statute clarifies conflicts of state spill laws and federal standards facing tanker operators.63 Similar to other federal law regarding maritime safety, the purpose of the OPA is to protect the waters from oil pollution.64 In order to accomplish

Inc. v. Paul, 373 U.S. 139, 141 (1963) (treating food quality cases and cases of interstate carriers differently due to field and federal concerns of each field).

60 See Nicholas, supra note 22, at 2061 (discussing impact of field definition in context of BAP laws and preemption doctrine and stating that Chevron treatment of field definition, in context of water pollution, allows preventive measures to be taken); see also Coleman, supra note 11, at 333 (warning that regulations with indirect titles may have direct effect on vessel operations).


62 See Bill Dibenedetto, US Court to Decide on Stringent Spill Policy, LLOYD'S LIST INT'L, WORLD REPORTER, Oct. 21, 1999, available in 1999 WL 29118854, at 1. Dibenedetto discusses the underlying purpose of the Oil Pollution Act. States have interpreted it to mean that federal law does not preempt stricter state laws. See id. The clauses of the Oil Pollution Act have received ample attention. See John M. Woods, Two OPA '90 Decisions To Affect Industry, JOURNAL OF COMMERCE, Oct. 28, 1999, at 9. The issue posed before the Supreme Court is whether OPA clauses were correctly interpreted. See id.

63 See Dibenedetto, supra note 62, at 1 (providing that tanker operators deal with conflicting and confusing coastal state spill laws); see also Coleman, supra note 11, at 325 (reasoning that it may be difficult for vessels to cooperate effectively with opposing regulations, including international treaties); Woods, supra note 62, at 9 (suggesting that operators only have to deal with states imposing regulations, fines, and penalties greater than OPA limits). See generally Samuel N. Lind, Eco-Labels and International Trade Law: Avoiding Trade Regulations While Regulating the Environment, 8 INT'L LEGAL PERSP. 113, 116 n.6 (1996) (discussing pollution prevention approaches).

64 See Crick, supra note 10, at 643. The article discusses the common goals of the OPA and the Washington State regulations. The goal of the Washington regulations and the OPA relate
its goal, the federal law has exceeded international law, requiring, for example, double hulls for new oil tankers.\textsuperscript{65} Similarly, states have imposed unilateral requirements on oil tankers in order to protect the marine environment.\textsuperscript{66}

Section 1018 of the OPA, known as the savings clause, states that: "Nothing in this Act . . . shall affect, or be construed as interpreting as preempting, the authority of any State . . . from imposing any additional liability or requirements with respect to the discharge of oil or other pollution by oil . . . ."\textsuperscript{67} One commentator has noted that courts have declined to interpret the savings clause to mean that states have the power to impose additional requirements on oil tankers in any context they choose.\textsuperscript{68} The areas of vessel manning, safety, navigation, equipment, and operations are argued to be excluded from OPA’s delegation of state power.\textsuperscript{69} Instead, it is to the protection of the marine environment from oil spills or discharges. The author treats these similar objectives as a lack of evidence of some type of actual conflict. The similar purposes seem to make the state and federal law compatible. Crick states that there is "no present obstacle to the implementation of federal law" and that it is not "physically impossible for a tank owner to comply with both." See id.\textsuperscript{65}

\textsuperscript{See} Intertanko v. Lowry, 947 F. Supp. 1484, 1484 (W.D. Wash. 1996) (noting that state unilateral actions have been taken because some of the requirements interferes with international standards); see also 46 U.S.C. § 3703 (a) (showing that double hull requirement contradicts international standard imposed by Regulation 13F to Annex I of MARPOL); Intertanko, 947 F. Supp. at 1484 (citing to treaties involved, demonstrating that Congress was not concerned with uniformity).\textsuperscript{66}

\textsuperscript{See} WASH. ADMIN. CODE § 317-21-265 (requiring installation of specific technology, such as global positioning system receiver, two separate radar systems, and an emergency towing system); see also Intertanko, 947 F. Supp. at 1495 (concluding that OPA did not preempt these regulations and stating that “comprehensive regulation of an area alone . . . is not enough to infer preemption.”).\textsuperscript{67}

\textsuperscript{See} 33 U.S.C. § 2718 (1994). Section 1018 also provides that states may impose additional requirements or liabilities with respect to any removal activities for oil discharges. See id. The language of section 1018 must be considered in the context of the Act as a whole. See Intertanko, 947 F. Supp. at 1490. The court felt that the placement of this section by Congress in “Title I - Oil Pollution Liability and Compensation” meant that Congress envisioned that states would set “the standards for liability and damages for the discharge of oil or the substantial threat of discharge . . . .” See id. This provision may be read broadly due to its non-preemptive language. See id. at 1492.\textsuperscript{68}

\textsuperscript{See} Coleman, supra note 11, at 344-45. The article discusses how states may not regulate whatever area they desire within the meaning of the OPA savings clause. See id. Section 6001(e) of the Act specifically states that “except as otherwise provided in this Act, this Act does not affect— (1) admiralty and maritime law.” See OPA, 33 U.S.C. § 6001(e). Coleman provides that this section prohibits modification of admiralty law. See Coleman, supra note 11, at 345. Instead, the article illustrates how the act delegates authority to the states to enact provisions limiting liability. See id.\textsuperscript{69}

\textsuperscript{See} Coleman, supra note 11, at 344-45. Coleman notes that Congress did not intend to allow state regulation in certain areas. The article cites the Conference Committee Report of OPA, stating that section 6001(e) of the House bill "clarifies that the House bill does not affect admiralty and maritime law." See id. This provision was added into the final legislation. See H.R. Conf. Rep. No. 101-653, at 159 (1990). Congressional intent was one-sided within this act, giving state authority to force cleanups, compensate victims of oil spills, and impose liability
argued that the area in which a state may impose additional regulation is limited to penalties, liability and compensation plans to those injured from an oil spill. BAP laws rely on the rationale of Section 1018 of OPA, whose language may be interpreted as granting the states expansive power in enacting oil spill prevention laws which “relate” to oil discharge. It is to be noted that scholars have interpreted Section 1018 as a preservation of pre-existing state rights in traditional areas of state participation, such as, liability and compensation for actual oil spills.

B. Supreme Court Consideration

International Association of Independent Tanker Owners v. Locke brought before the United States Supreme Court a decade-old dispute between the United States federal government and the State of Washington. The International Association of Independent plans. See Coleman, supra note 11, at 344.

70 See Coleman, supra note 11, at 345. Coleman discusses the limited purpose of the OPA savings clause. The article examines the act, finding that there are other sections in it that provide navigation and safety measures. These particular sections allude to preexisting statutory schemes dealing with specific areas of maritime law. Coleman contends that it “would make little sense” to read the statute as allowing state power to enact requirements governing vessel manning, safety, equipment, and operations because such a provision would also allow any “political subdivision thereof” to regulate these areas. See id.

71 See Intertanko v. Locke, 148 F.3d 1053 (9th Cir. 1998) (arguing BAP requirements were not preempted); see also WASH. REV. CODE. ANN §§ 88.46.010–88.46.927 (providing requirements “related to oil discharge” within meaning of OPA); Robert M. Jarvis, Are States Bound by International Treaties Governing Ship Design, Construction, and Operation, PREVIEW 120 (1999-2000), United States Supreme Court Cases, Issue No. 3, 1, 3, Nov. 18, 1999 (describing rationale of waiver contained in § 1018 of OPA); Nicholas, supra note 22, at 2064 (analyzing Ninth Circuit decision, concluding requirements were valid).

72 See Coleman, supra note 11, at 348-50 (criticizing court’s interpretation as erroneous and discussing how states should not be permitted to regulate all aspects of tanker operations); see also Loble, supra note 8, at 59-61 (discussing interpretations of Section 1018 based on legislative history and congressional record); Nicholas, supra note 22, at 2064 (contending that state requirements were broadly interpreted as “related to oil discharge” within OPA); Petitioner’s Brief, supra note 9, at 46-48 (arguing Section 1018 was not meant to impose additional safety requirements on vessels).

73 See Intertanko v. Locke, 148 F.3d 1053 (9th Cir. 1998). The case questions whether statutes, regulations, and treaty commitments of the United States preempt various environmental and safety regulations. It also discusses the regulations imposed by the State of Washington on oil tankers engaged in coastal and interstate commerce. See id. Intertanko filed an application for a writ of certiorari with the U.S. Supreme Court on April 23, 1999. See Keith B. Letourneau, The Tide is Rising; State Pollution Prevention Regulations in Question, TEX. LAW. 31 (Jul. 12, 1999).

74 See Nicholas, supra note 22, at 2055 (explaining Ninth Circuit’s consideration of federal preemption of state environmental law addressed in Intertanko); see also Coleman, supra note 11, at 346-347 (explaining statutory interpretation and district court decision); Barry Hart Dubner, On the Interplay of International Law of the Sea and the Prevention of Maritime Pollution: How Far Can a State Proceed in Protecting Itself From Conflicting Norms in International Law, 11 GEO. INTL. ENVTL. L. REV. 137, 137-38 (1998) (discussing conflict between Washington State
Tanker Owners, ("Intertanko"), an international trade association whose members own or operate more than 2,000 tankers with United States and foreign registry, filed suit, claiming that 16 of Washington State's BAP regulations were unconstitutional. In hearing the case, the Supreme Court determined whether Washington may impose safety and environmental regulations on oil tankers entering its ports. The regulations, promulgated by Washington's Office of Marine Safety in 1995, regulate tank vessel design, construction, operation, manning and personnel qualifications pursuant to Chapter 88.46 of the Laws of the State of Washington. The BAP regulations go beyond the requirements of federal regulations and of international agreements to which the United States is a party. For example, the BAP standards for drug and alcohol testing extend to all crew members on all covered vessels, on a random or probable cause basis, and are conducted
before employment or after an incident. Federal drug and alcohol testing regulations are limited to mariners in "safety-sensitive" positions. Contrary to federal and international standards regarding training and shipboard drill requirements, BAP standards apply to vessels that are not operating in Washington waters and to vessels entering Washington waters, including those with destinations in other states. Also, BAP requirements go beyond federal law regarding work hours and language, because the requirements apply to vessels with foreign flags. Washington's regulations reached maritime and environmental areas pursuant to their broad interpretation of the OPA.

The petitioners in Intertanko relied on the interpretation of the Ports and Waterways Safety Act, ("PWSA"), articulated in Ray, arguing that federal law governed oil tanker safety, including the OPA, and international treaties, to which the United States is a

79 See Wash. Admin. Code § 317-21-235 (2) (providing personnel policies, illicit drug, and alcohol use provisions, and training qualifications beyond those required for obtaining licensing or merchant marine document); Wash. Admin. Code § 317-21-230 (discussing personnel training and qualifications); see also Crick, supra note 10, at 645 (discussing how BAP validity can be questioned due to their extreme requirements).

80 See Crick, supra note 10, at 645. Certain limits were placed within the federal law. For example, Congress chose not to impose drug and alcohol testing on foreign vessel crews in U.S. waters. See id. Further, some of the regulations applied to vessels traveling through Washington in order to reach other jurisdictions, such as Oregon and Canada. See Petitioner's Brief, supra note 9, at 5. The brief noted that the tankers call at ports in Washington State or transit through Washington state waters en route to destinations in other jurisdictions. See id. at 6.


83 See Jarvis, supra note 71, at 3 (providing extensive interpretation of OPA was source for BAP regulations); see also OPA, 33 U.S.C. § 2701 (outlining provisions for states to enact liability plans); OPA 33 U.S.C. at § 6001(e) (establishing act does not affect admiralty and maritime law except when it states it does). See generally Coleman, supra note 11, at 343 (discussing how OPA seeks to "preserve status quo" with regard to preemption).


Further, they argued that any conflicting state regulations should be preempted. The federal district court concluded the laws "protect Washington's delicate and valuable marine resources through the exercise of the state's police powers" and analyzed the validity of the Coast Guard's express preemptive statements.

On appeal, Intertanko contended that the state regulations interfered with various international treaty obligations. The BAP laws, including, American regulations of work hours and language, interfered with international laws due to its extensive application to vessels of foreign flags within state waters. Also, strict requirements regarding training and shipboard drills apply at times


The district court held that: (1) the statutes and regulations in question were not preempted by federal law; (2) the provisions did not violate the Commerce Clause or the Foreign Affairs Clause of the United States Constitution; and (3) the provisions were not improper extraterritorial restrictions in violation of the State of Washington's Constitution. See id. In contrast, Ray held certain provisions of Washington's tanker law were preempted by federal law while other tanker law provisions were a valid exercise of Washington's police powers. See Ray, 435 U.S. at 151. The Ninth Circuit Court of Appeals examined whether Coast Guard statements preempted BAP regulations. See Intertanko, 148 F.3d at 1067-68. The Coast Guard had stated that several BAP laws regulate areas, including manning, navigational safety, operational requirements, and drug and alcohol testing, falling within the exclusive power of the federal government. See Petitioner's Brief, supra note 9, at 33-34. The brief discussed the nature of the statements and their application to specific BAP regulations in detail. See id.


See Intertanko, 148 F.3d at 1067-68 (concluded that preemptive statements were beyond the statutory authority of Coast Guard because they interfered with state power to enact additional requirements for oil spill prevention within the meaning of the savings clause of the OPA); see also WASH. ADMIN. CODE § 317-21-245 (imposing requirements on foreign-flag vessels); WASH. ADMIN. CODE § 317-21-250 (requiring foreign vessels to comply with American regulations); Crick, supra note 10, at 645-46 (discussing how BAP standards supplement and modify federal and international standards).
when the vessel is not operating within the state's waters.\textsuperscript{91}
Rejection of the international standards implies that BAP laws frustrate the President's role in foreign relations.\textsuperscript{92} The federal government joined the appeal, making the same arguments as Intertanko.\textsuperscript{93}

The Ninth Circuit held that, while several BAP regulations related to navigation and specialized towing equipment were preempted by federal law, those dealing with staffing, training, and the operation of ships were not.\textsuperscript{94} The navigation and specialized towing equipment regulations were interpreted to be design and construction requirements, subjects that were preempted after \textit{Ray}.\textsuperscript{95} Design and construction requirements were classified as non-operational and subject to field preemption.\textsuperscript{96} The emergency equipment was not classified as a non-operational regulation, but as a design and construction requirement preempted by \textit{Ray}.\textsuperscript{97}

\textsuperscript{91} See Wash. Admin. Code § 317-21-230 (applying to vessels regardless of operation location); see also Intertanko, 148 F.3d at 1053 (providing outline of best achievable regulations); Crick, supra note 10, at 645-46 (discussing regulations and how they actually conflict with federal laws). Cf. \textit{Ray}, 435 U.S. at 151 (holding design and construction standards were preempted).

\textsuperscript{92} See \textit{Ray}, 435 U.S. at 180 (upholding tug escort provision with Puget Sound because it had insignificant international ramifications); see also Crick, supra note 10, at 646 (discussing how court may conclude that regulations "impermissibly interfere" with executive role). See generally Coleman, supra note 11, at 330 (noting that BAP regulations in \textit{Intertanko} are more severe, and stating that federal government sought to achieve international agreement on tanker design regulations).

\textsuperscript{93} See \textit{Intertanko v. Locke}, 148 F.3d at 1053, 1063 (9th Cir. 1998) (noting U.S. argument that other federal statutes aside from OPA preempt state law); see also Dubner, supra note 74, at 138 (describing arguments made in \textit{Intertanko}); Greenhouse, supra note 74, at A2 (noting that government's arguments were "with little more success" before Ninth Circuit). See generally Admiralty Law Institute: \textit{Admiralty Law at the Millenium, Panel Discussion of Uniformity in Maritime Law}, 23 MAR. LAW. 585, 586 (1999) (discussing basic preemption issues).

\textsuperscript{94} See \textit{Intertanko v. Locke}, 148 F.3d at 1066 (distinguishing activity covered by regulations as design or construction requirements); see also Dubner, supra note 74, at 155 (stating standard used in \textit{Intertanko}); Nicholas, supra note 22, at 2062-63 (discussing Court's ruling in \textit{Intertanko}). See generally McCormack, supra note 44, at 1496-97 (reviewing ruling in \textit{Intertanko}).

\textsuperscript{95} See \textit{Intertanko}, 148 F.3d at 1065-66 (providing non-preemptive regulations); see also Nicholas, supra note 22, at 2064 (discussing how court depended on \textit{Ray} as leading case on preemption of state tanker regulations). Cf. Chevron U.S.A. v. Hammond, 726 F.2d 483, 485 (9th Cir. 1984) (classifying regulation as water pollution standard). See generally \textit{Ray}, 435 U.S. at 171 (defining regulations as vessel operations).

\textsuperscript{96} See \textit{Intertanko v. Lowry}, 947 F. Supp. 1484, 1495 (W. D. Wash. 1996) (providing certain regulations were not preempted); see also \textit{Ray}, 435 U.S. at 171 (stating that state requirements "arising from the peculiarities of local waters that call for special precautionary measures" were not impliedly preempted); Loble, supra note 8, at 36 (discussing three implied preemption principles used in \textit{Intertanko}).

\textsuperscript{97} See Wash. Admin. Code § 317-21-265 (2) (requiring tankers to install emergency towing package in on bow and stern of vessel within 2 years of effective date); see also \textit{Intertanko}, 148 F.3d at 1053 (discussing Best Achievable regulations); Crick, supra note 10, at 644-46 (analyzing regulations and conflicts caused within certain areas of law). Cf. \textit{Chevron}, 726 F.2d at 485 (defining regulations in name of water pollution as opposed to operational);
Similarly, the navigation regulation was preempted by the PWSA as a design and construction requirement. In effect, fourteen of the sixteen regulations were deemed "operational" in nature and upheld. The court declined to extend Ray to requirements concerning operations, personnel qualifications, training, and manning. Section 1018 (a) of the OPA was found to have a non-preemptive effect, permitting states to regulate "operational" vessel activity. Finding that Washington's BAP regulations clearly concerned the discharge of oil, the appellate court held that they were not preempted by federal law and did not frustrate Congress' purposes. Furthermore, the court found that the BAP regulations: (1) did not violate the Commerce Clause or infringe upon the foreign affairs power of the federal government under the Constitution; and (2) were not preempted by international

Coleman, supra note 11, at 330-33 (comparing regulations found in Ray and Chevron, and describing importance of characterization of field that statute addresses or occupies). See generally Dubner, supra note 74, at 137-38 (discussing Intertanko's application of OPA).

98 See Intertanko, 148 F.3d at 1069 (preempting navigation regulation as operational); see also PWSA, Pub. L. No. 92-340, 86 Stat. 424 (providing design and other operational regulations are preempted); Nicholas, supra note 22, at 2065 (discussing preemption of regulations by PWSA). See generally Ray, 435 U.S. at 153 (examining definition of regulations).


100 See Intertanko v. Locke, 148 F.3d at 1059 (relying on Ray and distinguishing between operational and non-operational regulations of Title II of Port and Waterways Safety Act); see also PWSA, Pub. L. No. 92-340, 86 Stat. 424 (preempting operational regulations); Petitioner's Brief, supra note 9, at 11 (claiming Ray was confined to requirements specifically invalidated); Coleman, supra note 11, at 341 (referring to regulations in light of OPA). Cf. Chevron, 726 F.2d at 486 (upholding regulations deemed to be pollution preventive). See generally Ray, 435 U.S. at 153 (providing design and construction regulations were preempted).

101 See Intertanko v. Locke, 148 F.3d at 1061-62 (recognizing that Section 1018(a) of OPA does not fully preempt states from "imposing ... requirements with respect to the pollution by oil," and congressional intent to permit state regulation of tank vessels); see also OPA, 33 U.S.C. § 2718 (authorizing states to enact liability plans related to discharge); Petitioner's Brief, supra note 9, at 9 (indicating that Congress was willing to permit state efforts for oil spill prevention, removal, liability, and compensation). See generally Devine & Johnston, supra note 20, at 377 (referring to BAP regulations within meaning of OPA); Dubner, supra note 74, at 145-46 (stating that Supreme Court held design and construction of ships should be left to federal government); Morgan, supra note 61, at 4 (discussing language of OPA); Ryan, supra note 99, at 33 (analyzing OPA regulations).

102 See Intertanko, 148 F.3d at 1060 (holding that OPA did not preempt oil spill prevention requirements set forth in BAP Regulations and that purpose of OPA was not frustrated in light of full purposes and objectives of Congress in "relevant legislative field" as opposed to single act). See generally Dubner, supra note 74, at 138 (discussing Washington maritime requirements and OPA); Morgan, supra note 61, at 5 (discussing limitations and general objectives of OPA); Mullahy, supra note 99, at 610-612 (discussing BAP standards and purposes of OPA).
treaties. 103

The United States Supreme Court reversed the appeals court, holding that Washington rules concerning crew training, English language proficiency, navigation watch, and accident reporting were preempted by federal law. 104 Writing for a unanimous court, Justice Kennedy stated that "uniform national rules regarding general tanker design, operation and seaworthiness have been mandated" by federal law. 105 Federal law that is supplemented by state law was deemed to have a compromising effect on "the uniformity the federal rule itself achieves." 106 Justice Kennedy addressed the area of maritime law and commerce as "an area where the federal interest has been manifest since the beginning of our republic and is now well-established." 107 States, however,

103 See Intertanko v. Locke, 148 F.3d at 1063. The court refused to read Section 1018 in a manner that would permit "state tanker regulation only when field in question is not subject to international regulation." See id. Further, the court held that the United States Coast Guard was not acting within its scope of its congressionally delegated authority under the Oil Pollution Act in enacting regulations that purportedly preempted state law. See id. at 1067. Intertanko's contention that the BAP regulations violated the Commerce Clause was found to be without merit because of the lack of evidence establishing an incidental burden on interstate and foreign commerce. Case law has defined how an incidental burden was "clearly excessive in relation to the putative local benefits." See Pacific Northwest Venison Producers v. Smitch, 20 F.3d 1008, 1012 (9th Cir. 1994) (quoted and cited in Intertanko).

104 See Intertanko v. Locke (Locke), 120 S. Ct. 1135, 1143 (2000). The Supreme Court relied on Ray, holding some of the state regulations were preempted. See id. at 1145. The Washington best achievable protection laws are set forth according to the specific area of law covered. See Intertanko, 148 F.3d at 153.

105 See Locke, 120 S. Ct. at 1148 (addressing PWSA in particular); see also Susan Gordon, U.S. Supreme Court Rejects Washington State's Oil-Tanker Rules, THE NEWS TRIBUNE, Mar. 7, 2000, at 1 (referring to unusual circumstances where state law may supercede federal law); The Associated Press, State Rules are Struck Down by Court, JOURNAL OF COMMERCE, Mar. 8, 2000, at 19 (discussing how Court held that state rules upset federal government authority); U.S. Supreme Court Partially Invalidates Washington's Oil Spill Prevention Law, BUSINESS WIRE, Mar. 6, 2000, at 1 (providing how Coast Guard plays role in creating uniform national laws).

106 See Locke, 120 S. Ct. at 1150 (showing deference to federal law); see also A Weekly Roundup of Excerpted Editorial Opinion, THE WASHINGTON POST, Mar. 9, 2000, at 1 (discussing how uniformity was held despite admission of importance for stricter regulation); Bruce Barnard, Shipowners Fear Crackdown by EU, JOURNAL OF COMMERCE, March 9, 2000, at 16 (referring to uniformity favored by European shipowners); Tankers and Safety, JOURNAL OF COMMERCE, Mar. 13, 2000, at 6 (providing that "crazy quilt of conflicting regional regulations" would result without uniformity).

107 See Locke, 120 S. Ct. at 1143. The Ninth Circuit referred to the arguments of uniformity argued in Chevron. See Intertanko v. Locke, 148 F.3d at 1063. Chevron suggested that strict uniformity was not as necessary and that states could impose regulations that go beyond minimum standards in waters subject to federal jurisdiction. See Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483, 483-86 (9th Cir. 1984). The case also discusses how federal and international standards have been undermined. See id. The Ninth Circuit court in Intertanko, rejected this argument, reasoning that Congress did not intend to preclude state legislation. See Intertanko, 148 F.3d at 1061-62. The BAP regulations were held not to frustrate the purposes and objectives of Congress by conflicting with international treaties. Further, the court did not recognize the burden placed on foreign commerce. The Ninth Circuit reasoned that the regulations were not argued to be in favor of state interests. See id.
maintain some power to set their own safety standards addressing unique local waterway conditions where the regulation is directed at “peculiarities of local waters” and does not conflict with federal rules. For example, several of Washington’s regulations concerning specific needs of navigation in Puget Sound may be deemed to have “limited extraterritorial effect,” and therefore, not preempted. Similar local requirements, including watch requirements at a time of restricted visibility in Puget Sound, were remanded for review.

The Supreme Court based its decision of exclusive federal regulation primarily on the Ports and Waterways Safety Act, which requires the Coast Guard to issue regulations governing tanker design, construction, operation, manning, repair, and personnel qualification. States, however, may enact laws regarding vessel traffic and navigation, areas that are not required to be federally regulated by the Coast Guard. The Supreme Court also analyzed the language of the OPA and concluded that “if Congress had intended to disrupt national uniformity in all of these matters” it would have been done so directly. The decision, however, does

108 See Locke, 120 S. Ct. at 1148. Depth and narrowness were exemplified as “peculiarities.” Also, local waterway concerns would be considered an area for state control. The regulations at issue addressed national and international concerns instead of “peculiar” local interests. Regulations such as vessel design, construction, equipment, and personnel operations were deemed to be of greater importance to all nations, requiring uniformity. See id. at 1149.

109 See Locke, 120 S. Ct. at 1152. The Court discussed how regulations addressing peculiarities should be subject to conflict as opposed to field preemption. See id. One scholar analyzes the conflict preemption test. See Schwarzer, supra note 12, at 460. Conflict preemption exists where states law either: (1) makes it “impossible... to comply with both federal and state law” or (2) would frustrate “the accomplishment and execution of the full purposes and objectives of Congress.” See Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

110 See Locke, 120 S. Ct. at 1152. The Court reviewed the watch requirements within Puget Sound. See id. Vessels must comply with watch manning requirements for navigation, pilotage, security, anchor, and engineering watches throughout the vessel owner’s fleet. See WASH. ADMIN. CODE § 317-21-200 (Watch Practicing Operating Procedures).

111 See Locke, 120 S. Ct. at 1144 (discussing two titles within Act as applied in Ray); see also Petitioner’s Brief, supra note 9, at 23-24 (describing how PWSA authorized Coast Guard to establish minimum safety standards); Coleman, supra note 11, at 331-32 (explaining Chevron and that provisions preempted state action on same subject). See generally Allen, supra note 25, at 19 (noting that PWSA/PTSA may have occupied the field).

112 See Locke, 120 S. Ct. at 1144 (permitting Coast Guard to enact measures regarding vessel traffic); see also Intertanko, 148 F.3d 1053, 1067-68 (1998) (examining whether Coast Guard statements preempted BAP regulations); Petitioner’s Brief, supra note 9, at 33-34 (discussing Coast Guard view that navigational safety is federal government power). See generally Michael P. Donaldson, The Oil Pollution Act of 1990: Reaction and Response, 3 VILL. ENVTL. L.J. 283, 287-293 (1992) (reviewing regulations considered under OPA and ramifications of broad and narrow interpretations).

113 See Locke, 120 S. Ct. at 1146. The Court referred to the savings clause in Title I. Explicit provisions were interpreted to provide for a limited savings clause. The PWSA, and the
not limit the ability of the state to impose additional liability in response to oil discharges within their jurisdictions.114

The Court did not reach the issue of whether any international treaties would preempt the state regulations, but instead, focused on congressional intent, within the federal statutory scheme, in promoting national uniformity in the context of maritime commerce.115 Intertanko's objective is to raise international marine safety standards, a goal that was not achievable if the United States permitted states and municipalities to enact laws that conflicted with their commitments with foreign nations.116 Justice Kennedy was sympathetic with environmental concerns and addressed the "oil's proximity to coastal life and its destructive power."117 The issue, however, was not "adequate regulation but political responsibility," a responsibility that was held to belong to Congress and the Coast Guard.118

regulations promulgated under the PWSA were held to have a preemptive effect within the meaning of the savings clause. Without explicit text indicating a non-preemptive effect, the court held that states might not enact "wide-ranging" regulations. See id.

114 See Locke, 120 S. Ct. at 1146 (discussing savings clause within Oil Pollution Act); see also OPA 33 U.S.C. § 2718(a)(c) (imposing liability, requirements, and penalties relating to oil spill discharges); Donaldson, supra note 112, at 313-319 (considering industry and international reactions to OPA). See generally David P. Lewis, The Limits of Liability: Can Alaska Oil Spill Victims Recover Pure Economic Loss?, 10 ALASKA L. REV. 87, 124-126 (1993) (discussing effects of uncontrolled liability under liability plans).


116 See Locke, 120 S. Ct. at 1142 (providing Intertanko's argument that development of international standards would be "defeated" if local political subdivisions imposed differing regulatory regimes); see also Loble, supra note 8, at 66-67 (discussing Intertanko motto is to promote "Safe Transport, Cleaner Seas, and Free Competition"). See generally Coleman, supra note 11, at 325 (contending that international approach provides consistency and facilitates flow of commerce); Devine & Johnston, supra note 20, at 377 (referring to BAP regulations and foreign affairs power of federal government).

117 See Locke, 120 S. Ct. at 1152 (discussing "destructive power" of oil spills); see also Falvey, supra note 1, at 364 (describing effect of oil spill on state waters and animals); Millard, supra note 1, at 340-46 (referring to Exxon Valdez oil spill disaster); Mooney, supra note 1, at A1 (noting local consequences of environmental disasters).

118 See Locke, 120 S. Ct. at 1152 (describing political responsibility of Coast Guard and Congress to create uniformity in maritime regulation, and discussing procedure through which to achieve uniformity and formulate national maritime laws as compromise between ideas of state government, local government, environmental groups, ports and harbors); see also Coleman, supra note 11, at 313-27 (discussing adoption of doctrine of federal preemption to resolve conflicts between federal and state law with regards to issues of maritime safety and regulation). See generally Ray v. Atlantic Richfield Co., 435 U.S. 151, 163-65 (1978) (developing federal responsibility with regards to maritime issues, and, under supremacy
III. Practical Issues

A. Trade Barriers

The Supreme Court has reasserted national uniform standards for vessel safety and oil spill prevention.\(^{119}\) Intertanko has argued that uniformity is a significant national objective because the U.S. must be able to effectively approach complex maritime safety and environmental protection issues.\(^{120}\) Conflicting state regulations have been criticized as trade barriers because of their international application to foreign vessel owners who will face a conflict with the law of their nation.\(^{121}\) Intertanko has warned that the lack of uniformity will lead to the formation of small entities of tanker owners interested in particular regions, causing Intertanko to lose its voice as the tanker industry's global representative.\(^{122}\) Uniformity of maritime law would be served with one set of safety regulations for the prevention and clean up of oil spills.\(^{123}\) States should not be
granted the power to impose additional requirements beyond federal requirements in the interest of the nation's ability to freely participate in international commerce.124

B. National Uniformity

Intertanko argued that marine and environmental safety areas have traditionally been regulated by the national government, including issues of waterborne transport, safe design, and operation of ships.125 Intertanko also noted statements of Alexander Hamilton, addressing a need for national uniformity of maritime commercial law.126 In particular, Congress has exercised its constitutionally enumerated powers to promulgate safety and environmental standards and requirements for vessels engaged in interstate and foreign commerce.127 These environmental standards, however, do not usually preempt state regulation.128 The PWSA, for example, distinctly delegates power to the states to enact stricter safety

power to enact liability plans).

124 See Woods, supra note 62, at 9 (analyzing effect of different state and federal maritime laws on international commerce, through discussion of state regulation that required three licensed desk officers as opposed to federal regulation that required two desk officers, thus compelling vessel operators to hire addition crew in order to traverse through waters of that state); see also Letourneau, supra note 73, at 31 (discussing federal preemption of state imposed maritime regulation).

125 See Petitioner's Brief, supra note 9, at 11 (arguing marine safety and environmental protection are matters of "explicit, traditional national concern"); see also Dubner, supra note 74, at 159 (discussing conflicting problems between state and international law); Loble, supra note 8, at 66 (noting BAP standards invade areas occupied by national government); Nicholas, supra note 22, at 2071-72 (discussing historic regulation of "environmentally sound" vessel operation through Admiralty and Commerce Clause). See generally Donald Rothwell, Navigational Rights and Freedoms in the Asian Pacific Following Entry into Force of the Law of Sea Convention, 35 VA. J. INT'L L. 527, 590-91 (discussing global concerns for protecting environment).

126 See Petitioner's Brief, supra note 9, at 18 (discussing The Federalist No. 80 in which Alexander Hamilton describes how maritime issues generally depend on laws of nations and that these issues "commonly affect the right of foreigners"). See generally Allen, supra note 25, at 21-23 (discussing interpretation of Commerce Clause and its influence on creation of uniform maritime laws).

127 See Petitioner's Brief, supra note 9, at 11 (providing analysis of Commerce Clause); see also Loble, supra note 8, at 66-68 (discussing how BAP regulations impose different requirements or implementation deadlines from federal regulations and how such regulations "invade areas long occupied by the U.S. federal government and other national governments," thus affecting interstate and international commerce).

equipment requirements for structures. Congressional intent has consistently been that the standards require uniformity.

The federal laws, coupled with international treaties, have promoted national uniformity by handling matters of environmental protection with a "single decision maker that can speak for the country." Congress and the Executive Branch have also never expressed reservations to treaties, on marine environment protection or vessel safety, which would allow states to modify the provisions in the treaty. Accordingly, in keeping with our Constitutional traditions, federal law and treaties in this area should be upheld as supreme law; as opposed to permitting these laws to become "dependent for its meaning and existence on the interpretations . . . of state governments acting unilaterally."

In 1999, however, the Court issued three separate decisions, striking down federal statutes that permitted suits against individual states, reaffirming the sovereign immunity of states under the Eleventh Amendment. These cases held that only two

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129 See Petitioner's Brief, supra note 9, at 23-24. The brief explains how PWSA authorized the Coast Guard to establish minimum safety standards, preserving states' authority to enact greater safety requirements. See id. In each area, the Coast Guard has explicitly stated that they intend the provisions "to preempt State action addressing the same subject matter" and that they intend to "oust State action." See id. at 34-35. The brief quotes preemptive statements urging state regulations to "give way." See id. Federal laws set forth minimum standards. See 33 U.S.C. § 1225(b). Further, they establish minimum standards for self-propelled tankers. See 46 U.S.C. § 3708.

130 See Petitioner's Brief, supra note 9, at 11 (recognizing need by Framers for uniformity in maritime regulation, and discussing argument made by Intertanko that Congress has never contemplated joint role for states and local governments in matters relating to tanker standards); see also Mullahy, supra note 99, at 615 (discussing case law demonstrating interest of national uniformity). See generally Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 403-04 (1988) (emphasizing that national uniformity also serves interest of strong maritime economy).

131 See Petitioner's Brief, supra note 9, at 11; see also Bederman, supra note 22, at 33 (reviewing interest of national uniformity); Greenhouse, supra note 74, at A2 (reporting statement of national government to Supreme Court). See, e.g., Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (recognizing national interest for regulating vessels).

132 See Petitioner's Brief, supra note 9, at 12 (arguing that federal law and treaties should not be deviated from); see also Intertanko v. Locke, 120 S. Ct. 1135, 1145 (2000) (referring to notion that nation speaks with one voice). See generally Ray, 435 U.S. at 155 (analyzing impact of international treaties); Jarvis, supra note 71, at 3 (determining to what extent states are bound by international agreements).

133 See Petitioner's Brief, supra note 9, at 12 (noting Intertanko has also argued that allowing state views to superecede national judgments governing vessel safety would be "constitutionally repugnant"); see also Coleman, supra note 11, at 306-313 (explaining sources of federal preemption and referring to areas of maritime law where constitutional sources are relevant); Mullahy, supra note 99, at 616-17 (reviewing preemption of maritime regulations within Supremacy Clause); Wyatt, supra note 17, at 4-6 (providing constitutional evolution of preemption in context of maritime law).

134 See Alden v. Maine, 119 S. Ct. 2240 (1999) (deciding sovereign immunity in context of Fair Labor Standards Act litigation); see also Florida Prepaid Postsecondary Education Expense
exceptions exist that permit a resident of a state, another state or a foreign country to file suit against a state in federal court: (1) when Congress authorizes such a suit under the Fourteenth Amendment; or (2) when the state consents to such a suit.\textsuperscript{135} Providing the conditions are not met, a state is immune from suit in their own courts.\textsuperscript{136} These decisions appear to seriously undermine the power of the federal government.\textsuperscript{137} The Supreme Court decision did not force tankers to comply with individual state regulations, an outcome that has been criticized as being detrimental to the purpose behind state regulations, namely, increased safety, and would have created "hideously inefficient" situations.\textsuperscript{138}


\textsuperscript{135} See U.S. CONST. art. I, § 8 et seq; see also Florida v. College Savings Bank, 119 S. Ct. at 2206-08 (discussing how Congress may seek to remedy Fourteenth Amendment violation through legislation); \textit{Alden}, 119 S. Ct at 2262 (providing Eleventh Amendment prevented congressional authorization of private suits in federal courts against nonconsenting states). See, e.g., Hess v. Port-Authority Trans-Hudson Corp., 513 U.S. 30, 39 (1994) (noting that States are shielded by Eleventh Amendment from amenability to suit in federal courts where States have not consented to such suits); Blatchford v. Native Village of Noatak, 501 U.S. 773, 781 (1991) (holding that Congress may subject States to private suits in their own courts only where States have surrendered such power to Congress in Constitution). See \textit{generally} Letourneau, \textit{supra} note 73, at 31 (providing that states are amenable to suit in federal court only where Congress has authorized such suits pursuant to Fourteenth Amendment or when states themselves have consented to suit); William E. Thro, \textit{The Eleventh Amendment Revolution in the Lower Federal Courts}, 25 J.C. & U.L. 501, 504 (1999) (stating that Eleventh Amendment immunity of states is almost absolute).

\textsuperscript{136} See \textit{Alden}, 119 S. Ct. at 2263. The \textit{Alden} decision analyzed essential principles of federalism in context of sovereign immunity. The Court also considered that a state can retain constitutional immunity from private suits in their own courts, concluding that "Congress lacks the Article I power to subject the States to private suits." See \textit{id}. Furthermore, Congress may not use its Article I power to authorize private suits against States without prior consent of state. See Seminole Tribe v. Florida, 517 U.S. 44, 54-55 (1996). The Constitution has been interpreted to prevent individuals from bringing suit against a state in either state or federal court without consent of state. See Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 59 (1944) (Frankfurter, J., dissenting). Scholars have argued that states enjoy sovereign immunity protection from private actions based on Article I statutes. See \textit{generally} Richard H. Seamon, \textit{The Sovereign Immunity of States in Their Own Courts}, 37 BRANDEIS L.J. 319, 414 (1988).

\textsuperscript{137} See \textit{Alden}, 119 S. Ct. at 2245 (providing that states are entitled to reciprocal immunity similar to that enjoyed by federal government); see \textit{also} Letourneau, \textit{supra} note 73, at 31 (expressing doubts regarding Intertanko's position before U.S. Supreme Court).

\textsuperscript{138} See Woods, \textit{supra} note 62, at 9 (discussing scenarios where complying with state law would be unreasonable and warning that vessels will not be any more safe with state laws); see \textit{also} Intertanko v. Locke, 148 F.3d 1053, 1066 (9th Cir. 1998) (stating that OPA does not federally preempt BAP regulations); Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483, 495-501 (9th Cir. 1984) (finding doctrine of implied preemption inapplicable). See \textit{generally} Lind, \textit{supra} note 63, at 116 n.6 (discussing pollution prevention act of 1990 requires EPA to work with states to develop international pollution prevention approaches); Schminke, \textit{supra} note 119, at 173
Another issue to be explored is whether BAP regulations frustrate Congress' objectives in enacting OPA and international treaties.\textsuperscript{139} In its interpretation of OPA, the state of Washington did not argue that their vessel regulations were not within the subject matter of federal statutes and regulations, nor that the state regulations escape preemption.\textsuperscript{140} Instead, Washington argued that the savings provision of OPA reflected congressional intent authorizing states to impose strict oil spill prevention regulations.\textsuperscript{141} In response, Intertanko contended that the savings provision strictly preserves local, state, and federal authority to impose penalties, fines, or liabilities regarding oil spills.\textsuperscript{142} A central theme underlying Intertanko's arguments was the importance of national uniformity as contemplated by the framers of the Constitution at the time the Union was being formed.\textsuperscript{143} Intertanko specifically contended that "local interests must yield to the common welfare" for subjects of

\textsuperscript{139} See 33 U.S.C. § 1018(a); Allen, supra note 25, at 75 (noting that court did not consider BAP regulations as related to SOLAS and preemption and invoking Hammond's "treaties set only minimum standards" rule); Crick, supra note 10, at 643 (discussing how Washington's laws seek to protect state marine environment, a goal compatible with OPA and other federal law); Schminke, supra note 119, at 188 (explaining relationship between OPA and maritime law and how Coast Guard was given authority to establish stricter requirements than those set by international agreements).

\textsuperscript{140} See Petitioner's Brief, supra note 9, at 12 (arguing that state regulations do not escape preemption because they do not "fall within a void of federal regulation"); see also Ray v. Atlantic Richfield Co., 435 U.S. 151, 151 (1978) (finding some state safety regulations preempted and upholding others); Rothwell, supra note 125, at 590 (discussing rights to enact laws to control pollution). See generally Mullahy, supra note 99, at 616 (stating pollution laws do not prohibit states from enacting stricter legislation).

\textsuperscript{141} See State Respondent's Brief to the Supreme Court at 25-27, Intertanko v. Locke, 148 F.3d 1053 (9th Cir. 1998) (No. 98-1701, 98-1706) (arguing that states can impose "more stringent oil spill prevention measures") cert granted, 527 U.S. 1063 (1999), rev'd, 120 S. Ct. 1135 (2000); see also Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 452-53 (1960) (holding that federal statutes relating to inspection, approval, and licensing of steam vessels in interstate commerce preempted state laws and that Code unconstitutionally burdened interstate commerce); Dubner, supra note 74, at 158 (stating Washington laws did not interfere with federal laws). But see Zherney v. Miller, 389 U.S. 429, 441 (1968) (holding that state regulations may not override international agreements).

\textsuperscript{142} See Petitioner's Brief, supra note 9, at 13 (providing that state interpretation of savings provision dramatically distorts lower courts' constitutional analysis); see also Mullahy, supra note 99, at 616 (discussing exclusive jurisdiction of federal courts). See generally OPA, 33 U.S.C. § 1018(a) (allocating authority for oil spill liability plans); Francis J. Gonyon, Six Years Before the Mast: The Evolution of the Oil Pollution Act of 1990, 9 U.S.F. MAR. L.J. 105, 110-118 (1990) (tracing development, history, and ramifications of OPA).

\textsuperscript{143} See Petitioner's Brief, supra note 9, at 18-21. Intertanko argued that national government was given authority to impose uniform requirements for interstate and international commerce. See id. This power was given at a time when all commerce was maritime. See id. at 20. Furthermore, Petitioner discussed Alexander Hamilton's view that it was necessary for the judiciary to promote a uniform body of maritime law. See id. at 18 n.10.
national concern.\textsuperscript{144}

\textbf{C. Recent Legislation}

In addition, President Clinton issued an executive order, on August 5, 1999, prohibiting agencies from interpreting a federal statute as preempting state law unless the statute contains an express preemption.\textsuperscript{145} Alternatively, the federal statute must provide clear evidence that Congress intended to preempt state law, or demonstrate how exercise of state authority conflicts with the exercise of federal authority.\textsuperscript{146} The order further provides that all executive branch departments and agencies are to take into account certain fundamental federalist principles in formulating and implementing policies.\textsuperscript{147}

A pending bill in Congress, entitled The Federalism Accountability Act of 1999 also deserves some exploration because it appears to undermine the legal doctrine of federal preemption.\textsuperscript{148} The Senate’s version of the bill proposes to completely eliminate implied preemption with exceptions, threatening national uniformity within the context of maritime law.\textsuperscript{149} Express

\begin{footnotesize}
\textsuperscript{144} See Petitioner’s Brief, supra note 9, at 20 (stating that states were prohibited from imposing restrictions); see also Intertanko v. Locke, 148 F.3d 1053, 1061-64 (9th Cir. 1998) (arguing that states could not control national subject of maritime commerce); Mullahy, supra note 99, at 616 (discussing state right to impose restrictions on maritime laws). But see Rothwell, supra note 125, at §§90-91 (discussing state ability to control pollution).
\textsuperscript{145} See Exec. Order on Federalism at 1, available at 1999 WL 588094 (Aug. 5, 1999) [hereinafter Exec. Order]. The order provides that all executive branch departments and agencies are to take into account certain fundamental federalism principles in formulating and implementing policies. Executive branch departments are expected to incorporate the notion that uniform federal regulations can inhibit the creation of effective solutions to societal problems. The order implies that strict requirements imposed on legislators may not result in interpreting federal statutes as preemptive of state law. See id. The vessel group, Intertanko, has suggested that a federal uniform approach is not always best. See Petitioner’s Brief, supra note 9, at 20.
\textsuperscript{146} See Exec. Order, supra note 145, at 1. The legislature describes special requirements for preemption. Legislators must abide with these special requirements in order for the statute to be interpreted as preempting state law. Effectively, the order may serve to shift power back to the states. This may provide a “green light” for more state regulation on environmental and maritime safety issues. See id.
\textsuperscript{147} See Exec. Order, supra note 145, at 1. The legislature incorporated the ideals and beliefs underlying federalism. They provided that non-national issues are “most appropriately addressed by the level of government closest to the people.” Agencies were directed to narrowly construe federal statutes as preempting state law. See id.
\textsuperscript{149} See S. 1214, at § 6. The bill provides exceptions where federal and state laws are in
\end{footnotesize}
preemption would be recognized providing Congress expressly states, in advance, every section of a bill that is intended to be preemptive. Also, the law must identify the constitutional basis for each such preemption. Under the bill, legislators will have to be explicit in order to effectuate preemption, a burden that may lie in favor of state regulations.

IV. RESOLVING THE CONFLICT BETWEEN ENVIRONMENTAL AND MARITIME LAW

The doctrine of federal preemption may be considered inapplicable to BAP regulations when read within the context of Professor Lyndon's works. Lyndon warns that courts should not rush to replace state law using the doctrine of preemption before reaching a complete understanding of the function and capability of tort law. It is not uncommon for courts to be drawn to preemption direct conflict. It redefines the preemption doctrine against interest of uniformity. The bill addresses federal and state concerns, including agencies. Congressional committee reports will also be required to comply with requirements imposed on rules promulgated by agencies. See id.

150 See S. 1214, at § 6(a)(1). The bill requires that such preemptive sections be explicitly identified in language of statute. This may lead to overinclusiveness. State law may be displaced where such displacement is not truly necessary. It also may lead to underinclusiveness, undermining the effectiveness of federal law by failing to replace state law. See id.

151 See S. 1214, at § 6(a)(1) (adding requirement for narrow interpretation of federal statute); see also S. 1214, at § 8 (treating committee reports, joint explanatory statement accompanying conference report and rules similarly). See generally Intertanko v. Locke, 148 F.3d 1053, 1062 (9th Cir. 1998) (using Commerce, Supremacy, and Treaty Clauses); Coleman, supra note 11, at 311 (discussing sources of preemption used).

152 See S. 1214, at § 6. The bill sets forth strict requirements that lead to the narrow construction of federal statutes. Under the pending bill, the committee reports must provide reasons for preemption. The required description must explain the preemptive impact. Further, requirements of the bill apply to the state and local governments as directed by the Director of Congressional Budget Office (CBO). See id.

153 See Mary L. Lyndon, Tort Law, Preemption, and Risk Management, 2 WIDENER L. SYMP. J. 69 (1996) [hereinafter Preemption, and Risk Management] (discussing preemption as legal mechanism that simply does not address difficult problems facing regulation and tort law); see also Mary L. Lyndon, Tort Law and Technology, 12 YALE J. ON REG. 137 (1995) [hereinafter Tort Law and Technology] (analyzing how courts utilize preemption doctrine when there are shortcomings in tort law). See generally Mullahy, supra note 99, at 619 (discussing preemption and ability of Congress to provide for it); Stabile, supra note 119, at 1-3 (providing that courts should apply doctrine of federal preemption).

due to the shortcomings of tort law, after blindly assuming Congress fully considered the effects of removing tort liability.\footnote{55} The works also assert that the doctrine is an insufficient rule in a variety of social and economic contexts and risk management issues within environmental law, because it encourages division between state and federal interest.\footnote{56} On a domestic level, the preemption doctrine is an insufficient tool for resolving the conflict between state and federal law because the state desire for social progress is left unfulfilled.\footnote{57} On an international level, however, preemption is appropriate because it promotes the uniformity required due to the impact of maritime commerce on the national economy and positive commercial relations.\footnote{58}

An effective approach toward resolving federal and state interests in regulating tanker transport of oil within state waters might be a hybrid system of national standards and states implementation and enforcement of these standards.\footnote{59} Traditionally, in the areas of regulated entities, laws have followed a command and control approach, a prohibitive type of ruling that controls behavior instead preempt).

\footnote{55} See Tort Law and Technology, supra note 153, at 140. Lyndon describes how courts escape dysfunctional characteristics of tort law by using the preemption doctrine. Lyndon, however, notes that the regulations that are used to preempt the judicial management of the specific subject are also imperfect. One type of regulation with shortcomings are those of the FDA, approving DES drug which caused serious health and pregnancy problems. Case law in which courts have assumed preemption doctrine was appropriate is also analyzed. See id.

\footnote{56} See Tort Law and Technology, supra note 153, at 137 (discussing preemption within domestic context, not in context where U.S. is party to international agreement); see also Cox & Seidman, supra note 154, at 211 (analyzing judicial application of preemption doctrine to conflicting federal and state labor laws). See, e.g., Drummonds, supra note 154, at 469 (examining preemption doctrine’s application to employment law and workplace regulation); Lyndon, Tort Law, Preemption, and Risk Management, supra note 153, at 76 (discussing how territorial division between state and federal interest is promoted in analyzing whether federal law has “occupied the field” or conflicted with state law).

\footnote{57} See Tort Law and Technology, supra note 153, at 143 (discussing how tort law and regulation should be coordinated to provide legal reform and analyzing preemption doctrine within health, safety, and environmental context); Lyndon, Tort Law, Preemption, and Risk Management, supra note 153, at 73 (discussing same).

\footnote{58} See Tort Law, Preemption, and Risk Management, supra note 153, at 76. Lyndon notes how preemption allows the “economy’s systematic dimensions to function effectively” and to flourish. See id. at 75-76. The article describes the significance of uniformity in the context of commercial regulation. See id. at 77. In the context of health and environment, preemption may fail to guarantee legal protection instead of alleviating social risks. Lyndon proposes a balance of uniformity with vessel safety issues and oil spill prevention interests. See id.

\footnote{59} See Intertanko v. Locke, 148 F.3d 1053, 1061-63 (9th Cir. 1998) (compromising state and federal interests); see also Coleman, supra note 11, at 310 (referring to concurrent state and federal use of Treaty Clause under certain circumstances); Nicholas, supra note 22, at 2064 (distinguishing between state and federal interests in context of field preemption). See generally Ray v. Atlantic Richfield, 435 U.S. 151, 156-58 (1978) (providing that regulations allowed vessels to comply with both state and federal regulations).
of a preventive mode that influences behavior. One alternative to the command-and-control law is state incentive-based oil tanker regulations, as discussed in a proposal by Mark T. Peterson. Peterson presents oil tanker owners with the option of complying with enacted requirements in exchange for a reduction or cap of potential liability in the event of an oil spill. Contrary to incentive based regulations, a command-and-control approach prevents technology development and places the burden of strict standards on new operations. Also, market-based pollution control has a limited influence on the oil spill problem because there is no level of legally tolerable deliberate oil spill release. Peterson's proposal establishes minimum requirements and provides economic rewards, in the form of limitations on liability to shippers who adopt further preventive measures beyond the scope of the regulation. The

160 See Daniel J. Fiorino, Rethinking Environmental Regulation: Perspectives on Law and Governance, 23 HARV. ENVTL. L. REV. 441, 459 (1999). The article discusses behavioral deterrence and enforcement within command and control laws. Fiorino refers to the mandatory type of regulations. Behavioral patterns are negative in response to these types of regulations. Preventive modes, such as incentive plans, influence behavior more effectively and positively. Enforcing compliance of regulations, in general, has been progressing to incentive types of behavioral control. See id.


163 See Peterson, supra note 2, at 299 (criticizing command-and-control regulations because some requirements fail to meet specific conditions and are difficult to administer and enforce and they require larger bureaucracies, favoring existing operations in order to avoid high costs).

164 See Peterson, supra note 2, at 299-300. Usually, market-based pollution has applied to environmental situations in which pollutants are allowed some level of deliberate release. Peterson compares sulfur releases into the air, which are controlled, unlike accidental oil spills. Emission trading under the Clean Air Act has successfully used incentive based regulation. Tradable permits are offered as an example of traditional incentive based regulations that have limited effect. See id.

165 See Peterson, supra note 2, at 300. The plan combines traditional command-and-control and incentive based regulation, setting forth some requirements and creating an option. See id. Peterson discusses the company may choose to adopt a program and decide how to implement the requirements, considering their policy. See id. at 300-01. Incentives may be
proposal invites vessel owners to conduct a cost-benefit analysis of the state requirements and their own needs in order to determine whether to adopt a cost effective prevention plan. \footnote{See Peterson, \textit{supra} note 2, at 305.} Aside from the benefits discussed, Peterson recognizes confusion may arise if states do not work together to implement similar requirements. \footnote{See Peterson, \textit{supra} note 2, at 306.}

In order to be effective, proposals should require uniformity among states, thereby, avoiding "state-port-shopping" by vessel owners and "a race to the bottom" in shipping regulations. \footnote{See Allen, \textit{supra} note 25, at 25. Allen discusses the problem between uniform international standards and unilateral action. Ultimately, the federal government's decision is a foreign policy choice. A uniform approach will prevent states from racing to the bottom and enacting lenient standards. The race will consist of substandard ships attracted to states with lax regulations, thereby avoiding demanding states. See \textit{id.}} Craig H. Allen warns that a "go-it-alone" approach may increase protection on a national level, but reduce protection on a global level and result in a loss of reciprocity for U.S. vessels abroad. \footnote{See Allen, \textit{supra} note 25, at 98. Allen warns that state actions may thwart efforts made by the U.S. with foreign nations. The U.S. must meet its treaty obligation to recognize certificates issued by the parties to the treaty. See \textit{id.} He also discusses how the International Maritime Organization, (IMO), representatives will suffer a loss in their bargaining power. See \textit{id.} at 99. The U.S. must be consistent with its arguments, urging stricter international standards. See \textit{id.}} Further, if the United States allows unilateral action, it will be faced with opposition from foreign nations when negotiating for stricter international standards. \footnote{See Allen, \textit{supra} note 25, at 100. Congress granted the power to control and regulate}
regulations that create negative foreign relations has been addressed by the Constitution and related federal law.\(^7\) Also, Allen raises the "no overlap rule," prohibiting state and federal regulations that overlap within one field, and its role in the dispute over vessel safety.\(^7\)

Perhaps the application of the "no overlap" rule would be clear if the regulations are titled non-operational or operational, dividing the field into occupation by the federal and state government, respectively.\(^4\) Conflict preemption is implied where "compliance with both federal and state regulations is a physical impossibility," as exemplified in design and technology requirements.\(^5\) Federal

 navigable U.S. waters to the federal government. See id. Allen acknowledges that states may share this power, subject to preemption. See id. at 101. It is internationally understood and accepted that a foreign vessel has the right of innocent passage and a right of transit passage. See id. at 100. The United States expects the same treatment in foreign waters. See id. Allen discusses how state regulations should exempt vessels in innocent passage in order to avoid foreign relation problems. See id. at 101.

\(^7\) See Allen, supra note 25, at 27. Allen discusses the limited role states play because the U.S. became a party to the International Maritime Organization, (IMO), convention. See id. The Tanker Safety and Pollution Prevention Conference, called by the U.S., recognized the importance of a global approach. See id. at 97. Allen notes that, in the same year, protocols to the MARPOL and SOLAS were passed. Further, the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers (STCW), provided qualification and training standards. The 1982 LOS Convention provided that international standards should be complied with while simultaneously allowing states to regulate sub-standard foreign vessels. Also, Congress has passed laws allowing vessels that have complied with international standards into U.S. waters. The President directed federal agencies to analyze the influence of federalism on new agency regulations. See id. at 102. An agency may conclude that a rule has a preemptive effect on state law. This conclusion may guide state legislatures, especially in situations in which the agency rule must be consistent with federal law. Allen notes some commentators have argued that federal agencies should be given "primary jurisdiction" over preemption challenges because the agencies have more reliable and exceptional knowledge in the specific area being regulated. See id. at 102-03.

\(^1\) See Allen, supra note 25, at 34-35. The article notes that vessels holding a federal license or inspection certificate may continue to face problems posed by state regulations. Allen cited the court in Ray, holding that the federal judgment prevails over state judgments. See id. However, states may apply reasonable "conservation and environmental protection measures" to vessels with federal licenses. See id. at 105. This may be true whether there is federal law on the specific area regulated. The overlapping regulations are enforced through a variety of sanctions. See id.

\(^4\) See Allen, supra note 25, at 35. Allen notes that states including Alaska, Washington, and New York regulate and bar maritime operations with laws overlapping federal laws and treaties. See id. Allen discusses the "occupation of the field" analysis used by the Ninth Circuit in Chevron. See id. at 107. The classification of the regulation, as operational or non-operational, was the determinative factor of the result. See id. Allen notes that the PWSA/PTSA may have occupied the field. See id. at 109. Also, the regulation should be considered with respect to the federal purposes of the regulations. See id.

\(^5\) See Coleman, supra note 11, at 325. Internationally, this approach is effective because it provides consistency between federal and foreign laws, facilitating the flow of commerce. Coleman recognizes the difficulties posed by state regulations with respect to international treaties. One such treaty is the U.S.-Canada Vessel Traffic Service Agreement, limiting the regulation posed to vessels with foreign "flag states." Coleman compares the regulations in Ray, which made it possible for vessels to comply with both state and federal regulations. See
preemption of state law may be necessary for non-operational regulations, including vessel design and construction, due to the commercial and international nature of shipping. In the non-operational context, there is a greater need for uniformity and agreeable international standards in order to prevent "state-port shopping" and a negative impact on foreign relations. This does not mean that federal laws cannot provide for "tug boat alternative" types of provisions within the traditional command-and-control approach. A state incentive approach for operational regulations should be used to prevent states from yielding completely to federal law and losing their police power. The state-port shopping in this context is not fatal to maritime commerce or reciprocity. Also, there is no actual conflict that would arise, preventing compliance with the regulations. The United States may continue to encourage strict regulations, working at a slower pace with foreign nations. Thus, the agreement reconciles the differences between id.

176 See Coleman, supra note 11, at 331-32. The PWSA/PTSA was analyzed by the Chevron court in order to determine congressional intent for occupying the field of tanker oil pollution regulations. See id. The court concluded that vessel equipment, a non-operational regulation, was implicitly preempted by the PWSA. See id. at 332-33. Allen notes the Ray Court also emphasized the classification of the regulation within the interpretation of the PWSA/PTSA preemption. See Allen, supra note 25, at 56-57. Also, the Senate Report for the PWSA stated that federal preemption applied for design and construction regulations. See id. at 98.

177 See Bederman, supra note 22, at 32-33 (discussing significance of uniformity for foreign commerce); see also Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 350-51 (1851) (providing uniformity is not required for local matters). See generally Nicholas, supra note 22, at 2071 (analyzing historical background of uniformity in maritime law).

178 See Coleman, supra note 11, at 330-31. Coleman notes that the BAP regulations in Intertanko are more severe. The BAP regulations are compared with some of the regulations upheld in Ray. One such regulation was the alternative tug escort feature. Tug alternatives provisions were within the traditional police power. See id. at n.135. Alternatives allowed for concurrent regulation. See id.

179 See Intertanko v. Locke, 148 F.3d 1053, 1063 (9th Cir. 1998) (requiring proof of burden on interstate and foreign commerce); see also Coleman, supra note 11, at 345 (discussing congressional intent was not to allow states to regulate areas affecting international and interstate trade); Petitioner's Brief, supra note 9, at 20 (arguing states were prohibited from regulating national concerns of maritime commerce). See generally Coleman, supra note 11, at 345 (noting growth of federal law, leaving less room for state regulations); Mullaly, supra note 99, at 612 (discussing how BAP standards may violate interstate commerce clause).

180 See Crick, supra note 10, at 643. Crick presents three situations in which state regulations can be held to be invalid. The first test discussed is whether the regulations create an actual conflict with the federal law. If an actual conflict is found, the federal law preempts the state regulation. An actual conflict exists when it is physically impossible to comply with both state and federal law or when the state law creates an obstacle to the execution of the full objectives of Congress. Crick concludes that the Washington's BAP requirements do not create an actual conflict. See id.

181 See Allen, supra note 25, at 29 (providing that U.S. must be consistent with national laws in order to be in position to urge stricter international standards and in effect, U.S. will receive reciprocal treatment for its own vessels and create positive foreign relations); see also
national and state interests, without neglecting to address their main concerns.\footnote{182}

CONCLUSION

Traditionally, federal law governed international maritime issues. Protection of the marine environment, however, has historically been within the reach of police powers of the states. The federal preemption doctrine as a proposed resolution to the conflict between state and federal law, is an insufficient doctrine on the domestic level. State BAP regulations will be discouraged rather than encouraged as a result of the \textit{Intertanko} decision. A compromise between state and federal governments and a division in the field, allowing state regulation of operations as opposed to non-operational requirements, may also be necessary. In light of \textit{Intertanko}, greater federal encroachment upon the state role in tanker safety and pollution prevention will be encouraged through an incentive approach. Congress, however, should follow a traditional command-and-control approach for non-operational regulations. Regulations need to be classified to clearly establish federal preemption of state law when international commerce is at issue. The tension of maritime law will begin to dissipate with resolutions providing states with sufficient power and with global progress towards strict international standards.

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Crick, supra note 10, at 644-45 (expressing that future regulations should clearly express congressional intent of preemption and interest of preserving “delicate field of international relations”).

\footnote{182 See Allen, supra note 25, at 15. Allen discusses problems in traditional approach to maritime preemption analysis. This approach does not adequately address federal role in foreign affairs. Also, it fails to recognize the significance of foreign commerce. Proposals must also respectfully incorporate the treaty obligations of the U.S. with foreign nations. Also, there is a need for more guidance in determining the scope of the state police power by courts. See id.}