States' Rights and the Oil Pollution Act of 1990: A Sea of Confusion?

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NOTE

STATES’ RIGHTS AND THE OIL POLLUTION ACT OF 1990: A SEA OF CONFUSION?

At 11:43 p.m., Bill Ryan, chief mate and second in command of the M/V Pacific Trader, stepped onto the bridge of his ship. The M/V Pacific Trader is a 730 foot, 80,000 dead-weight ton, single hull oil tanker which was en route from Indonesia to the port of Manchester, Washington with a cargo of 720,800 barrels of crude oil (approximately 30 million gallons). Although the current owner of the M/V Pacific Trader is an American-based company, the port of registry on the stern of the ship does not indicate American ownership. In addition, the ship flies the flag of Liberia and is governed by the laws of that country.

Ryan walked onto the bridge of the ship, grabbed a cup of coffee, and walked out on the starboard bridge wind. As he peered into the darkness, all he could see were the running lights of the ship. Visibility was limited by heavy fog to approximately an eighth of a mile, and even the stars were obscured by cloud cover. Ryan re-entered the bridge and prepared to assume the watch. All of the officers, with the exception of Ryan, were British; crew members in the deck department were Greek; and the unlicensed personnel down in engineering were Filipino.

1. All persons involved, the name of the vessel, and county of registry are fictitious. Any resemblance to any living person is purely coincidental. The Author is not attempting to make any particular statement about foreign-flagged vessels or foreign-trained crews. The narrative serves to illustrate conditions of ships that continue to trade in the United States, even after the adoption of the Oil Pollution Act of 1990’s new standards and procedures for the industry. See infra notes 7-13 and accompanying text. If Washington State’s Best Achievable Protection Standards withstand constitutional challenge, a vessel such as the M/V Pacific Trader would not be permitted to enter state waters and the possibility of an incident occurring that could lead to an oil spill would be drastically reduced.

2. Requirements as to the design, arrangements, and construction of a ship are governed by the laws of the state whose flag the ship flies. See NATIONAL RESEARCH COUNCIL, TANKER SPILLS: PREVENTION BY DESIGN 43-44 (1991) [hereinafter NATIONAL RESEARCH COUNCIL]. Flying the flag of a country other than that which owns the ship is commonly known in the industry as flying a “flag of convenience” since a flag state is selected “on the basis of favorable conditions for residents in terms of commercial flexibility and tax treatment.” Id. at 44 & n.10.
As Ryan relieved the watch, he heard the new helmsman, Georgios, talking to the crewmen going off watch. Ryan did not understand any of what was being said because it was all in Greek. He did, however, detect a distinct smell coming from Georgios. Even from where he was standing, a good six feet away, Ryan could smell alcohol emanating from Georgios—almost as if he had used it as aftershave.

The idea of alcohol on a ship was nothing new to Ryan. Although he had been drinking on ships since he was a young cadet at one of the country’s maritime colleges, the practice was never officially sanctioned. In fact, pursuant to the enactment of the Oil Pollution Act of 1990, all licensed officers on U.S. flagged vessels are subject to random drug and alcohol testing. On the *M/V Pacific Trader*, however, the consumption of alcohol was permitted, as long as the alcohol was not ingested four hours prior to standing watch. Even with Ryan’s sleep-deprived senses, it was obvious that Georgios had been drinking within the past four hours. According to company regulations, Ryan had to relieve Georgios of the helm and report him to the captain. Yet, after some consideration, Ryan decided that he would not report him; he had performed this transit before and concluded that Georgios probably would be alright.

For the past day, the ship had been skirting the West Coast, approximately forty miles out (in U.S. waters), trying to stay to the east of a storm line. If the *M/V Pacific Trader* was a U.S. flagged ship, two licensed officers would be required to be on the bridge while in U.S. waters. The *M/V Pacific Trader* was, however, governed by an international convention which did not require two officers to be on the bridge. Ryan was by himself. “Pretty lousy out there, huh?,” Ryan asked Georgios. All he received as a response was a quizzical grin. “I hope it’s the alcohol affecting him and not that he doesn’t understand what I’m saying,” Ryan thought. Unfortunately, it was both.

Ryan walked over to the radar and peered in. The choppy seas and squall lines to the north and west were wreaking havoc on the radar and were sending back false readings. After a few unsuccessful attempts to eliminate this clutter, Ryan took the information from the previous watch and went to the chartroom. A big sliding window in the chartroom was kept open so that the officer on watch could communicate with the helmsman. Ryan looked down at the chart and noticed that the last plot

5. See id.
was over an hour ago at 11:30 p.m. He hated to rely on such an old plot to determine his present location, but he had no other choice, since the ship had no Global Positioning System ("GPS"). He estimated that the ship would be picking up the Puget Sound pilot (who would assist in navigating the ship) in about two hours.

At 12:42 a.m., Ryan determined from his new plot that it was time to make a turn and head into the Straits of Juan de Fuca at the mouth of Puget Sound. In reality, due to the currents the ship was running against, the ship's position was approximately a quarter of a mile south of where he believed it to be.

"O.K. Georgios, at 12:45 a.m. I want you to come right five degrees and then steady up on 035. You will see a traffic lane buoy on your starboard side. I have to go to the bathroom. Any problems, just yell." Unfortunately, Georgios either did not understand or could not comprehend most of what was said, and the helmsman made his turn three minutes too soon. Ordinarily, Ryan would have noticed the ship starting to turn, but due to the choppy seas, he could not feel it.

At 12:51 a.m., Ryan returned to the bridge and looked at the magnetic compass which read 035. "Great," he said, "we should be picking up the pilot in about an hour." After a couple of minutes, he noticed that he still did not see the starboard inbound traffic lane buoys which marked the area of safe passage so that ships would not run aground. "Hmm, that's strange," Ryan thought. What Ryan did not know, was that while he was in the bathroom the ship had already passed the first buoy. The problem was that it was on the wrong side of the ship—the port side. Georgios had been daydreaming and since there was no extra watchstander on the bridge, the buoy went by unnoticed.

Ryan checked the radar. Instead of a land mass appearing about three miles to starboard, it looked as if it was directly off his starboard bow—almost right in front of him. Puzzled, he looked up and finally saw a buoy, but on the wrong side of the ship.

"Bring the rudder over hard left!" Ryan yelled. Georgios froze as Ryan shouted his order, so Ryan grabbed the helm and made the turn. As fear sank in, Ryan realized that the ship was probably not going to make

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6. The GPS was originally designed by the Department of Defense for military use. The system "uses signals from a network of 24 satellites to instantaneously provide a fix anywhere in the world." Sandi Doughton, A New Way to 'See' at Sea: Advanced Navigational System Should Be Boon to Safety, NEWS TRIB., Feb. 5, 1996, at B1. The military version of GPS is capable of giving a fix on location that is accurate to approximately 20 yards. See id.
Where did I go wrong," Ryan wondered to himself as he called down to the captain to get up to the bridge. At 12:57 a.m., the M/V Pacific Tanker struck the rocks, shuddered and came to a halt. With the smell of escaping crude oil filling the air, the captain came through the bridge door. "Captain," Ryan said, "we need to radio the Coast Guard. We've run aground."

I. INTRODUCTION

Despite the adoption of the Oil Pollution Act of 1990 ("OPA 90"), situations like Ryan's potentially still exist. The purpose of OPA 90 is to establish an all-encompassing set of regulations for oil spill liability and standards for the operation of tank vessels while in U.S. waters. OPA 90 did tighten standards for the operation of U.S. flagged tank vessels and the licensing of officers, but the regulation of foreign-flagged vessels remains limited. While OPA 90 provides that the Secretary of Transportation must evaluate the operational standards of foreign-flagged vessels on a periodic basis and after a casualty, a question arises as to how effective these periodic evaluations will be and what effect a post-casualty evaluation will have on preventing oil spills from occurring.

Congress left room for the states to supplement the guidelines provided by OPA 90, however, by allowing them to enact legislation which imposes "any additional liability or requirements with respect to . . . the discharge of oil or other pollution by oil within such State." Relying on this section of OPA 90, Washington State adopted its own oil

9. See id. at 10120.
10. See 46 U.S.C. § 9101(a)(1) (1994) ("The Secretary shall evaluate the manning, training, qualification, and watchkeeping standards of a foreign country that issues documentation for any vessel . . . . "); see also id. § 9101(a)(2) ("The Secretary shall determine whether . . . the foreign country has standards for licensing and certification of seamen that are at least equivalent to United States law or international standards accepted by the United States . . . . ").
spill prevention plan which includes a controversial section defined as the Best Achievable Protection Standards ("BAP Standards").

The BAP Standards increase the licensing requirements and operational guidelines required by federal and international standards. These standards require that all tankers sailing in state waters be outfitted with a GPS, all crew members on all tankers in state waters submit to random drug and alcohol testing, and that there be at least three licensed officers on the bridge while the vessel is in state waters during restricted visibility conditions. These standards are aimed at decreasing the possibility of human error, which is responsible for the majority of incidents involving oil spillage. Implementation of the BAP Standards would have prevented the plight of the MV Pacific Trader.

Washington State's BAP Standards are currently being challenged by the International Association of Independent Tanker Owners ("Intertanko") on constitutional grounds. Intertanko's key contentions are that (1) the states are preempted from regulating in the maritime field, and (2) the BAP Standards place an undue burden on interstate and foreign commerce.

Part II of this Note discusses the history behind the enactment of OPA 90. Part III examines the role of the states in legislating in the environmental field in general and the admiralty field in particular. Part IV explores Intertanko's potential challenges to the constitutionality of OPA 90 through a statutory and constitutional preemption analysis. Part V examines two specific sections of the BAP Standards which pose

13. See generally Model Oil Spill, supra note 4 (comparing Washington State's standards with federal and international standards).
15. See id. § 317-21-235(2). In contrast, OPA 90 requires only that licensed officers on U.S. flagged vessels be tested for drug and alcohol abuse. See 46 U.S.C. § 7702.
17. Rear Admiral Card, Chief of the U.S. Coast Guard Office of Marine Safety, Security, and Environmental Protection, stated that human error is the cause of 75-95% of all accidents. See Rahita Elias, Safety at Sea Focuses on People, Bus. Times, Jan. 31, 1996, at 19.
19. See Intertanko Complaint, supra note 18, ¶¶ 18, 36.
Particular preemption problems. Part VI concludes that although there may be sections of the BAP Standards that fall within a federally pre-empted area, the BAP Standards as a whole will most likely survive constitutional challenge.

II. THE OIL POLLUTION ACT OF 1990: STEMMING THE TIDE AGAINST OIL POLLUTION

OPA 90 incorporated many federal environmental provisions in an effort to improve prevention, response, research, and development of technology to stem the tide against oil pollution. Drastic revisions were also made regarding "spill prevention control and countermeasure plan requirements." Additionally, tighter guidelines were adopted for the issuing and renewing of licenses for personnel operating aboard tank vessels and the operations and equipment on board tankers.

Prior to OPA 90, attempts by Congress to pass a comprehensive piece of legislation which would "consolidate and rationalize oil spill response mechanisms under various federal laws" were met with resistance. On several occasions, oil spill legislation was introduced on the floor of Congress, but failed in committee due to political differences. However, the Exxon Valdez incident of March 1989, coupled with other spills occurring around the same time, served as the impetus for

20. Concerns over the areas of the BAP Standards which this Note discusses were first articulated by Jonathan Benner, attorney for Intertanko at the time the lawsuit against Washington State was filed. These areas were further discussed by Laurie L. Crick in her article regarding the BAP Standards. See Laurie L. Crick, The Washington State BAP Standards: A Case Study in Aggressive Tanker Regulation, 27 J. MAR. L. & COM. 641 (1996).

21. See Randle, supra note 8, at 10119. Statutes incorporated into OPA 90 include the Federal Water Pollution Control Act (the Clean Water Act); the Deepwater Port Act; the Outer Continental Shelf Lands Act Amendments of 1978; and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). See id. Although these acts were earlier attempts by the federal government to address pollution of U.S. waters by oil and other hazardous substances, only OPA 90 nears success in adopting the needed comprehensive oil spill legislation. See id. at 10119-20.

22. Id. at 10120.

23. See id.

24. Id. at 10119.

25. See id. In 1980, there was an extensive oil spill provision included in CERCLA. However, not only was this provision omitted prior to the passing of the Act, but CERCLA specifically excludes oil spills and contains a petroleum exemption. See id.

26. This includes the Mega Borg fire and subsequent explosion in the Gulf of Mexico in the Summer of 1990 and the American Trader's grounding and release of 400,000 gallons of oil off the coast of Southern California in early 1990. See id. at 10119 n.2.
Congress to unify and pass an effective piece of oil pollution legislation.\textsuperscript{27} Currently, vessel traffic in U.S. waters is increasing and projections indicate an increase in petroleum and crude oil imports of almost fifty percent by the year 2000, with more than eighty percent being shipped in foreign-flagged vessels.\textsuperscript{28} Clearly, the need for this legislation has never been greater.

OPA 90 specifically addresses the roadblocks which had previously impeded Congress from enacting a comprehensive piece of oil spill legislation. The main obstacles that faced Congress were reaching a compromise on the requirement for double-hulls\textsuperscript{29} on all oil tankers trading in U.S. waters,\textsuperscript{30} adoption of international guidelines and liability standards,\textsuperscript{31} and preemption of state law.\textsuperscript{32}

A compromise was reached between the two houses of Congress on the issue of requiring double-hulls on tankers trading in the United States. The Senate wanted the Secretary of Transportation to continue further studies before making a decision on the double-hull requirement.\textsuperscript{33} In contrast, the House of Representatives wanted all tankers carrying oil in U.S. waters outfitted with double-hulls.\textsuperscript{34} The final agreement established that ships without double-hulls would be gradually phased out of traffic in the United States by the year 2015,\textsuperscript{35} and that the Secretary of Transportation would complete a study of structural and operational requirements, which would provide protection equal to or greater than double-hulls.\textsuperscript{36}

The question of whether the United States should adopt the current international guidelines and limitations on liability also caused an extensive debate between the two houses of Congress. The adoption of

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  \item \textsuperscript{27} See id. at 10119.
  \item \textsuperscript{28} See NATIONAL RESEARCH COUNCIL, supra note 2, at xvii.
  \item \textsuperscript{29} The term "double-hull" refers to a non-cargo space located between the cargo tanks and the water. The theory is that this design will prevent pollution in all but the most serious accidents. See Alison Rieser & William J. Milliken, \textit{A Review of Developments in U.S. Ocean and Coastal Law 1990-1991}, 1 TERRITORIAL SEA J. 291, 341 (1991).
  \item \textsuperscript{30} See \textit{The Oil Pollution Act of 1990}, OIL SPILL U.S. L. REP., July 31, 1991 (Version 1.1).
  \item \textsuperscript{31} See id.
  \item \textsuperscript{32} See id.
  \item \textsuperscript{33} See id.
  \item \textsuperscript{34} See id.
  \item \textsuperscript{35} See 46 U.S.C. § 3703(a) (1994).
  \item \textsuperscript{36} See id. The double-hull requirements ultimately articulated in OPA 90 were based on existing federal standards in the Port and Tanker Safety Act of 1978, see 33 U.S.C. §§ 1221-1236 (1994), and the Act to Prevent Pollution from Ships, see 33 U.S.C. §§ 1901-1912, which adopted international standards. See also Rieser & Milliken, supra note 29, at 341.
\end{itemize}
such guidelines would preempt all state and federal law.37 Proponents of preemption believed that ratification of the international conventions by the United States would provide

- effective coverage for the United States citizens; jurisdiction and enforceability of United States judgments abroad; enhanced speed and certainty and settlement of claims; predictability and consistency of limits and costs for shipowners and oil companies; reduced cost to the United States of catastrophic oil spills; and expanded United States influence in international maritime negotiations.38

Opponents to the adoption of the international conventions argued that the costs would outweigh the benefits.39 When brought to a vote, the proposal for adoption failed, as the small gain in coverage afforded by the conventions did not provide Congress enough of an incentive to eliminate current or future federal or state laws.40 The Senate voted unanimously and the House of Representatives voted in an overwhelming margin to strengthen federal standards.41

While double-hull requirements and international guidelines were prominent issues on the floor, the issue of whether the states should be preempted from enacting any further oil pollution legislation was a principle source of controversy.42

Whenever legislation is proposed that will impose federal environmental controls, there arises a question of federal preemption of state laws.43 Federal legislation maintains the rights of states to protect their own natural resources, including water, “by permitting them to establish State standards which are more restrictive than Federal standards.”44 The collective belief of Congress is that “oil pollution legislation, like other federal environmental laws, should set minimum standards but

37. See George J. Mitchell, Preservation of State and Federal Authority Under the Oil Pollution Act of 1990, 21 ENVTL. L. 237, 237 (1991). Senator Mitchell, Senate Majority Leader at the time of this Note’s writing, was integral in achieving the passage of OPA 90. See id.
39. See Mitchell, supra note 37, at 240 (“The United States would be required to dismantle current federal and state laws and prohibit future ones in order to conform to the lowest common denominator of environmental protection set by these international accords . . . .”).
40. See id.
41. See id. at 250-51.
44. Id.
should allow states to provide greater protection for their own natural resources and citizens. When the issue of state preemption under OPA 90 was raised in the Senate, the members voted unanimously to preserve the states' ability to enact tougher oil spill legislation. When the amendment was originally introduced on the floor of the House, it was met with some initial resistance. In fact, the House voted three times on amendments regarding preemption of state laws. On all three occasions, the House voted by large margins to retain the states' rights.

The section of OPA 90 which explicitly permits the states to enact tougher oil spill legislation provides that no state shall be preempted from "imposing any additional liability or requirements with respect to . . . the discharge of oil or other pollution by oil within such State." The crucial issue emerging from the congressional debates and the resulting language of OPA 90 is: Just how far can the states go?

III. LEGISLATING IN THE MARITIME FIELD—IS IT LIMITED TO THE FEDERAL GOVERNMENT OR CAN THE STATES PLAY, TOO?

The Framers of the United States Constitution recognized the need for uniformity in maritime regulation and thus vested the authority to preside over cases involving maritime and admiralty jurisdiction in the federal government. "This provision [which extends judicial power over cases in admiralty jurisdiction to the federal government] by implication, grants Congress the power to revise and supplement the maritime law ...." It additionally gives the "federal courts power to

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45. Mitchell, supra note 37, at 239.
47. See 135 Cong. Rec. H8128-42 (daily ed. Nov. 8, 1989). The proponents of state preemption attempted to amend the original amendment to the oil pollution bill (the Miller-Studds Amendment) by removing subsection (b), see id. at H8137, which would have allowed the states to impose "any additional liability or requirements with respect to the discharge of oil or other pollution by oil within such state." Id. at H8128. This "revision" to the Miller-Studds Amendment was defeated by almost a two-to-one margin. See id. at H8141. The Miller-Studds Amendment became Section 1018 when OPA 90 was adopted. See Oil Pollution Act of 1990, Pub. L. No. 101-380, § 1018, 104 Stat. 484, 505-06 (1990) (codified as amended at 33 U.S.C. § 2718 (1994)).
48. See Mitchell, supra note 37, at 250.
49. See id.
51. See U.S. Const. art. III, § 2, cl. 1. ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . ")
develop the general maritime [common] law” in the absence of statutory law.\textsuperscript{53}

Pursuant to constitutional authority, Congress provided the federal district courts, by statute, original, exclusive jurisdiction over all civil cases of admiralty or maritime jurisdiction.\textsuperscript{54} This grant of power to the federal courts does not mean, however, that the states are banned from enacting any legislation which will have an effect on the admiralty field. States are still empowered with “police powers,” and with such

may establish rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs, provided that the state action “does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations.”\textsuperscript{55}

For example, the federal government’s pollution laws, as they relate to the maritime environment, do not prohibit a state from enacting stricter regulations regarding the pollution of its own waters.\textsuperscript{56}

Under the Supremacy Clause,\textsuperscript{57} the federal government can

\begin{footnotes}
\textsuperscript{53} Id.
\textsuperscript{54} See 28 U.S.C. § 1333(1) (1994) (noting an exception for suits which are brought to obtain remedies other than those of admiralty, for which the parties are entitled); see also Paduano v. Yamashita Kisen Kabushiki Kaisha, 221 F.2d 615, 617 (2d Cir. 1955) (holding that federal courts have original exclusive jurisdiction over all civil cases arising under the admiralty jurisdiction, with the exception of suits brought to obtain other than admiralty remedies). The “saving to suitors” clause in 28 U.S.C. § 1333(1), implicitly gives states concurrent admiralty jurisdiction with the federal courts. See Paduano, 221 F.2d at 617, 621.
\textsuperscript{55} Askew v. American Waterways Operators, Inc., 411 U.S. 325, 339 (1973) (quoting Just v. Chambers, 312 U.S. 383, 389 (1941)). The issue in Askew was whether the state of Florida, in enacting a statute providing for the recovery of clean-up costs and imposing strict liability on parties responsible for the release of oil, unconstitutionally intruded into an area preempted by federal law. The Supreme Court, in upholding Florida’s statute, held that “absent a clear conflict with the federal law,” state regulation is permissible in the admiralty area. Id. at 341. “Evenhanded local regulation to effectuate a legitimate local public interest is valid unless pre-empted by federal action, or unduly burdensome on maritime activities . . . .” Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960) (citations omitted).
\textsuperscript{56} See supra notes 44-50 and accompanying text; see also Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483, 501 (9th Cir. 1984) (holding that because an Alaskan statute governing the discharge of ballast by oil tankers into state waters did not conflict with federal law (since there was no evidence presented that Congress implicitly intended to occupy the field of regulating tanker discharges into state waters), the state’s statute was not preempted by the Port and Water Safety Act).
\textsuperscript{57} U.S. Const. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the
supersede these inherent powers of the state, but to do so, it must make its intent "clear and manifest." The Supreme Court in *Wardair Canada Inc. v. Florida Department of Revenue* explains that when performing a preemption analysis, the first inquiry must be whether

Congress intended to displace state law, and where a congressional statute does not expressly declare that state law is to be pre-empted, and where there is no actual conflict between what federal law and state law prescribe, [it is] required that there be evidence of a congressional intent to pre-empt the specific field covered by the state law.  

There are three situations in which the states’ police powers are superseded by Congress. The first and most obvious situation occurs when Congress explicitly declares that the states are prohibited from regulating in a particular field. Second, Congress may demonstrate an implicit intent to preempt the states. This occurs when the scheme of regulation is so extensive that it is reasonable to assume Congress intended to completely occupy the field, leaving no room for the states to act. Yet, the mere existence of federal regulations in the area does not automatically preempt the state. “Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law... Instead, we must look for special features warranting pre-emption.” For example, where the area of regulation is of such an important federal interest, it will be assumed that the states

Contrary notwithstanding.

58. Napier v. Atlantic Coast Line R.R., 272 U.S. 605, 611 (1926) (stating that “[t]he intention of Congress to exclude states from exerting their police power must be clearly manifested”).

59. 477 U.S. at 6.


61. See id. at 157.

62. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-27, at 497 (2d ed. 1988); see also City of Cleveland, 893 F. Supp. at 742 (holding that Congress did not implicitly preempt state land use ordinances when it enacted the Federal Aviation Act).

63. See TRIBE, supra note 62, § 6-27, at 497-98. For a discussion of whether the BAP Standards impermissibly intrude into the maritime field, see infra notes 76-117 and accompanying text.


are precluded from acting in that area.  

The final preemption situation occurs, even if Congress has not excluded the enacting of state legislation in a particular area, when "a state statute . . . actually conflicts with a valid federal statute." This last situation can occur in either of two ways. The first occurs when "compliance with both federal and state regulations is a physical impossibility." The second occurs when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."  

Under OPA 90 and most state legislation, oil shippers must have contingency plans for cleaning up oil spills. Washington State has been more aggressive in this area of legislation, however, by enacting its own oil spill prevention plan, commonly referred to as the BAP Standards. These standards require ships to have plans for oil spill prevention. The BAP Standards establish provisions for manning, training, equipment, and personnel qualifications, which exceed all federal and international levels. Yet, despite the benefits of the BAP Standard's extensive protection, these standards may fall if Intertanko prevails in its recent challenge to the constitutionality of Washington's new regulations, on the grounds that Washington is preempted from enforcing its BAP Standards.  

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66. See, e.g., Ray, 435 U.S. at 165 (holding that Congress granted the Secretary of Transportation the power to issue all design and construction regulations and that Congress "intended" to establish a uniform federal regime controlling the design of oil tankers" when it enacted the Port and Waterways Safety Act of 1972; thus, the Supremacy Clause mandates that a state cannot invalidate a federal decision with respect to design or construction standards).
67. Id. at 158; TRIBE, supra note 62, § 6-26, at 481.
72. "Best achievable protection" is defined as the highest level of protection that can be achieved through the use of the best achievable technology and those management practices, staffing levels, training procedures, and operational methods that provide the greatest degree of protection available. The administrator's determination of best achievable protection shall be guided by the critical need to protect the state's natural resources and waters, while considering: (a) [the additional protection provided by the measures; (b) [the technological achievability of the measures; and (c) [the cost of the measures.

Id. § 317-21-060(1).
74. See generally MODEL OIL SPILL, supra note 4 (comparing Washington State's standards with the federal and international standards).
75. See Intertanko Suing, supra note 18, at B1.
IV. WASHINGTON STATE AND ITS BAP STANDARDS: DID THEY GO OVERBOARD?

A. Preemption

The first argument Intertanko asserts against the constitutionality of the BAP Standards is that the states are statutorily preempted from regulating in the field of maritime and admiralty jurisdiction. When performing a preemption analysis of a state statute, the "first and fundamental inquiry" is to determine whether Congress intended to preempt state law. Washington State claims that Section 2718 of OPA 90 expressly grants Washington the authority to enact legislation which may affect the manning, training, equipment, and personnel qualifications with respect to tanker operation in the states' territorial waters. Section 2718 provides that "[n]othing in this Act... shall... affect, or be construed or interpreted 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 within such State." It appears from a literal reading of the statute that Section 2718 is an express validation of the state's police power to enact legislation to protect its territorial waters and, therefore, the BAP Standards are permissible.

However, was it really the true intent of Congress to give the states such a broad grant of power? The term "requirements," in this instance, is ambiguous. Although the term is mentioned in several places in OPA 90, the Act does not include "requirements" in its definitions section. How encompassing did Congress intend the term "requirements" to be?

To determine Congress's meaning of the term "requirements," it is
helpful to refer to the legislative history of the Act in general, and particularly to the section regarding preemption.\textsuperscript{84} Committee reports and agency interpretations serve as aides in interpreting a statute.\textsuperscript{85} The Senate's Committee on Environment and Public Works discussed the issue of state preemption in a report regarding OPA 90.\textsuperscript{86} This report explains that "[t]he theory behind the Committee action is that the Federal statute is designed to provide basic protection for the environment and victims damaged by spills of oil. Any state wishing to impose a greater degree of protection for its own resources and citizens is entitled to do so."\textsuperscript{87} In addition it states that, "[h]istorically, the Committee on Environment and Public Works has protected the rights of States to impose more restrictive requirements or liability, particularly in the area of oil pollution law."\textsuperscript{88}

Neither a definition of the term "requirement" is mentioned in the legislative history, nor are there any limits placed upon this term. However, in a debate on the floor of the House regarding the Miller-Studds amendment of the oil pollution bill,\textsuperscript{89} a comment was made regarding the state's ability to impose additional "requirements." Congressman Studds stated in part that if the states were preempted from enacting their own pollution legislation, they would be unable to "impose insurance requirements on oil tankers and barges."\textsuperscript{90} Additionally, there

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  \item \textsuperscript{84} See Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483, 487 (9th Cir. 1984) (stating that when performing a preemption analysis, the court should look at the "concerns emphasized by Congress in enacting the subject legislation"). Hammond involved an Alaskan state statute that prohibited oil tankers from discharging ballast in the state's territorial waters if the ballast had been stored in the ship's cargo tanks. See id. The court held that (1) the federal government did not intend to occupy the field of discharges by ships into state's territorial waters, and (2) the state statute was not void on the grounds that it conflicted with federal law, namely, the Coast Guard regulations. See id. at 501. But see Patricia M. Wald, The Rhetoric of Results and the Results of Rhetoric: Judicial Writings, 62 U. CHI. L. REV. 1371, 1403 (1995) (noting that Supreme Court Justices Scalia and Thomas state that legislative history, written largely by aides and lobbyists, is unreliable).
  \item \textsuperscript{87} Id. at 6.
  \item \textsuperscript{88} Id.
  \item \textsuperscript{89} See 135 CONG. REC. H8128-42 (1989). This amendment preserves the states' rights to enact legislative protections against oil pollution which exceed those provided by federal law.
  \item \textsuperscript{90} Id. at H8130 (statement of Rep. Studds (Mass.)).
\end{itemize}
was a discussion regarding the ability of a state to impose requirements greater than the federal guidelines for producing evidence of financial responsibility.\footnote{See id. at H8131-32.}

These discussions, however, do not provide a clear understanding with respect to the states' ability to impose certain requirements. They may be read to mean that the states are only permitted to impose requirements for additional insurance or to show evidence of financial responsibility. Alternatively, they may be just examples of requirements which the states can impose.

Intertanko may argue that Congress intended to limit the states to imposing additional "requirements" with respect to insurance and financial responsibility, because this is the only area in the legislative history to which the term "requirements" refers. This is not a strong argument and should fail. When Congress declines to act, courts are "reluctant to draw inferences."\footnote{Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 306 (1988).} In addition, the Supreme Court is reluctant to find preemption of state law in ambiguous cases.\footnote{See TRiBE, supra note 62, § 6-25, at 479. "The Supreme Court has referred to this reluctance as a presumption that 'Congress did not intend to displace state law.'" Id. at 479 n.7 (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)).} This reluctance is displayed in the Court's continued "emphasis on the central role of Congress in protecting the sovereignty of the states."\footnote{Id. § 6-2, at 480; see also Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 527, 552 (stating that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power").}

In contrast, Washington State advances a strong argument which establishes that not only was Congress unambiguous on the question of "requirements," but that Congress implicitly validated the state's ability to enact its BAP Standards. Congress preserved the state's authority to enact legislation imposing "additional liability or requirements,"\footnote{33 U.S.C. § 2718(a)(1) (1994).} but this authority is not absolute.\footnote{See Michael P. Donaldson, The Texas Response to Oil Pollution: Which Law to Apply, 25 St. Mary's L.J. 533, 576 (1994).}

The House Conference Report on OPA 90 reflects this restraint on authority when it states that the proposed bill "does not disturb the Supreme Court's decision in Ray v. Atlantic Richfield Co."\footnote{H.R. Conf. Rep. No. 101-653, at 122 (1990), reprinted in 1990 U.S.C.C.A.N. 779, 800.} In Ray, Washington State attempted to regulate the design and construction of
tankers transiting state waters. The Court held that Congress intended uniform national standards for the design and construction of tankers, and, therefore, the state was preempted from enacting legislation which would intrude on this area. The Court acknowledged, however, that vessels must comply with "reasonable, nondiscriminatory conservation and environmental protection measures . . ." imposed by a state.

Therefore, a vessel's compliance with federal safety regulations does not necessarily preclude the enforcement of a statute which has other objectives, such as a pollution control law. Nevertheless, the Court in this case held that "Congress intended uniform national standards for design and construction of tankers . . . [to] foreclose the imposition of different or more stringent state requirements." The fact that Congress specifically discussed preempting the states in the area of design and construction of tankers provides two arguments for Washington State. First, had Congress intended to preempt the states in areas other than those set forth in Ray, then it would have specifically addressed such areas. A second, more persuasive argument is that Congress singled out the Court's holding in Ray, indicating its intent to define the area in which state legislation could not intrude. Since the congressional record is otherwise silent on the issue of when the state is preempted from enacting legislation, one could reasonably infer that Congress implicitly validated Washington State's BAP Standards, provided that the standards do not attempt to regulate in the area of design or construction of tankers.

A state may enact legislation affecting the maritime field, as long as it does not destroy the uniformity in areas which Congress deems necessary. As discussed above, the Supreme Court has held that the design and construction of tanker vessels is of such national importance that the states are preempted from enacting legislation in this area. Once a ship is built, its design or construction may not be altered to meet

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98. See 435 U.S. at 151.
99. See id. at 152.
100. Id. at 164 (quoting Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 277 (1977)); see also Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 447 (1960) (holding that a federally licensed vessel was not exempt from (1) local pilotage laws; (2) local quarantine laws; (3) local safety inspections; or (4) local regulation of wharves and docks).
103. See supra notes 97-99 and accompanying text.
various state requirements.\textsuperscript{104} This finding of preemption, however, is limited to ship design characteristics only and thus, does not control on issues of ocean pollution.\textsuperscript{105} Unlike design regulations, state and federal environmental regulations can co-exist "without impinging on the exclusively federal concerns of vessel design and traffic safety."\textsuperscript{106}

Next, Intertanko may argue that the field in which Washington State is regulating has been completely occupied by the federal government. Since it has been established that the states are permitted to enact environmental legislation,\textsuperscript{107} Intertanko may contend that the state is preempted from regulating in the maritime field. The regulation of operations, manning, safety, training, equipment, design, and personnel qualifications onboard merchant vessels arguably has been comprehensively occupied by federal statute, regulations, and treaties to which the United States is a party,\textsuperscript{108} thus preempting the states from enacting legislation in this area.

Washington State may rebut Intertanko’s claims of preemption by relying on Huron Portland Cement Co. v. City of Detroit.\textsuperscript{109} The issue in Huron was whether a city smoke abatement ordinance was preempted, where the city attempted to apply the ordinance to vessels which had been inspected, approved, and licensed by the federal government. The Supreme Court held that "the sole aim of the Detroit ordinance [was] the elimination of air pollution to protect . . . the local community."\textsuperscript{110} The federal requirements, on the other hand, were designed to "insure the seagoing safety of vessels."\textsuperscript{111} Thus, although both the city and federal governments were ultimately regulating the same subject-matter, the city ordinance was not preempted because the federal government only intended to enforce safety standards. Washington State may argue by analogy that although the BAP Standards appear to regulate the same subject-matter as some federal laws (commercial merchant vessels), the standards aim to eliminate oil pollution and to protect its citizens; not to regulate the operation of vessels on its waters.

Even if Washington State’s BAP Standards are not preempted by the Supremacy Clause, courts may invalidate the standards if the state statute

\begin{itemize}
    \item \textsuperscript{104} See Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483, 493 (9th Cir. 1984).
    \item \textsuperscript{105} See id. at 487, 493.
    \item \textsuperscript{106} Id. at 493.
    \item \textsuperscript{107} See supra notes 43-50 and accompanying text.
    \item \textsuperscript{108} See Intertanko Complaint, supra note 18, ¶ 18.
    \item \textsuperscript{109} 362 U.S. 440 (1960).
    \item \textsuperscript{110} Id. at 445.
    \item \textsuperscript{111} Id.
\end{itemize}
conflicts with federal law. As discussed above, state and federal statutes may conflict if either (1) the state law would be "an obstacle to the . . . execution of the . . . objectives of Congress," or (2) it is physically impossible to comply with both regulations.

Although Washington’s BAP Standards are stricter than the regulations provided by OPA 90, they are not an obstacle to Congress’s objective in OPA 90. In fact, Congress intended for OPA 90 to set the minimum standards, thus permitting the states to enact tougher legislation. Furthermore, compliance with OPA 90 and Washington’s BAP Standards is not “physically impossible” since adherence to the stricter state requirements automatically satisfies the more lenient federal standards. Thus, the state and federal standards can co-exist.

"[T]he question whether federal law in fact preempts state action in any given case necessarily remains largely a matter of statutory construction." After performing a statutory preemption analysis, courts may find it difficult to find the BAP Standards statutorily preempted.

B. Undue Burden on Interstate and Foreign Commerce

Although a court can invalidate a state’s statute based upon statutory preemption grounds, it can also strike down a statute on constitutional preemption grounds. This may occur when (1) there exists either ambiguous federal legislation or none at all, and (2) the state regulation is found to violate the Commerce Clause.

The Commerce Clause provides in part that Congress has the power "to regulate Commerce with foreign Nations, and among the several States." Accompanying this affirmative grant of power to Congress is an “implicit or ‘dormant’ limitation on the authority of the States to enact legislation affecting interstate commerce.” Thus, there are areas which escape legislation by Congress “because of their local character and their number and diversity.” The states are permitted to regulate

113. See supra notes 67-69 and accompanying text.
118. See supra notes 76-117 and accompanying text.
119. U.S. CONST. art. I, § 8, cl. 3.
in these areas, absent federal legislation, so long as the state’s legislation does not violate the restraints placed on them by the Commerce Clause. Although these restraints are not outlined in the actual words of the Commerce Clause, they “have emerged gradually in the decisions of [the Supreme] Court giving effect to its basic purpose.” Moreover, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.

Thus, one state may not isolate itself from the others by erecting protectionist barriers against trade. Sometimes, Congress can expressly give the states the power to enact legislation in areas or in situations where, ordinarily, they would be prohibited from doing so. On the other hand, Congress can also prevent the states from enacting legislation in areas “of peculiarly local concern.” In general, though, “Congress has left it to the courts to formulate the rules thus interpreting the commerce clause in its application, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn.” Courts make an informed decision by reviewing the

122. See City of Philadelphia v. New Jersey, 437 U.S. 617, 623, 626-27 (1978) (holding that a New Jersey statute which prohibited the importation of most “solid or liquid waste which originated or was collected outside the territorial limits of the State,” id. at 618, violated the Commerce Clause because the effect of the statute was to discriminate against out-of-state parties for no legitimate purpose).

123. Id. at 623.

124. Southern Pac. Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 767 (1945); see also id. at 763, 781-82 (determining that an Arizona state statute which limited passenger trains to 14 cars and freight trains to 70 cars violated the Commerce Clause). The Court initially asked whether the total effect of the law as a safety measure . . . is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect on the interstate train journey which it interrupts.

Id. at 775-76; see also H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537-38 (1949) (“This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of [sic] the economy . . . has as its corollary that the states are not separable economic units.”).

125. See City of Philadelphia, 437 U.S. at 627.


127. Id. at 770.
relevant facts to determine if a state's actions violate the Commerce Clause.128

When reviewing the BAP Standards in light of the Commerce Clause, two separate analyses must be performed. One must first determine whether the standards violate the Interstate Commerce Clause. Next, it must be determined whether they violate the Foreign Commerce Clause. The inquiry courts perform is similar in both instances, with the exception of an additional level of scrutiny included in the Foreign Commerce Clause analysis—the need for a national foreign policy with respect to the regulation of foreign commerce.129 This Part first analyzes the BAP Standards in relation to the Interstate Commerce Clause. It then focuses on the additional level of scrutiny used by courts to determine if a statute violates the Foreign Commerce Clause.

1. Interstate Commerce Clause

"State regulation affecting interstate commerce will be upheld if (a) the regulation is rationally related to a legitimate state end, and (b) the regulatory burden imposed on interstate commerce, and any discrimination against it, are outweighed by the state interest in enforcing the regulation."130 In analyzing a state statute that regulates interstate commerce, the Supreme Court has articulated two tiers of scrutiny to determine if the statute violates the Commerce Clause.

The first tier is used when a statute "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests."131 "Where a state regulation amounts to 'simple protectionism'—because it discriminates against interstate commerce either on its face or in effect—it is subject to a heightened level of scrutiny that amounts to a virtual per se rule of invalidity."132 An example of a statute that discriminates on its face is the New Jersey state statute at issue in City of Philadelphia v. New Jer-

128. See, e.g., id. at 771, 781-82.
129. See Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979) (holding that a state property tax assessed on cargo containers was unconstitutional since it resulted in multiple taxation and was inconsistent with Congress's power to regulate foreign commerce, emphasizing the importance of uniformity in foreign commerce).
130. Tribe, supra note 62, § 6-5, at 408.
The statute in this case provided in part that no out-of-state solid or liquid waste would be permitted in New Jersey. The Court held that the statute discriminated against out-of-staters by imposing upon them the full burden of conserving the state's remaining landfill space, and was therefore a violation of the Commerce Clause. In general, if a statute can be characterized as motivated primarily to protect state economic interests, courts will declare the statute invalid.

A statute can also discriminate in its effect on interstate commerce. It is unnecessary to show that a state intentionally engaged in economic protectionism. If a result is achieved by a state discriminating against articles of commerce coming from outside the state, for no other reason than their origin, then the state violates the constitutional principle of non-discrimination. However, courts will occasionally allow states to discriminate against out-of-state commerce in situations where a compelling state interest exists and where there is no less discriminatory way to accomplish the same goal.

A court could not reasonably conclude that Washington State's BAP Standards are a violation of the Interstate Commerce Clause. Generally, regulations may burden commerce, provided that they do not place a heavier burden on out-of-state commerce than intrastate commerce. No section in the BAP Standards provides economic advantages for in-state over out-of-state parties or U.S. over foreign companies. In fact,

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133. 437 U.S. at 617.
134. See id. at 618.
135. See id. at 628-29.
136. See York Moody Faulkner, Note, Judicial Review of State Regulation Which Impacts Foreign Trade: A Second Look at South-Central Timber Dev. v. Wunnicke, 1992 BYU L. REV. 271, 278-79 (examining the Court's analysis of an Alaskan administrative regulation which was intended to protect the state lumber industry by requiring that all timber purchased from state lands undergo primary processing within Alaska prior to export from the state).
137. See City of Philadelphia, 437 U.S. at 626 ("The evil of protectionism can reside in legislative means as well as legislative ends.").
138. See id. at 626-27.
139. See Maine v. Taylor, 477 U.S. 131, 140 (1986) (holding as constitutional a Maine statute that prevented the importation of live baitfish from outside the state, despite finding that the statute discriminated against out-of-state commerce, since there existed a legitimate local purpose (to prevent the spread of a particular disease) that could not be accomplished in a less discriminatory manner).
140. See Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 126 (1978) ("The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce."); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 187 (1938) (validating a state regulation which barred all trucks from traveling on state highways which were wider than 90 inches or heavier than 10 tons); City of Cleveland v. City of Brook Park, 893 F. Supp. 742, 753 (N.D. Ohio 1995).
Washington State may suffer economic disadvantages from the establishment of the BAP Standards. Since Washington's standards exceed current federal and international requirements, some companies might forego complying with them by shipping oil to other states with less stringent standards. Moreover, due to Congress's recent sanction of shipping Alaskan oil overseas, there is particular concern that foreign companies will decide to avoid Washington State waters. For example, the Puget Sound area, because of its proximity to Alaska, receives most of its crude oil from Alaska. Prior to 1995, the exportation of Alaskan oil was prohibited by federal law. However, Congress recently voted to allow Alaska oil to be shipped overseas to more lucrative markets. This means that state refineries, such as those in the Puget Sound area, may have to rely more on foreign suppliers and foreign tankers. The Washington State Public Ports Association predicts that imports of foreign oil will increase by 800 percent over the next fifteen years. Thus, Washington State is putting its oil refining industry somewhat at risk, if foreign companies elect not to ship their oil to Washington due to Washington's regulations. For these reasons, it does not appear that courts could reasonably conclude that Washington State's BAP Standards are a form of economic protectionism, and thus, the standards should be held constitutional.

The second level of scrutiny set forth by the Supreme Court—the "balancing test"—is used by courts to determine if state regulations create an undue burden on interstate commerce. Courts must ask

142. See supra note 13 and accompanying text.
146. See Doughton, supra note 143, at B2.
147. This foreign oil would most likely come from Indonesia, Russia, and other countries. See id.
149. This risk is overshadowed by the possible repercussions that may occur if the BAP Standards are struck down. Since foreign vessels often have "more safety problems, inferior equipment" and less crew training than U.S. ships, id., it is crucial that the BAP Standards be upheld.
whether "the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it." 151 Using this approach, a state law would be deemed invalid if the "incidental burden on interstate commerce" was clearly excessive in relation to the benefit derived by the state. 152 "[T]he inquiry [regarding whether the state's regulation is a permissible burden] necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." 153 Although there may be alternative methods of solving the same problem, it is not for the courts to determine which is best. 154 This is a policy decision which is appropriately left to the legislature. 155

The Commerce Clause, in general, is concerned with the need for uniformity of regulation. A lack of uniformity can place an undue burden on commerce and therefore invalidate a state's statute. The need for uniformity when regulating in the maritime field is particularly necessary. 156 It has been argued that

the Constitution presupposes a body of maritime law, that this law, as a matter of interstate and international concern, requires harmony in its administration and cannot be subject to defeat or impairment by the

152. Norfolk S. Corp., 822 F.2d at 398-99; see also Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (applying this standard to affirm the invalidity of an official state order prohibiting a company from shipping its cantaloupes outside the state unless they were packed in containers in a manner approved by the state official, to ensure that they were identified as of Arizona origin).
153. Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 441 (1978). This case involved a Wisconsin law which banned trucks longer than 55 feet from all state highways unless they were granted permits. Although the Supreme Court, in its decision, affirmed the notion that the state is responsible for the maintenance and construction of its highways, as well as stated that the legislature was superior to the courts in the area of policymaking and weighing evidence, the Court struck down the law. See id. at 444 n.18, 448-49 (Blackmun, J., concurring). The Court in effect ignored the state's claim that the law was a safety measure because the state failed to rebut the evidence that the law had no real effect on highway safety. See id.
154. See Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 524 (1959). Bibb involved an Illinois statute which required the use of contoured mudflaps on trucks traveling through the state. These trucks, which were required to spend the time and money to change to contoured mudflaps, would be unable to travel through Arkansas, which required conventional, straight mudflaps. The Supreme Court struck down the statute after concluding that ""the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it."" Id. (quoting Southern Pac. Co., 325 U.S. at 775-76).
155. See id.
156. See generally Crick, supra note 20.
diverse legislation of the States, and hence that Congress alone can make any needed changes in the general rules of the maritime law.\textsuperscript{157}

Yet, this argument is not absolute. "[M]aritime law [is] not a complete and perfect system and . . . in all maritime countries there is a considerable body of municipal law that underlies the maritime law as the basis of its administration."\textsuperscript{158} The Supreme Court has consistently held that the states may enact rules relevant to land or water which affect maritime affairs, so long as the state’s regulations do not contradict any federal law, cause any prejudice to the qualities of maritime law, or interfere with its uniformity in international and interstate relations.\textsuperscript{159} Uniformity is not disrupted when the states enact laws in response to gaps in the law\textsuperscript{160} or when there is no clear conflict with federal law.\textsuperscript{161}

When courts discuss the "burdens on commerce," they are referring to added costs.\textsuperscript{162} Even when specifically referring to increased cost and time, it really boils down to one thing—money. How much money will a party have to pay in order to comply with the state’s regulation?

There are two situations in which courts will evaluate the added cost in relation to the local benefit. The first is where the added cost is due primarily to conflicting non-uniformity. What this means is that when two states have conflicting regulations (one state requires X and the other requires non-X), a party will be subjected to excessive costs for entering and exiting these states.

An example of this is the requirement of mudguards, discussed in \textit{Bibb v. Navajo Freight Lines, Inc.}\textsuperscript{163} In this case, Illinois had a requirement that all trucks which traveled on its roads were to be outfitted with contoured mudguards.\textsuperscript{164} On the other hand, Arkansas required that trailers operating in the state be equipped with straight mudguards.\textsuperscript{165} Therefore, a truck that was equipped to operate in Illinois could not

\begin{itemize}
  \item \textsuperscript{157} Just v. Chambers, 312 U.S. 383, 389 (1941).
  \item \textsuperscript{158} \textit{Id.} at 390 (citation omitted).
  \item \textsuperscript{159} \textit{See id.} at 389; \textit{see also} Askew v. American Waterways Operators, Inc., 411 U.S. 325, 339 (1973).
  \item \textsuperscript{160} \textit{See Crick, supra note 20.}
  \item \textsuperscript{161} \textit{See Askew,} 411 U.S. at 341 (stating that "state regulation is permissible, absent a clear conflict with the federal law").
  \item \textsuperscript{162} \textit{See Bibb v. Navajo Freight Lines, Inc.}, 359 U.S. 520, 525, 527-28 (1959). \textit{But see} Norfolk S. Corp. v. Oberly, 822 F.2d 388, 404 (3d Cir. 1987) (acknowledging that courts often use the term "burden on commerce" in a more general sense to mean affecting the flow of commerce).
  \item \textsuperscript{163} 359 U.S. at 520.
  \item \textsuperscript{164} \textit{See id.} at 521-22.
  \item \textsuperscript{165} \textit{See id.} at 523.
\end{itemize}
legally do so in Arkansas. Those responsible for the truck would be required to purchase not only the contoured mudguards, but the straight ones as well, to travel through both states. Additionally, the truck would be required to stop at the border of the applicable state and have the mudguards changed. The increased cost, due to the purchase of both types of mudguards, and the time it would take to switch the mudguards, created an undue burden on commerce.

The Supreme Court held that "[t]his is one of those cases... where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce." The BAP Standards do not impose this type of added cost on ships transiting Washington State's waters. Washington's standards are higher than all other ports, so it is possible to comply with all of the requirements without delay or added costs, and ships traveling through Washington State waters would not be subjected to inconsistent regulations from other states. A ship complying with Washington State law would be neither limited to the states whose waters it could enter, nor saddled with the delay and inconvenience of altering its manning and operation requirements to meet those of different states.

Although there is a chance that a state might enact legislation which conflicts with that of Washington, that alone is not sufficient to strike down an existing statute; there must be an actual statute with which Washington's conflicts. At the time of this writing, any vessel which conforms to the standards enacted by Washington will be in compliance with federal, international, and all state laws regarding oil pollution.

A second situation where courts could review added costs occurs when the cost derives solely from compliance with a state's regulation. This can be thought of as a "dollar-for-dollar" exchange; where the added cost is directly attributable to the benefit derived by the state. This can occur when one state has a standard or regulation that the others do not have. For example, if forty-nine states require bicycles to have lights on them, but one state, State X, requires lights and bells, the added cost

166. See id. at 524.
167. See id. at 527-28.
168. Id. at 529.
169. See supra note 13 and accompanying text.
of purchasing the bell is directly attributable to the added safety to the state’s citizens. If a bicycle meets State X’s requirements, it can be ridden anywhere in the country.

In determining whether the benefits outweigh the burdens, courts must identify both the benefit and the burden. 171 The benefit of the BAP Standards is the protection of state waters, marine environment, and natural resources from the harmful effects that may result from the transportation of oil in tanker vessels. However, statutory language which purports to promote the public health and safety is not sufficient by itself to protect the statute from attack under the Commerce Clause. 172 Washington State will need to demonstrate that the effect of the BAP Standards’ provisions are not illusory—that they will add additional safety to the state’s waters. 173

This task should not prove too difficult for Washington State. Since the majority of the provisions in the BAP Standards were enacted to eliminate the chance of operator error, 174 and more than seventy-five percent of all incidents which lead to oil spills are due to human error, 175 courts should find that Washington’s regulations, which are aimed to prevent human error, 176 are not illusory and that they will provide additional protection to the state’s waters.

Determining the burdens placed on interstate commerce by the statute is slightly more difficult. Case law suggests that any increase in

171. See Norfolk S. Corp. v. Oberly, 822 F.2d 388, 405-06 (3d Cir. 1987).
173. See id. at 330 (holding that “where . . . the State’s safety interest has been found illusory, and its regulations impair significantly the federal interest in efficient and safe interstate transportation, the state law cannot be harmonized with the Commerce Clause”).
174. See WASH. ADMIN. CODE § 317-21-200 (1995) (implementing operating procedures for navigation watch personnel, a management system for efficient coordination of the bridge team, procedures to interact with the state’s pilot, security rounds for spaces on the vessel of vital importance, an anchor watch, and engineering watch procedures); id. § 317-21-205 (establishing procedures for the navigation of the vessel in state waters, including a voyage plan used while operating in state waters so that the bridge team will be aware of water depth, navigational obstructions, predicted currents and weather, environmentally sensitive areas, and berthing locations); id. § 317-21-220 (establishing the need for the vessel to have policies and procedures in the event of emergencies); id. § 317-21-230 (requiring that all vessels implement a comprehensive training plan for all personnel); id. § 317-21-235 (requiring that the vessel perform random drug and alcohol tests on all personnel); id. § 317-21-245 (establishing a limit on the number of hours the vessel's personnel may work within a 24 hour time period); id. § 317-21-250 (requiring that all licensed deck officers be proficient in English and speak a language spoken and understood by the crew).
175. See Elias, supra note 17, at 19.
176. See supra note 17 and accompanying text.
cost to out-of-state parties, regardless of whether the same costs are imposed on in-state parties, is a relevant burden.\footnote{177} Yet, under this precedent, essentially all state regulation would be a burden on interstate commerce since almost all state regulations entail additional costs for those desiring to conduct business within a state.\footnote{178}

The Supreme Court applies a much narrower comparative burden analysis, however.\footnote{179} If the burden placed on out-of-state parties is the same as that imposed on in-state parties, it is classified as a burden on commerce generally, but not a burden on interstate commerce.\footnote{180} The burden imposed by the BAP Standards would be an increased cost to the companies who desire to trade in Washington State. This cost would derive from, among other things, the necessity to have certain pieces of equipment on board,\footnote{181} the increase in training of personnel onboard the ship,\footnote{182} and mandatory random drug testing of all personnel.\footnote{183} No portion of the standards places a lesser burden on in-state parties. If portions of the BAP Standards are removed, the protection available to the state decreases. When the benefit to the state is weighed against the burdens on commerce, it is clear that Washington State’s regulation does not place an undue burden on interstate commerce, “either facially or in application.”\footnote{184}

\footnote{177. See \textit{Norfolk S. Corp.}, 822 F.2d at 406; \textit{Roger Beers, Preemption and Commerce Clause Claims in Environmental Litigation} 47, 55-56 (ALI-ABA Course Study 1989).}
\footnote{178. See \textit{Norfolk S. Corp.}, 822 F.2d at 406.}
\footnote{179. See \textit{id}.}
\footnote{180. See \textit{id}; see also \textit{CTS Corp. v. Dynamics Corp. of Am.}, 481 U.S. 69, 88 (1987); \textit{City of Cleveland v. City of Brook Park}, 893 F. Supp. 742, 753 (N.D. Ohio 1995).}
\footnote{181. See \textit{WASH. ADMIN. CODE} § 317-21-265 (1995) (stating that all vessels covered by the BAP Standards must carry certain navigation equipment (a GPS and two separate radar systems, one of which is equipped with an automated radar plotting aid) and an emergency towing system).}
\footnote{182. See \textit{id} § 317-21-230 (specifying that the crew of every vessel covered by the BAP Standards must receive training including vessel orientation, position specific requirements, refresher training, and shipboard drills).}
\footnote{183. See \textit{id} § 317-21-235. The policy for alcohol and drug testing for ships covered by the BAP Standards includes post-incident (collision, allusion, grounding, fire, flood, oil spill, etc) testing, when there is a reasonable belief the person is using drugs or alcohol, and random testing. \textit{See id}. This exceeds both the federal standard (requiring testing for U.S. mariners in watchstanding positions) and international standard (requiring the vessel’s master to ensure that all watchstanders are fit for duty). \textit{See MODEL OIL SPILL, supra} note 4, at 2-7.}
\footnote{184. \textit{Norfolk S. Corp.}, 822 F.2d at 407.
2. Foreign Commerce Clause

The analysis of Interstate and Foreign Commerce Clause issues is virtually the same, with the exception of one additional consideration in Foreign Commerce Clause cases: focus on the need for a national foreign policy with respect to the regulation of foreign commerce. In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.

The need for a national policy for foreign commerce stems from the desire to avoid trade retaliation and disputes that might arise if the states were allowed to regulate foreign trade. This argument is an outdated one.

Foreign countries, now more than ever, understand that when a state acts, the federal government bears little, if any responsibility. If a country is going to retaliate in response to perceived state-based discriminatory trade practices, it is more likely that they will do so against the offending state, rather than against the United States as a whole. An example of this is the response of the British government to California’s imposition of a franchise tax in Barclays Bank v. Franchise Tax Board. The British retaliated against California, not the United States, by not enforcing a statute which would have given California-based companies tax credit.

It is also possible that there will be no retaliation or adverse effect at all. An illustration of this is the Clean Water Act, which gives the Coast Guard the exclusive authority to regulate pollution devices, but allows the states to determine if their waters require further protection, and if so, to enact more stringent statutes. These state statutes have been applied to foreign vessels

186. Board of Trustees v. United States, 289 U.S. 48, 59 (1933); see also Japan Line, 441 U.S. at 446; Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976) (“[T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments . . . .”); Norfolk S. Corp., 822 F.2d at 399 (quoting Board of Trustees, 289 U.S. at 59).
188. See id.
189. See id.
191. See Spiro, supra note 187, at 164 & n.164.
without detrimental results to international trade. Furthermore, courts have held that this is not an intrusion on the treaty-making power of Congress.

With the increase in activity on the international scene by states, it has been argued that there should be an end to Foreign Commerce Clause analysis. States should be allowed to implement legislation at their own risk. If foreign countries are going to retaliate, it will be against the offending state statute. If the state refuses to amend its offending statute and the result is such that the nation as a whole begins to feel the adverse effects, the federal government may preempt the state's law. Thus, there are no compelling reasons for a court to hold that Washington State's BAP Standards violate the Foreign Commerce Clause.

V. ROUGH SEAS AHEAD FOR THE BAP STANDARDS?

It appears that only one section in the BAP Standards could be construed as an attempt by Washington State to regulate the design or construction of ships. Section 265 of the BAP Standards deals with the state's requirements in relation to technology. Subsection one requires that a vessel, covered by the state's pollution prevention plan, be equipped with a GPS and two separate radar systems, one

195. See Spiro, supra note 187, at 167; see also Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 78 (1993) (Scalia, J., concurring in part and concurring in judgment). In Itel Containers, Scalia notes that the Constitution contains no "dormant" Commerce Clause, and that "the Commerce Clause contains no 'negative' component [and] no self-operative prohibition upon the States' regulation of commerce." Id. at 78. He reasons that it is not the place for the courts to determine foreign policy, see id. at 80, and that all state regulations would satisfy the Japan Line test because "no state law can ever actually 'prevent' this Nation from speaking with one voice," id. (quoting Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 451 (1979)), in relation to foreign commerce since the federal government may always preempt the state's law. See id.
196. See Spiro, supra note 187, at 167. Of course, there are always certain prohibitions placed on the states by the Constitution such as the inability of the states to "enter into alliances, keep troops, grant letters of marques and reprisal, or engage in war." Id. at 170 n.190; see also U.S. CONST. art. I, § 10.
197. See Spiro, supra note 187, at 169.
198. See Crick, supra note 20, at 9.
200. See id. § 317-21-265 (1)(a).
equipped with an automated radar plotting aid ("ARPA").\(^\text{201}\) Courts should find that these two requirements deal with pieces of equipment and therefore do not constitute a design or construction requirement.\(^\text{202}\) Subsection two, on the other hand, may prove to be an intrusion by the state in the area of design or construction.

Subsection two requires that all vessels covered by the state’s oil prevention plan be equipped with an emergency towing package system on both the bow and stern.\(^\text{203}\) The specification that the system be able to withstand the load of towing the vessel in forty knot winds and eighteen-foot seas\(^\text{204}\) indicates that this towing package must be permanently attached to the ship. This attachment to the ship may bring this requirement out of the equipment classification and into the realm of a design or construction requirement.\(^\text{205}\) If this is the case, courts may strike down this section of the statute as an intrusion into a preempted area.

Yet, a statute is not invalid because it contains a provision which falls within a federally preempted area.\(^\text{206}\) Even if a court finds that subsection two is preempted, the court should only invalidate that portion of the BAP Standards, and retain the rest.

VI. CONCLUSION

The issue of whether Washington State has the power to enact the BAP Standards will most likely be decided by the Supreme Court.\(^\text{207}\)

\(^{201}\) See id. § 317-21-265(1)(b). The ARPA is a radar system that continuously plots and marks the route the ship has traveled. This allows the bridge team to update and plot the vessel’s route without continuously referring to the ship’s navigational charts.

\(^{202}\) See Crick, supra note 20.

\(^{203}\) See WASH. ADMIN. CODE § 317-21-265(2).

\(^{204}\) See id.

\(^{205}\) See Crick, supra note 20.


\(^{207}\) Prior to the publication of this Note, U.S. District Judge John Coughenour ruled that Washington State’s BAP Standards are not preempted by federal law and do not violate the Commerce Clause of the Constitution. See Judge Backs Washington’s Oil-Spill Prevention Law, supra note 148, at B2. In reaching his decision, Judge Coughenour performed an analysis similar to that outlined in this Note. See Intertanko v. Lowry, 947 F. Supp. 1484 (W.D. Wash. 1996). The court ultimately ruled that Washington State’s “oil spill prevention laws legitimately protect Washington’s delicate and valuable marine resources through the exercise of the state’s police power.” Id. at 1500. However, Intertanko has appealed this ruling to the Court of Appeals for the Ninth Circuit. See Sandi Doughton, 9th Circuit Court Gets Appeal of the State’s Strict Oil-Spill Rules: Tanker Owners Association Claims District Judge Erred, NEWS TRIB., Jan. 11, 1997, at B3. Jonathan Benner, attorney for Intertanko, has stated that the court of appeals will hear the case this summer and will possibly issue a ruling by the end of the year. See id. Because of the far-reaching
In reaching its decision, the Supreme Court should look at the legislative history and congressional intent behind the enactment of OPA 90. The need for uniformity in maritime law and the transportation of commerce must be weighed against the states' right to protect its citizens and natural resources. With the exception of sections which the Court may deem to be explicitly preempted by federal law, the Washington State BAP Standards should survive the constitutional analysis the Court will most likely perform.

Ultimately, the question that must be answered is: "Did Congress intend to give the states such a broad grant of power?" The problem is that the judiciary is not the branch of government that should resolve this issue. Courts should not draw inferences when Congress is silent or has declined to act. For these reasons, the Supreme Court should uphold Washington State's BAP Standards. If Congress later determines that the BAP Standards exceed the power granted to the states by OPA 90, then it is within the power of Congress to rectify the situation.

Washington State's standard may ultimately dictate the national policy on environmental regulation in relation to oil tankers. If the Supreme Court determines that the import of this would affect the decision of whether the regulations were unconstitutional, it should refrain from balancing the possible national effect against the local benefits of the statute. The fact that the permissibleness of the standards should be a congressional decision, coupled with the lack of a basis to hold that the BAP Standards are preempted by federal legislation or that they would violate the Dormant or Foreign Commerce Clause, dictates that the BAP Standards should be upheld as constitutional.

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implications to the maritime industry if other states decide to enact oil-spill legislation similar to that of Washington, regardless of how the court of appeals rules, this issue will most likely be decided by the Supreme Court.

208. See supra notes 198-206 and accompanying text.


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