

Spring 1997

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Recommended Citation

Falvey, Robert E. (1997) "A Shot Across the Bow: Rhode Island's Oil Spill Pollution Prevention and Control Act," *Roger Williams University Law Review*: Vol. 2: Iss. 2, Article 6.

Available at: http://docs.rwu.edu/rwu_LR/vol2/iss2/6

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A Shot Across the Bow: *Rhode Island's Oil Spill Pollution Prevention and Control Act*

INTRODUCTION

Discerning the law in this area is far from easy; one might tack a sailboat into a fog bank with more confidence.

The Honorable Michael Boudin¹

Rhode Island, the Ocean State, has always been proud of its coastline and its relationship with the sea. Ever since Roger Williams established his "Providence Plantations" at the uppermost portion of Narragansett Bay in 1636,² Rhode Islanders have made their living in, on and around Narragansett Bay and Block Island Sound.

The Port of Providence has been a central hub in the flow of goods from points around the world to the surrounding New England area. All manner of natural resources and manufactured goods including foreign-made cars, lumber, coal, and of course, oil, have coursed through Narragansett Bay on ships bound for Providence and points beyond. This extensive vessel traffic has not been without incident. Mishaps have been occurring ever since ships have been using these waterways.³

The now infamous grounding of the tug *Scandia* and its tow, the barge *North Cape*, resulted in the worst environmental disaster in Rhode Island's history.⁴ On Thursday, January 19, 1996, the Eklof Marine Tug *Scandia* left Bayonne, New Jersey, towing the Barge *North Cape*, loaded with four million gallons of No. 2

1. *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 624 (1st Cir. 1994).

2. William G. McLoughlin, *Rhode Island, A History* 3 (1978).

3. See Bruce Landis, *In Previous Marine Oil Spills, R.I. Was Lucky*, *Prov. J. Bull.*, Jan. 20, 1996, at A7, available in 1996 WL 6996194.

4. See Tom Mooney, *Oil in the Water, One Year Later, Spill Left Scars Time Can't Wash Away*, *Prov. J. Bull.*, Jan. 19, 1997, at A1, available in 1997 WL 7312002.

fuel oil, bound for Providence.⁵ By the time the *Scandia* reached Rhode Island's Block Island Sound, the winds were blowing a gale, thirty-five knots and better, with a dense fog and eight foot seas.⁶ The tug caught fire, and the captain lost control of the vessel as it foundered in heavy seas about five miles south of Point Judith.⁷ The tug and its barge grounded on Moonstone Beach in South Kingstown, the site of a federal wildlife refuge.⁸ Gale winds and twenty foot waves smashed both vessels against the sandy bottom and opened several gashes in the barge's hull.⁹ In the final tally, the barge leaked 828,000 gallons of oil onto the beach, into the surrounding coastal ponds and into Block Island Sound.¹⁰ The spill killed an estimated one million lobsters and four hundred birds,¹¹ and forced the closing of many square miles of Block Island Sound to both commercial and recreational fishing, "seriously crippling the state's seafood industry."¹²

A bill was subsequently introduced in the General Assembly to amend the current law relating to water, navigation and pollution control, and was signed into law by Governor Lincoln Almond on August 9, 1996,¹³ as the Oil Spill Pollution Prevention and Control Act.¹⁴

The Oil Spill Pollution Prevention and Control Act (OSPPCA) is a comprehensive attempt to prevent future oil spills, to regulate the equipment, barge construction standards, and personnel used in the oil barge industry, and to establish a safety committee to monitor the effectiveness of existing regulations to protect the coastal environment of the state.¹⁵ Perhaps the most significant provision of the OSPPCA requires barge owners to use double-

5. Gerald M. Carbone, *Oil in the Water: The Grounding, Mayday! We are Abandoning!*, Prov. J. Bull., Jan. 28, 1996, at B2, available in 1996 WL 6997544.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Peter B. Lord, *Oil in the Water, One Year Later, Polluters, State Join to Study Spill's Impact*, Prov. J. Bull., Jan. 21, 1997, at A1, available in 1997 WL 7312403.

11. *Id.*

12. Christopher Rowland, *Drawing a Line in the Sand, R.I. Toughens Oil-Barge Rules*, Prov. J. Bull., Aug. 10, 1996, at A1, available in 1996 WL 11084591.

13. *Id.*

14. R.I. Gen. Laws §§ 46-12.5-.09 to -1, -12.5-5, -12.5-18 to -25 (1996).

15. Explanation by the legislative council of an act relating to waters and navigation—oil pollution control. S. 3304 Subst. A (R.I. 1996).

hulled barges in times of bad weather, or to employ an additional escort tug to ensure safety. By the year 2001, the OSPPCA requires that *all* barges be either of double hull construction or use an escort tug regardless of weather conditions.¹⁶ These provisions stand in stark contrast to those of the federal Oil Pollution Act of 1990 (OPA '90), which does not mandate double hulls on all tank barges until the year 2015.¹⁷

While most Rhode Islanders were pleased with the OSPPCA, the new regulations did not meet with universal approval. The American Waterways Operators (AWO), the largest tugboat lobbying group in the country, immediately voiced its objection to the legislation. In particular, the group expressed concern over the double hull provisions, now mandated in Rhode Island fourteen years ahead of the federal schedule. Jack Morgan, a spokesman for the AWO, commented on the OSPPCA: "We're disappointed that Rhode Island has passed a law that we view as constitutionally indefensible. . . . The federal government does have, in our view, jurisdiction over interstate movement of petroleum products, and we think that's the proper place for it to be decided."¹⁸

Linda O'Leary, vice president of the AWO, also commented on the unilateral character of the OSPPCA:

Without some symmetry, it is impossible to operate, absolutely impossible [On most trips, tugs and barges pass through several different states. It would be technically, operationally and financially impossible to comply with a different set of laws for each state] If you can't comply with Rhode Island law, how can you leave New York with a fully-laden tank barge?¹⁹

This Comment will assess the constitutionality of Rhode Island's new Oil Spill Pollution Prevention and Control Act in light of the concerns raised. Part I will explore and explain the pertinent sections of the OSPPCA. Part II will explore the relationship between the state and federal power to regulate commerce between the states, particularly in the maritime area. Part III will explore the preemption doctrine and analyze the conflicts between federal

16. R.I. Gen. Laws § 46-12.5-24(b) (1996) (emphasis added).

17. 46 U.S.C. § 3703(a) (1994).

18. Rowland, *supra* note 12, at A1.

19. Elizabeth Abbott, *Oil in the Water, One Year Later, Spill Produces Flurry of New Barge, Tug Regulations*, Prov. J. Bull., Jan. 20, 1997, at A1, available in 1997 WL 7312266.

and state oil pollution schemes. This Comment will conclude that the Rhode Island Oil Spill Pollution Prevention and Control Act is a constitutionally indefensible, albeit well-intentioned, exercise of Rhode Island's police power, used in an effort to protect a vital natural resource and economic base in the face of anemic and stalled federal efforts.

I. THE OIL SPILL POLLUTION PREVENTION AND CONTROL ACT

The OSPPCA is divided into five separate sections, each addressing a different concern. The OSPPCA contains several common and unremarkable sections such as a definitions section,²⁰ an oil discharge reporting section,²¹ and a section establishing the Narragansett Bay/Rhode Island Sound Safety Committee.²² More pertinent for this discussion are the provisions which have been targeted by critics of the OSPPCA and described as potentially unconstitutional.²³ A brief description of these sections follows.

The "Personnel Policies" section regulates the personnel required on tugs and tank barges, their qualifications and duties, and in particular, the requirements and manner of drug and alcohol testing.²⁴ This section generally proscribes the use or consumption of any alcoholic beverage or illicit drug by personnel on a tank vessel.

The OSPPCA imposes added personnel requirements for tank barges operating in coastal waters. Specifically, the OSPPCA requires that two personnel man any tank barge while it is in Rhode Island waters, whether underway or at anchor. This section is significant because it requires crew members to be aboard the towed barge at all times, where none were required before. The lack of a crewman onboard who may have been able to set an anchor was specifically condemned as a contributing factor in the grounding of the barge *North Cape* by Dennis W. Nixon, a maritime lawyer, professor and director of the University of Rhode Island's graduate program in marine affairs. According to Nixon, speaking at a Senate commission hearing on preventing future oil spills, the General Assembly should require all oil barges entering Rhode Island wa-

20. R.I. Gen. Laws § 46-12.5-1 (1996).

21. *Id.* § 46-12.5-5.

22. *Id.* § 46-12.5-25.

23. See *supra* text accompanying notes 18-19.

24. R.I. Gen. Laws § 46-12.5-18.

ters to be manned with at least two crew members and equipped with a workable anchor. Nixon further commented that Eklof's two main competitors in Rhode Island already use crew men, and added "[e]ven Eklof operates [with] them, but apparently not in Rhode Island."²⁵

The most significant portions of the OSPPCA are those mandating equipment and design features which supersede those required by the federal OPA '90. In particular, the OSPPCA requires the owner or operator of a tank barge to equip vessels with functioning radar,²⁶ Global Positioning System (GPS) receivers,²⁷ both a magnetic and a gyrocompass,²⁸ two VHF radios,²⁹ functioning automated fire and flooding detection systems,³⁰ and manually-deployable anchoring equipment which can be activated by a crew member on the barge, or another means of retrieving a lost tow.³¹

The signature portion of the OSPPCA is the section requiring double-hulled barges to be used in Rhode Island waters. That section requires that:

Effective June 1, 1997, no tank vessel shall transport oil or hazardous material on or over waters of the state, in conditions of limited visibility unless the tank vessel (i) has a double hull or (ii) is accompanied by a tugboat escort.³² Effective January 1, 2001, no tank vessel shall transport oil or hazardous material over the waters of this state *in any conditions* unless the tank vessel (i) has a double hull or (ii) is accompanied by a tugboat escort.³³

25. Tom Mooney, *Senate Commission Opens Hearings on Preventing Spills*, Prov. J. Bull., Feb. 3, 1996, at A1, available in 1996 WL 6998404.

26. R.I. Gen. Laws § 46-12.5-23(1)(a).

27. *Id.* § 46-12.5-23(1)(b). GPS receivers allow for an extremely accurate fix of a vessel's position by receiving signals from several specialized satellites which are then processed through a microcomputer to indicate the exact latitude and longitude of the vessel.

28. *Id.* § 46-12.5-23(1)(c).

29. *Id.* § 46-12.5-23(1)(d).

30. *Id.* § 46-12.5-23(1)(e).

31. *Id.* § 46-12.5-23(2).

32. *Id.* § 46-12.5-24(a).

33. *Id.* § 46-12.5-24(b) (emphasis added).

The movement to require double hulls or double sides³⁴ in this country has been a long and turbulent one.³⁵ Although Congress finally adopted rules requiring double hulls by the year 2015,³⁶ the Coast Guard had been reluctant to impose similar regulations of its own accord.³⁷ The culmination of that struggle has been described as follows:

The technology required to build tankers with double hulls (or related designs such as double bottoms and/or sides) is neither new nor especially complex. But, despite essentially uncontradicted evidence that double hulls would prevent or at least reduce the severity of some oil spills following grounding or collision, the Coast Guard, encouraged by tanker industry representatives, has steadfastly refused to institute this requirement. . . . Following the *Exxon Valdez* spill, lawmakers attempted to address both aspects of the problem—prevention of accidents and prevention of the resulting pollution—in a single, lengthy statute, The Oil Pollution Act of 1990 (OPA). One provision of the new legislation requires double hull ships (or their equivalent) to be phased in over a period of twenty-five years.³⁸

The adoption by the Rhode Island legislature of double hull mandates for tank vessels³⁹ is therefore significant, and reflects the frustration over the inaction of the federal government, coupled with the anger over the recent catastrophic destruction of a portion of Rhode Island's primary resource.

The major issue presented by the new regulations is whether the State of Rhode Island may constitutionally supersede the authority of the federal government in regulating commerce and maritime affairs in light of the implications of preemption and the

34. A double-hulled vessel has one complete hull inside another, providing maximum protection from groundings or collisions. A double-bottomed vessel has a double layer on the bottom only, providing extra protection from groundings, but not collisions with other ships or objects above the water line. A double-sided vessel has a double layer on the sides, providing protection from collisions, but not groundings.

35. See generally Tammy A. Alcock, "Ecology Tankers" and the Oil Pollution Act of 1990: A History of Efforts to Require Double Hulls on Oil Tankers, 19 Ecology L. Q. 97 (1992).

36. 46 U.S.C. § 3703(a) (1994).

37. Alcock, *supra* note 35, at 116-20.

38. *Id.* at 100.

39. R.I. Gen. Laws § 46-12.5-24 (1996).

Supremacy Clause, and the plenary authority of the federal government in admiralty matters.

II. THE RELATIONSHIP BETWEEN STATE AND FEDERAL POWER

A reviewing court might take either of two lines of analyses, or both, to analyze any act of Congress relating to the regulation of maritime commerce. The first is Congress's constitutional power to regulate pursuant to the Commerce Clause.⁴⁰ The second is Congress's traditional authority to legislate in the maritime and admiralty spheres.⁴¹ It is difficult to follow one of these lines of analyses without straying into the other, and back again. It has been observed that although "the scope of the maritime law and that of commercial regulation are not coterminous, the latter embraces the greater part of all that the former comprehends."⁴²

A detailed examination of both analyses reveals that the plenary power to regulate and determine the uniform maritime law is vested in the Congress, with some limited legislative power left to the states only in certain, prescribed situations.

A. Federal Power

1. Congressional Commerce Clause Power

Congress's power to regulate commerce is firmly rooted in the Constitution and American jurisprudence.⁴³ The Commerce Clause⁴⁴ gives Congress the power "to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."⁴⁵

A historical review clearly illustrates the need for comprehensive and plenary powers to be vested in the Congress. Commerce in the Colonies was carried on without any significant problems due to the controlling forces of England and the colonial governors.⁴⁶ Following the ratification of the Articles of Confederation,

40. U.S. Const. art. I, § 8, cl. 3.

41. *Id.* at art. III, § 2. For a discussion on congressional Admiralty Power, see *infra* Part II.B.

42. 1 Benedict on Admiralty § 109, at 7-20 (7th ed. 1996).

43. U.S. Const. art. I, § 8, cl. 3.

44. *Id.*

45. *Id.* (emphasis added).

46. John E. Nowak & Ronald D. Rotunda, Constitutional Law § 4.3, at 137 (5th ed. 1995).

problems between the states quickly developed in the commercial area.⁴⁷ The new states specifically denied the central government any control over commerce, fearing discriminatory restrictions influenced by conflicting commercial interests.⁴⁸ As a result, the lack of centralized authority led to "economic chaos" under the Articles.⁴⁹ In addition to the serious loss of trade with Great Britain and other international concerns, the individual states began setting trade barriers among themselves by imposing economic sanctions and significant tariffs on goods destined for other states.⁵⁰ This predicament led many political leaders to fear that economic warfare might bring a dissolution of the nation.⁵¹

The economic balkanization of the states was a prime force for the calling of the Constitutional Convention in May 1787.⁵² The need for a single, unifying control of interstate commerce was a leading factor in the launching of the Constitutional Convention, and the need was so apparent that it was not even debated at the meeting.⁵³

Early in this nation's history the power of Congress to regulate commerce was confirmed by the Supreme Court in *Gibbons v. Ogden*.⁵⁴ The case pitted the congressional Commerce Clause power against New York's power to grant a monopoly to a steamship operator running between New York and New Jersey. Chief Justice Marshall interpreted the power to regulate commerce in the following manner: "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."⁵⁵

Describing the sole authority of Congress to regulate interstate commerce, Chief Justice Marshall continued: "If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over

47. *Id.* at 138.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. 22 U.S. (9 Wheat.) 1 (1824).

55. *Id.* at 196.

commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government.⁵⁶ The authority of Congress to legislate pursuant to the Commerce Clause has been continually upheld by the Court in the years since, with almost no exception.⁵⁷

2. Admiralty Jurisdiction

There is no specific constitutional provision conferring on Congress the power to legislate generally with regard to maritime or admiralty matters,⁵⁸ although the Constitution does confer exclusive admiralty jurisdiction on the federal courts.⁵⁹ This clause has been interpreted to extend the legislative power of Congress "to jurisdictional and procedural matters, and to substantive admiralty law."⁶⁰ This power was firmly established in *Southern Pacific Co. v. Jensen*,⁶¹ which invalidated New York's Workmen's Compensation Act for conflicting with the general maritime law under article III, section 2 of the Constitution.⁶² In considering the power of Congress to legislate in the maritime area, Justice McReynolds observed first that:

56. *Id.* at 197.

57. See generally *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992); *Interstate Commerce Comm'n v. American Trucking Ass'n, Inc.*, 467 U.S. 354 (1984); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954); *American Trucking Ass'n v. United States*, 344 U.S. 298 (1953); *South Buffalo Ry. v. Ahern*, 344 U.S. 367 (1953); *United States v. Great Northern Ry.*, 343 U.S. 562 (1952); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945); *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177 (1938). But see *United States v. Lopez*, 115 S. Ct. 1624 (1995) (holding that Congress did not have the power to enact Gun-Free School Zones Act which made it a federal offense for an individual to possess a firearm within a school zone, due to the lack of a jurisdictional nexus to any economic activity substantially affecting interstate commerce).

58. 1 Benedict on Admiralty § 109, at 7-18 (7th ed. 1996).

59. U.S. Const. art. III, § 2. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, . . . and to all Cases of admiralty and maritime jurisdiction . . ." *Id.*

60. 2 Am. Jur. 2d *Admiralty* § 6 (1994) (emphasis added).

61. 244 U.S. 205 (1917).

62. *Id.* at 212.

Article III, § 2, of the Constitution, extends the judicial power of the United States "To all cases of admiralty and maritime jurisdiction;" and Article I, § 8, confers upon the Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof."

He went on to conclude that: "Considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions, *Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country.*"⁶³

In *Panama Railroad v. Johnson*,⁶⁴ a shipping company had been sued for negligence by an injured seaman under a federal employer's liability act.⁶⁵ The defendant argued that the statute, which incorporated other federal statutes pertaining to railway employees, could not be applied in the admiralty context.⁶⁶ Justice Van Devanter began his analysis by referring to the purpose and scope of the constitutional provision as reflected in prior decisions:

As there could be no cases of "admiralty and maritime jurisdiction," in the absence of some maritime law under which they could arise, the provision presupposes the existence in the United States of a law of that character. Such a law or system of law existed in Colonial times The framers of the Constitution were familiar with that system and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but to place the entire subject—*its substantive as well as its procedural features*—under national control because of its intimate relation to navigation and to interstate and foreign commerce. In pursuance of that purpose the constitutional provision was framed and adopted. Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicitly investing such power in the United States . . . subject to power in Congress to alter, qualify or

63. *Id.* at 214-15 (emphasis added).

64. 264 U.S. 375 (1924).

65. *Id.* at 382 (citing The Act of March 4, 1915, § 20, cl. 153, 38 Stat. 1185, as amended by the Act of June 5, 1920, § 33, cl. 250, 41 Stat. 1007).

66. *Id.* at 385.

supplement it as experience or changing conditions might require.⁶⁷

The *Jensen* Court was concerned with the balance of power between the federal government and the State of New York, both of whom were regulating within the same subject area.⁶⁸ In determining just how far a state may regulate within the admiralty context, the Court determined the fact "[t]hat this may be done to some extent cannot be denied Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits."⁶⁹ The Court then issued its widely quoted maxim concerning state regulatory powers in this area:

And plainly, we think, no such legislation is valid if it *contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law* or interferes with the *proper harmony and uniformity of that law* in its international and interstate relations.⁷⁰

The *Jensen* doctrine has survived to date, albeit with some dissension, doubt or limitation,⁷¹ and was reiterated in the recent case, *American Dredging Co. v. Miller*.⁷² In that case, the Supreme Court dealt with the question of whether the doctrine of *forum non conveniens* is "either a 'characteristic feature' of admiralty or a doctrine whose uniform application is necessary to maintain the 'proper harmony' of maritime law."⁷³ The Court determined that, because "the doctrine of *forum non conveniens* neither originated

67. *Id.* at 385-86 (emphasis added).

68. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 209 (1917).

69. *Id.* at 216.

70. *Id.* (emphasis added).

71. *See generally* *Ceres Terminals, Inc. v. Industrial Comm'n*, 53 F.3d 183 (7th Cir. 1995) (doubting that *Jensen* can determine the jurisdiction of state courts); *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623 (1st Cir. 1994) (third party may pursue purely economic damages following an oil spill on navigable waters); *Carey v. Bahama Cruise Lines*, 864 F.2d 201 (1st Cir. 1988) (states can still exercise some jurisdiction in maritime affairs not infringing on a uniform aspect of admiralty); *Slaven v. BP America, Inc.*, 786 F. Supp. 853 (C.D. Cal. 1992) (state may pursue damages for economic injury following an oil spill without physical injury); *Norfolk Shipbuilding & Drydock Corp. v. Lathey*, 380 S.E.2d 665 (Va. 1989) (injured maritime worker may receive state worker's compensation damages in a shoreside vessel accident).

72. 510 U.S. 443 (1994).

73. *Id.* at 447.

in admiralty nor has exclusive application there . . . Louisiana's refusal to apply *forum non conveniens* does not . . . work 'material prejudice to [a] characteristic featur[e] of the general maritime law.'⁷⁴

The *American Dredging* Court went on to discuss the need for uniformity in the maritime field.⁷⁵ Citing *Knickerbocker Ice Co. v. Stewart*,⁷⁶ the Court recounted its earlier decision in which it held that Congress could not allow the states to implement their own workers' compensation statutes affecting injuries occurring in the maritime context, because such a sanction would destroy the constitutionally prescribed uniformity required in the admiralty field.⁷⁷ In *Knickerbocker*, Justice McReynolds commented on the constitutional grant of admiralty jurisdiction to Congress and concluded that it was nondelegable by nature to ensure uniformity and harmony in one system of regulation.⁷⁸

In *American Dredging*, Justice Scalia recognized that the requirement of uniformity was not absolute, but that "it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation."⁷⁹

Notwithstanding Justice Scalia's doubts, *Romero v. International Terminal Operating Co.*⁸⁰ may provide some guidance in this regard. The Supreme Court was concerned with a tort claim, under the Jones Act⁸¹ and the general maritime law, of a Spanish seaman injured on a Spanish ship while in the Port of New York.⁸² In determining the jurisdictional question, the Court commented on the power of the states to legislate in the admiralty context: "It

74. *Id.* at 450 (quoting *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917)).

75. *Id.* at 449.

76. 253 U.S. 149 (1920).

77. *American Dredging*, 510 U.S. at 449.

78. The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated, but actually established—it would defeat the very purpose of the grant Congress cannot transfer its legislative power to the states—*by nature this is nondelegable.*

Knickerbocker, 253 U.S. at 164 (emphasis added).

79. *American Dredging*, 510 U.S. at 448 (citing *Jensen*, 244 U.S. at 216).

80. 358 U.S. 354 (1959).

81. 46 U.S.C.A. § 688 (1920).

82. *Romero*, 358 U.S. at 356.

is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope.⁸³ The opinion listed several instances of constitutional exercises of state power in the maritime field⁸⁴ including: state remedies for wrongful death and survival actions,⁸⁵ state rules for the partition and sale of ships,⁸⁶ state laws governing the specific performance of arbitration agreements,⁸⁷ and state laws regulating the effect of a breach of warranty under contracts of marine insurance.⁸⁸ These examples of state action have all been upheld as constitutional. The Court in *Romero* was careful, however, to point out that these valid exercises of state power "have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law *which did not require uniformity*."⁸⁹ Clearly, however, the regulations mandated by the OSPPCA are far more intrusive than those here mentioned, and interrupt the orderly flow of commerce required by an unvarying national scheme, which by its nature requires uniformity from state to state, and along all the coasts of this country.

B. *The Police Power of the States*

The power of the individual states to legislate within the exercise of their inherent police powers,⁹⁰ in both the admiralty and commerce clause contexts, has also been clearly established.

In *Ogden*, Chief Justice Marshall recognized that the states still have the power to affect commerce as an incidence of their in-

83. *Id.* at 373.

84. *Id.*

85. *Id.* (citing *Old Dominion S.S. v. Primus Gilmore*, 207 U.S. 398 (1907); *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921); *Just v. Chambers*, 312 U.S. 383 (1941)).

86. *Id.* (citing *Madruza v. Superior Court*, 346 U.S. 556 (1954)).

87. *Id.* (citing *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924)).

88. *Id.* (citing *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955)).

89. *Id.* at 373-74 (emphasis added).

90. An authority conferred by the American constitutional system in the Tenth Amendment, U.S. Const., upon the individual states, and in turn, delegated to local governments, through which they are enabled to . . . adopt such laws and regulations as tend to . . . secure generally the comfort, safety, morals, health, and prosperity of its citizens. . . .

Black's Law Dictionary 1156 (6th ed. 1990).

herent police power to regulate. Marshall described these powers as:

[T]hat immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.⁹¹

The police power concept was relied upon in *Willson v. Black-Bird Creek Marsh Co.*,⁹² to uphold the power of the State of Delaware to erect a dam which impeded the passage of an otherwise navigable stream to prevent the spread of disease from "[o]ne of those sluggish reptile streams, that do not run but creep, . . . and . . . spreads its venom, and destroys the health of all those who inhabit its marshes."⁹³ The defendants in that case were the owners of a sloop, the *Sally*, who broke the dam in order to navigate the creek.⁹⁴ The Court upheld the right of the dam owners, incorporated by an act of the general assembly of Delaware, to block the dam in order to improve the public health, and reasoned that it was a valid exercise of state police power, the effect on commerce notwithstanding.⁹⁵

A line of cases relevant for this discussion is based on the "peculiarly local concern"⁹⁶ or the "maritime but local" doctrines.⁹⁷ These lines of reasoning hold that, where the subject matter of a particular regulation "is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants,"⁹⁸ then one, uniform national rule is not required, and some state regulation is allowable.

91. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824).

92. 27 U.S. (2 Pet.) 245 (1829).

93. *Id.* at 252.

94. *Id.* at 246.

95. *Id.* at 245-46.

96. *See Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851).

97. *See Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955).

98. *Cooley*, 53 U.S. at 320.

In *Cooley v. Board of Wardens*,⁹⁹ the Supreme Court ruled that the local pilotage law of the Port of Philadelphia, although a regulation of navigation, and therefore of commerce,¹⁰⁰ was a constitutional exercise of state power.¹⁰¹ The Court recognized that some regulations were of necessity local in nature, and the direct control of pilotage regulations and requirements in the innumerable ports and harbors of the United States by Congress was impractical and "best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits."¹⁰² The Court was careful in *Cooley*, however, to limit its holding to "the precise questions . . . we are called on to decide,"¹⁰³—the state regulation of local pilots. The Court did not purport to decide the larger question of just how far the states may regulate commerce in the absence of federal legislation on the same subject, or to the extent that Congress may specifically prohibit state action.¹⁰⁴

The somewhat related "maritime but local doctrine" was enunciated in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*¹⁰⁵ In that case, the Supreme Court granted certiorari to determine a choice of law question involving a marine insurance contract.¹⁰⁶ A houseboat owned by the plaintiff Wilburn Boat Company had been moored on a man-made lake bordered by the states of Texas and Oklahoma. The boat caught fire and was destroyed, and the defendant insurance company refused to pay for the loss, citing a breach of several contract provisions. Under Texas law, the breach, which did not contribute to the loss, would have been immaterial.¹⁰⁷ Under federal admiralty jurisdiction, however, any breach of a maritime contract would bar recovery.¹⁰⁸ The Court looked to "the essentially localized incidence of the transaction"¹⁰⁹ and concluded that "the interests concerned with shipping in its

99. *Id.*

100. *Id.* at 316.

101. *Id.* at 301.

102. *Id.* at 319.

103. *Id.* at 320.

104. *Id.*

105. 348 U.S. 310 (1955).

106. *Id.* at 312-13.

107. *Id.* at 311-12.

108. *Id.* at 312.

109. *Id.* at 322 (Frankfurter, J., concurring).

national and international aspects are substantially unconcerned with the rules of law to be applied to such limited situations."¹¹⁰ *Wilburn Boat* provides a clear example of a case where uniformity is not required in the maritime field, and one arguably at the opposite end of the spectrum from interstate shipping navigational rules and vessel construction standards.

In the more recent case of *Huron Portland Cement Co. v. City of Detroit*,¹¹¹ the Supreme Court upheld the power of the city to enforce a local smoke abatement ordinance, as applied to ships operating in interstate commerce, as a valid exercise of the state's police power.¹¹² The appellants were the corporate owners of two vessels which used coal-fired boilers for propulsion.¹¹³ When the ships were docked at piers located within the Detroit city limits, the boilers emitted smoke which exceeded in density and duration the smoke abatement laws of Detroit.¹¹⁴ Criminal proceedings were instituted by the city against the ship owners and two of their officers for violations of the smoke abatement law.¹¹⁵ The ship owners challenged the authority of the city to apply the smoke abatement law to them on two grounds.¹¹⁶ First, the appellants argued that Detroit may not impose additional standards because the ships were inspected and licensed by the United States Coast Guard in accordance with the mandates of Congress.¹¹⁷ Second, the appellants argued that the city ordinance "materially affects interstate commerce in matters where uniformity is necessary."¹¹⁸

According to Justice Stewart, evenhanded local legislation to effect "a legitimate local public interest is valid unless pre-empted by federal action, . . . or unduly burdensome on maritime activities or interstate commerce."¹¹⁹ Although the analysis of any specific state regulation is necessarily fact intensive, in *Huron*, the Court found that the Detroit ordinance did not conflict with federal inspection laws,¹²⁰ and was not an undue burden on commerce. It is

110. *Id.*

111. 362 U.S. 440 (1960).

112. *Id.* at 442.

113. *Id.* at 441.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 441-42.

118. *Id.* at 442.

119. *Id.* (citations omitted).

120. *Id.* at 446.

important to note that the Court further defined the analysis and concluded "[a] state may not impose a burden which materially affects interstate commerce in an area *where uniformity of regulation is necessary*."¹²¹ *Huron* is significant because it provides the framework upon which the basic limitations upon local legislative action in this area may be evaluated.¹²²

C. Preemption Under the Admiralty and Maritime Doctrines

The operative question for this analysis is whether Rhode Island's OSPPCA "contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations."¹²³

An analysis under the admiralty context is even less forgiving for state regulation than that under Commerce Clause theory. The ruling in *Jensen* clearly requires uniformity in maritime and shipping regulations, even with regard to state workmen's compensation statutes. Congress, through the Department of Transportation and the Coast Guard, has promulgated a compendium of regulations governing shipping¹²⁴ and navigation¹²⁵ which provide for a uniform and predictable national system, free from interruption by the various rules of the several coastal states, and the OSPPCA would only serve to frustrate this goal. In addition, it is clear that the regulations at issue, in practical effect, concern the entire East Coast shipping industry, and not some entirely isolated area. Therefore, the "maritime but local doctrine" of *Wilburn Boat*¹²⁶ cannot save the OSPPCA.

Furthermore, a serious question regarding the ability of Congress to delegate any authority to the states concerning maritime regulation was raised by the holding in *Knickerbocker*. This concern was laid to rest only in the context of spill liability regulations

121. *Id.* at 444 (emphasis added) (citing *Hall v. DeCuir*, 95 U.S. 485 (1877); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959)).

122. *Id.* at 443.

123. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917).

124. 46 C.F.R. §§ 1.01-5 to 588.8 (1996).

125. 33 C.F.R. §§ 1.01-5 to 401-97 (1996).

126. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955).

by the holding in *Askew v. American Waterways Operators, Inc.*¹²⁷ *Askew* concerned an action by barge owners and shipping companies seeking to enjoin the application of Florida's Oil Spill Prevention and Control Act.¹²⁸ The Florida act is similar in scope and purpose to Rhode Island's Environmental Injury Compensation Act¹²⁹ and imposes strict liability for damage caused by oil spillage from ships or transport facilities.¹³⁰ The ship owners argued that Florida's act had been preempted by enactment of the federal Water Quality Improvement Act¹³¹ which was a predecessor to OPA '90 and contained a non-preemption clause similar to the one in OPA '90 section 1018.

The Supreme Court upheld the Florida Act, holding that both acts were intended to cover separate spheres of concern, and did not conflict in any way. The Florida Act covered only liability concerns, similar to Rhode Island's Environmental Injury Compensation Act. The Florida Act did not, however, contain any regulations concerning operational or navigational requirements. *Askew* should therefore reinforce the constitutionality only of the liability aspects of the Rhode Island legislation, and should be confined to its facts.

III. COMMERCE CLAUSE PREEMPTION ANALYSIS

The powers of Congress and the individual states to legislate are plenary in their respective spheres. However, the two can, and do, conflict. Generally speaking, the Supremacy Clause dictates that in a direct conflict between a state and a federal regulation, the federal legislation prevails.¹³² A leading commentator has described the underlying rationale of the doctrine: "Despite the diversity of preemption problems, the underlying constitutional

127. 411 U.S. 325 (1973).

128. Fla. Stat. Ann. §§ 376.011 to -.17, .19 to -.21 (West 1997).

129. R.I. Gen. Laws §§ 46-12.3-1 to -8 (1996).

130. *Askew*, 411 U.S. at 327.

131. *Id.* at 328 (citing Water Quality Improvement Act of 1970, 84 Stat. 91, 33 U.S.C. § 1161 (1970)).

132. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, § 2.

principles have a common end: to avoid conflicting regulation of conduct by various official bodies that might have some authority over the subject matter."¹³³

The analysis of a federal preemption¹³⁴ question begins with the determination of whether Congress has specifically acted in a certain area, or whether it has not acted, leaving the area open to the states under the so-called "dormant commerce clause."¹³⁵ When Congress has specifically legislated in a given area, the task of the courts is to ascertain the extent that Congress intended its legislation to encompass. The traditional preemption tests used by the Court were first formulated in *Hines v. Davidowitz*.¹³⁶ The Court enunciated the rule that "the test is whether, under the circumstances of a particular case, the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"¹³⁷

More recently, the Supreme Court reiterated its test for determining whether a state statute or regulatory scheme will be preempted by federal legislation. In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*,¹³⁸ the Supreme Court assessed a challenge by Pacific Gas that certain sections of California's Warren-Alquist State Energy Resources Conservation and Development Act,¹³⁹ dealing with the construction of nuclear power plants, were preempted by the federal Atomic Energy Act of 1954.¹⁴⁰ The Court succinctly stated the analytical framework to be used in determining any preemption question.

133. Nowak & Rotunda, *supra* note 46, § 9.1, at 320 (citing *Amalgamated Ass'n of St., Electric Ry. & Motor Coach Employees of America v. Lockridge*, 403 U.S. 274 (1971)).

134. "Federal Pre-emption. The U.S. Constitution and acts of Congress have given to the federal government exclusive power over certain matters such as interstate commerce and sedition to the exclusion of state jurisdiction. Occurs where federal law so occupies the field that state courts are prevented from asserting jurisdiction." Black's Law Dictionary 612 (6th ed. 1990).

135. "When the Court seeks to decide the extent of permissible state regulation in light of a dormant commerce clause power, it is in effect attempting to interpret the meaning of Congressional silence." Nowak & Rotunda, *supra* note 46, § 8.1, at 282.

136. 312 U.S. 52 (1941).

137. Nowak & Rotunda, *supra* note 46, § 9.1, at 320 (quoting *Hines*, 312 U.S. at 67).

138. 461 U.S. 190 (1983).

139. *Id.* at 194 (citing Cal. Pub. Res. Code §§ 25524.1(b), .2 (West 1977)).

140. *Id.* (citing 42 U.S.C. § 2011 *et seq.*).

First, within constitutional limits Congress may preempt state legislative authority by stating so in explicit terms.¹⁴¹ Second, lacking any such explicit language, Congressional intent to preempt state law may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room to supplement it,' or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."¹⁴² Third, even if federal law has not completely preempted or displaced a state law on a specific subject, the state law "is pre-empted to the extent that it actually conflicts with federal law[,] . . . [or where] . . . 'compliance with both federal and state regulations is a physical impossibility."¹⁴³

To what extent, then, does the Oil Pollution Act of 1990 preempt the provisions of Rhode Island's Oil Spill Pollution Prevention and Control Act? Has Congress explicitly preempted the states from enacting protective and preventative legislation? Is OPA '90 so pervasive as to preclude Rhode Island from guarding its waterways? For the purpose of these analyses the OSPPCA can be divided into four main parts: (A) the liability and clean-up provisions following a spill, (B) the construction and design requirement for double-hulled barges, (C) the other navigational rules which include personnel and equipment, and (D) the tug escort provisions.

A. *Oil Spill Liability Regulations*¹⁴⁴

Clearly, the governing federal act, OPA '90, the House and Senate reports with respect to OPA '90, and the pertinent case law make clear that Congress has permitted states to expand liabil-

141. *Pacific Gas*, 461 U.S. at 203 (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

142. *Id.* at 204 (citing *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218 (1947))).

143. *Id.* (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 218 (1963)).

144. R.I. Gen. Laws § 46-12.3-1 to -8 (1996) (originally known as the Rhode Island Environmental Compensation Act). Although enacted prior to, and separate from the Oil Spill Pollution Prevention and Control Act, it is considered for these purposes to be part of the total body of oil pollution control legislation because of its subsequent inclusion into the OSPPCA, and its relation to OPA '90. This act was specifically held constitutional in *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623 (1st Cir. 1994).

ity.¹⁴⁵ The constitutional challenge will likely focus on the remain-

145. The relevant provision of OPA '90 clearly explains the Act's relationship to other law in the area of oil pollution liability and compensation. The Act reads, in relevant part:

Nothing in this chapter or the Act of March 3, 1851 shall—

(1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to—

(A) the discharge of oil or other pollution by oil within such State; or

(B) any removal activities in connection with such a discharge; or

(2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. § 6901 et seq.) or State law, including common law.

33 U.S.C. § 2718(a) (1994).

Other provisions of OPA '90 further allow any state to establish a fund to pay the costs or damages from a spill, *id.* § 2718(b), or to impose additional liabilities or fines and penalties "relating to the discharge, or substantial threat of a discharge, of oil." *Id.* § 2718(c).

The legislative history of OPA '90, in no uncertain terms, shows Congressional intention to allow the states a wide latitude in supplementing their own, more stringent liability and damage collection schemes, in addition to that provided in the Act itself. See *Montauk Oil Transp. Corp. v. Steamship Mutual Underwriting Ass'n*, 79 F.3d 295 (2d Cir. 1996); *Ballard Shipping Co.*, 32 F.3d 623; *International Ass'n of Indep. Tanker Owners v. Lowry*, 947 F. Supp. 1484 (W.D. Wash. 1996); *In re Spray*, No. 95-3495, 1996 WL 451315 (D.N.J. Aug. 5, 1996); *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*, 842 F. Supp. 575 (D.D.C. 1994).

The Senate report on the proposed bill spoke of the preemption issues in this area:

The issue of Federal preemption of State laws is one that often arises during the formulation of legislation which imposes Federal environmental controls. To date, Federal legislation has affirmed the rights of States to protect their own air, water, and land resources by permitting them to establish State standards which are more restrictive than Federal standards. . . . To date, twenty-four States have enacted comprehensive oil pollution laws covering cleanup and damages and many have established compensation funds. . . . This legislation, as reported by the Committee, would permit such State laws to continue and would not preclude enactment of new State laws. The 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.

S. Rep. No. 101-94, at 4 (1990), reprinted in 1990 U.S.C.C.A.N. 722, 728 (emphasis added).

A later House conference committee report on the amended bill, to include amendments and revisions from the House and Senate versions, commented on the State's powers in this area:

Section 106 of the Senate amendment and section 1018 of the House bill are generally similar provisions preserving the authority of any State to impose its own requirements or standards with respect to discharges of oil within that State. Both provisions preserve the authority of any State to

ing portions of the OSPPCA. Nevertheless, an important difference should be recognized between the liability portion of the OSPPCA and all of the subsequent provisions. The liability provisions are concerned with all events which *follow* the unlawful discharge of oil or other hazardous material into state waters. The sections dealing with Rhode Island's attempt to *prevent* oil spills, rather than impose cleanup liability, such as those regulating construction, manning, etc., are more problematic.

B. *Construction and Design Standards—Double Hull Barge Requirements*

A distinction can be made between the "design requirements" and the more general navigational rules of the respective acts.¹⁴⁶ The specific design requirements include the construction specifications of tank barges, including the types and sizes of hulls, and more important, whether or not single or double hulls are required.¹⁴⁷ Perhaps the greatest point of contention with Rhode Island's OSPPCA is the imposition of double hull requirements on vessels transporting oil or other hazardous material in Rhode Island waters.

establish or maintain funds for cleanup or compensation purposes and to collect any fees or penalties imposed under State law. Both provisions also authorize States to enforce the financial responsibility requirements of this Act on their own navigable waters.

H.R. Conf. Rep. No. 101-653 (1990), *reprinted in* 1990 U.S.C.C.A.N. 722, 799-800.

146. R.I. Gen. Laws §§ 46-12.5-17 to -23 (1996).

147. *Id.* § 46-12.5-24. Environmental protection requirements for tank vessels. [Effective June 1, 1997.]

(a) Effective June 1, 1997, no tank vessel shall transport oil or hazardous material on or over waters of the state, in conditions of limited visibility unless the tank vessel (i) has a double hull or (ii) is accompanied by a tugboat escort.

(b) Effective January 1, 2001, no tank vessel shall transport oil or hazardous material over the waters of this state in any conditions unless the tank vessel (i) has a double hull or (ii) is accompanied by a tugboat escort.

(c) The provisions of this section shall not apply to tank vessels with a capacity of less than seven thousand five hundred (7,500) barrels.

(d) The provisions of this section shall not apply to a self-propelled tank vessel or a "notched barge". For the purposes of this section, "notched barge" shall be defined as a tank barge and towing vessel attached to the tank barge by a notched groove located in the stern of the tank vessel, into which the towing vessel is inserted and affixed.

(e) The director shall have authority to issue regulations concerning tugboat escorts as required under this section.

Id.

The *Pacific Gas* preemption test framework is instructive here. That test holds that a state regulation must fail "where compliance with both federal and state regulations is a physical impossibility."¹⁴⁸ The OSPPCA requires that, effective June 1, 1997, any vessel transporting oil or other hazardous material on or over waters of the state in conditions of limited visibility must either have a double hull or be accompanied by a tugboat escort.¹⁴⁹ The OSPPCA further imposes the additional tugboat escort for *all* single hull tank vessels, *regardless of conditions*, effective January 1, 2001.¹⁵⁰

OPA '90 clearly mandates that all vessels constructed or adapted to carry oil in bulk as cargo or cargo residue, and operating on the waters subject to the jurisdiction of the United States, including the Exclusive Economic Zone, shall be of double hull construction as of *January 1, 2015*, and specifies a detailed phase-in procedure for vessels depending on age and size.¹⁵¹ There is clearly a direct conflict between these provisions because, were a tanker owner to be transiting Rhode Island waters in a single-hulled tanker in the year 2002, he would be in violation of Rhode Island law, and yet, in compliance with federal law. The Rhode Island law could not be thought of as merely more restrictive, however, because Congressional intent clearly shows that *no* legislation in this area is allowable, regardless of the scope.¹⁵² This portion of the OSPPCA poses the greatest risk of unconstitutionality when considered in light of the United States's East Coast shipping industry as a whole. This portion of the OSPPCA requires a shipping company so engaged to retrofit their ships, or send an additional tugboat as escort whenever conditions of limited visibility,¹⁵³ defined to include mere precipitation, so require. The

148. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983) (quoting *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

149. R.I. Gen. Laws § 46-12.5-24(a) (1996).

150. *Id.* § 46-12.5-24(b) (emphasis added). The foregoing provisions do not apply to tank vessels with a capacity of less than seven thousand five hundred (7500) barrels, or to self-propelled tank vessels or a notched barge. *Id.* § 46-12.5-24(c)-(d).

151. 46 U.S.C. § 3703(a) (1994) (emphasis added).

152. H.R. Conf. Rep. No. 101-653 (1990), *reprinted in* 1990 U.S.C.C.A.N. 722, 817-21.

153. "Restricted visibility means visibility is limited because of fog, mist, precipitation, sand storms or other condition limiting visibility." R.I. Gen. Laws § 46-12.5-1(13).

OSPPCA's reference to limited visibility takes on additional significance in coastal areas, and in practical effect, requires all such vessels to employ additional tug escorts whenever transiting Rhode Island waters.

The initial test of the *Pacific Gas* framework, an explicit preemptive intent by Congress,¹⁵⁴ also nullifies this portion of the OSPPCA. The legislative history of OPA '90 shows a clear and unambiguous intent by Congress that construction and design standards, and particularly double hull requirements, were reserved for federal control.¹⁵⁵

In *Ray v. Atlantic Richfield Co.*,¹⁵⁶ the Supreme Court assessed the constitutionality of Washington State's then-existing "Tanker Law"¹⁵⁷ which included a requirement that enrolled and registered tankers from 40,000 to 125,000 DWT (Dead Weight Tons) possess "standard safety features," viz., double bottoms underneath all oil and liquid cargo compartments, and other equipment requirements.¹⁵⁸ The Act also included a conditional stipulation that the "standard safety features" were not required if the "tanker is in ballast or is under escort of a tug with an aggregate shaft horsepower equivalent to five percent of the deadweight tons of that tanker."¹⁵⁹ Additionally, the Act banned the use of any tankers in excess of 125,000 DWT.¹⁶⁰

The Supreme Court struck down the double bottom and maximum length limits of Washington's "Tanker Law" as an unconstitutional intrusion into an area reserved by Congress for their regulation pursuant to the Ports and Waterways Safety Act of 1972.¹⁶¹ The Court, Justice White, held:

154. See *Pacific Gas*, 461 U.S. at 203.

155. H.R. Conf. Rep. No. 101-653 (1990), reprinted in 1990 U.S.C.C.A.N. 722, 817-21.

156. 435 U.S. 151 (1978) (plurality opinion).

157. Wash. Rev. Code §§ 88.16.170, .180, .190 (1975).

158. Wash. Rev. Code § 88.16.190(2)(c).

159. *Id.*

160. *Id.*

161. 33 U.S.C. §§ 1221-1227 (1994). An act predicated on a finding by Congress that: "navigation and vessel safety and protection of the marine environment are matters of major national importance," *id.* § 1221(a), and intended to: "construct, operate, maintain, improve, or expand vessel traffic services, consisting of measures for controlling or supervising vessel traffic," *id.* § 1223(a)(1), and allowing the Secretary to: "require vessels to install and use specified navigation equipment, communications equipment . . . or any electronic or other device necessary to com-

This statutory pattern shows that Congress, insofar as design characteristics are concerned, has entrusted to the Secretary [of the Department of Transportation] the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States. *This indicates to us that Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements.* In particular, as we see it, Congress did not anticipate that a vessel found holding a Secretary's permit, or its equivalent, to carry the relevant cargo would nevertheless be barred by state law from operating in the navigable waters of the United States on the ground that its design characteristics constitute an undue hazard.¹⁶²

The Court also predicated its holding on the finding of a direct conflict between the state and federal acts, and a requirement under the Supremacy Clause that the federal act prevail.¹⁶³

The *Ray* decision has been underscored by the relevant legislative history of OPA '90. In a joint conference report on the proposed bill, the committee explained that the double hull mandate:

was drafted to ensure that the requirement for double hulls or double containment systems be implemented as quickly as possible. *However, the Conferees understand that there are a number of considerations that require some attention. While the goal of this provision is to ensure that the environment is protected as quickly as possible from oil spills, the Conferees also recognize that there could be a substantial impact on the maritime, oil, and shipbuilding industries, as well as on the availability of vessels to transport fuel oil.* To assure that existing operators will have time to plan to replace their fleets, to assure that there is adequate shipping capacity, and to insure sufficient worldwide shipbuilding capability exists, the phaseout is staggered based on tonnage and age of vessels.¹⁶⁴

In addition, the Conference Committee report specifically referred to the *Ray* decision in section 1018 entitled, "Relationship

ply with a vessel traffic service or which is necessary in the interests of vessel safety," *id.* § 1223(a)(3).

162. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 163-64 (1978) (emphasis added).

163. *Id.* at 165.

164. H.R. Conf. Rep. No. 101-653 (1990), *reprinted in* 1990 U.S.C.C.A.N. 722, 819 (emphasis added).

To Other Law." The last line of that section reads: "The Conference substitute does not disturb the Supreme Court's decision in *Ray v. Atlantic Richfield Company*."¹⁶⁵ Some of the House conferees were concerned that OPA '90 would be construed by the states as an open invitation to regulate areas traditionally reserved to Congress, and wanted additional language clearly delineating the areas preempted from those not preempted. This reference to *Ray* was a concession from the Senate members of the committee who were leery about including any such additional language.¹⁶⁶

It is important to note that the House and Senate extensively debated the double hull issue.¹⁶⁷ The bill finally adopted, and later signed into law as OPA '90, therefore represents a political compromise between both houses and should be granted due deference from the Court in any future actions.

C. Personnel, Equipment and Navigational Rules

The double hull requirement of the OSPPCA¹⁶⁸ represents the first such post-*Ray*, and post-OPA '90, state-imposed construction requirements on tank vessels. The OSPPCA also mandates other personnel and navigational requirements which exceed that of OPA '90. These requirements pertain to the watch requirements,¹⁶⁹ crew requirements,¹⁷⁰ drug and alcohol use

165. *Id.* (citation omitted), reprinted in 1990 U.S.C.C.A.N. 722, 800.

166. Cynthia M. Wilkinson et al., *Slick Work: An Analysis of the Oil Pollution Act of 1990*, 12 J. Energy Nat. Resources & Envtl. L. 181, 223 (1992); see also International Ass'n of Indep. Tanker Owners v. Lowry, 947 F. Supp. 1484 (W.D. Wash.) (1996). "The citation to *Ray* may mean that there was an intention not to eradicate the Court's holding that federal law impliedly preempted state tanker design and construction regulations." *Id.* at 1492 n.5.

167. See, e.g., Russell V. Randle, *The Oil Pollution Act of 1990: Its Provisions, Intent, and Effects*, 21 Envtl. L. Rep. 10119 ("One of the most debated aspects of the Oil Pollution Act was the need for and effectiveness of tanker double hulls in preventing or reducing oil spills from groundings, collisions, and other vessel casualties."); Wilkinson et al., *supra* note 166, at 222.

168. R.I. Gen. Laws § 46-12.5-24 (1996).

169. *Id.* § 46-12.5-21. Operating procedures—Watch practices and crew requirements for tank barges. [Effective June 1, 1997.]—

(a) *Water procedures:*

- (i) The navigation watch on the tow vessel shall consist of at least one licensed deck officer or tow vessel operator. The terms Master and operator may be used interchangeably as defined in section 46-12.5-1.
- (ii) When underway in restricted visibility, one (1) crew member must serve as a lookout, and must be assigned to a watch station in a safe

and testing for officers and crew members,¹⁷¹ voyage navigational and emergency spill response plan,¹⁷² and naviga-

location which allows sight and hearing of all navigational hazards and the tow vessel operator.

(iii) The names of each navigation watch member must be logged in the deck log as the member assumes duties.

Id. § 46-12.5-21(a).

170. *Id.* § 46-12.5-21.

(b) *Crew requirements:*

(i) Two (2) personnel, one (1) of whom must be a certified tanker-man under 46 C.F.R. subpart 12.20, shall be on the tank barge at all times when the tank barge is underway, anchored, or moored in the waters of the state.

(ii) Three (3) licensed officers or tow vessel operators shall be on a tow vessel for tank barge tows in coastal waters.

(iii) Tow vessel operators shall maintain a list of crew members while towing a tank barge in state waters.

(c) Any tank barge which is underway, anchored, or moored in the waters of the state and which does not fulfill the minimum manning safety standards as stated in this section, shall be in violation of this chapter.

(d) The requirements of this section shall not apply to tank vessels with a capacity of less than seven thousand five hundred (7,500) barrels.

Id. § 46-12.5-21(b)-(d).

171. *Id.* § 46-12.5-18. Personnel policies—Illicit drugs and alcohol use.

(1) An owner or operator of a tank vessel shall have policies, procedures, and practices for alcohol and drug testing that comply with 33 CFR Part 95 and 46 CFR Parts 4 and 16, except 66 CFR sec. 16.500. The owner's and operator's policies, procedures, and practices shall ensure that:

(a) A person neither consumes, nor is under the influence of, alcohol on a tank vessel while on the waters of the state, unless that person is a passenger who does not perform, and will not perform, any duty on the tank vessel in state waters; and

(b) A person neither consumes, nor is under the influence of, illicit drugs on a tanker while in the waters of the state.

Id. § 46-12.5-18(a)-(b).

172. *Id.* § 46-12.5-22. Operating procedures—Navigation. [Effective June 1, 1997.]

(1) Prior to operating in the waters of the state, the vessel master shall ensure that a comprehensive written voyage plan is developed for the tanker's trip throughout state waters. The voyage plan is a navigation guide used by the bridge team for transits through state waters, but subject to deviations by the master based on local conditions or recommendations from the vessel's state licensed pilot. A standard voyage plan for consecutive voyages along the same routes may be used if updated prior to the tank vessel's entry into state waters. The voyage plan must address, at a minimum, the following:

(a) Channel depth and width, turning areas, navigational obstructions, and appropriate speeds for each waterway transited;

(b) Accuracy, dependability, and operating status of available navigational aids, including radio-navigational aids;

tional equipment to be carried and used by all towing vessels.¹⁷³

This category of requirements has traditionally been regulated by Congress, through the Department of Transportation and the Coast Guard, to ensure uniform and national rules. Rhode Island is not the first or only state to enact laws of this type. Washington State enacted their own oil spill prevention plan, known as the Best Achievable Protection Standards For Tankers (BAPS).¹⁷⁴ This legislative scheme attempts to control many of the same areas of regulation as Rhode Island's OSPPCA: alcohol and drug use,¹⁷⁵ navigational equipment and use,¹⁷⁶ manning provisions,¹⁷⁷ and oil spill and navigational plan submissions;¹⁷⁸ and it also supersedes the analogous federal regulations.

(c) Environmentally sensitive areas, traffic separation systems, areas-to-be-avoided, landfalls, routes expected to be transited at night, and other areas where caution should be exercised;

(d) Predicted weather, currents, and tides;

(e) Emergency procedures to be used while transiting state waters for vessel casualties, pollution incidents, and personnel health and safety.

Id.

173. *Id.* § 46-12.5-23. Operating procedures—Technology. [Effective June 1, 1997.]

(1) An owner or operator of a tank barge shall ensure that tow vessels transporting tank barges within the waters of the state are equipped with a minimum of the following navigational and safety equipment requirements:

(a) Functional radar;

(b) Global Positioning System (GPS) receivers;

(c) Both a magnetic and a gyrocompass;

(d) Two VHF radios, one of which is independently powered (not reliant on the towing vessel's main power source); and

(e) Functioning automated fire and flooding detection systems that can be activated by the master or crew in the event of emergency or other situation that endangers, or threatens to endanger the safety of the tow vessel, barge or cargo.

(2) The owner or operator of a tank barge underway, anchored, or moored in the waters of the state shall employ anchoring equipment which can be manually deployed by a crew member manning the tank barge during coastal tow or another method of retrieving a lost tow.

Id.

174. Wash. Admin. Code § 317-21-020 (1995).

175. *Id.* § 317-21-235.

176. *Id.* § 317-21-265.

177. *Id.* § 317-21-130.

178. *Id.* § 317-21-120.

The Washington statute became effective on July 7, 1995, and was met with an immediate response by the International Association of Independent Tanker Owners, commonly known as Intertanko,¹⁷⁹ who filed suit in the Federal District Court for the Western District of Washington on July 19, 1995.¹⁸⁰

The BAPS legislation was condemned by C. Jonathan Benner, an attorney with the Washington, D.C., legal firm Haight, Gardner, Poor & Havens, who represented Intertanko. Benner described the BAPS as creating a "confusing mish-mash of governmental regulations, with one state's shipping regulations different from another's."¹⁸¹ Due to the substantial similarity between Rhode Island's OSPPCA and Washington State's BAPS, an analysis of the *Intertanko* suit will be illuminating and relevant in assessing the viability of Rhode Island's OSPPCA.

In *International Association of Independent Tanker Owners v. Lowry*¹⁸² (*Intertanko*), United States District Court Judge Coughenour granted a motion for summary judgment filed by Washington State, and upheld the BAPS against the constitutional challenge posed by Intertanko.¹⁸³ Specifically, Intertanko had alleged that the state regulations concerning the voyage navigational and oil spill contingency plans,¹⁸⁴ as well as sixteen other provisions¹⁸⁵

179. Intertanko is an international association based in Oslo, Norway, and is comprised of 300 shipping companies which account for 80% of the world's independently owned oil tankers. Some of these companies are American based, and the group is collectively responsible for 60% of America's crude oil deliveries. Kery Murakami, *Tanker Operators Sue State Over Regulations*, Seattle Times, July 20, 1995, at B1, available in 1995 WL 5033116.

180. *Id.*

181. *Id.*

182. 947 F. Supp. 1484 (W.D. Wash. 1996).

183. *Id.* at 1500.

184. *Id.* at 1488 (citing Wash. Admin. Code §§ 88.46.010(2)-(3), .040(3) (1996)).

185. *Id.* at 1488-89 (citing Wash. Admin. Code § 317-21-130 (1996)). Compare R.I. Gen. Laws § 46-12.5-5 (1996) (Event and discharge reporting requirements), with Wash. Admin. Code § 317-21-130. Compare R.I. Gen. Laws § 46-12.5-21 (Operating procedures—watch and crew practices), with Wash. Admin. Code § 317-21-210. Compare R.I. Gen. Laws § 46-12.5-22 (Operating procedures—navigation), with Wash. Admin. Code §§ 317-21-210, -215, -220. Compare R.I. Gen. Laws § 46-12.5-22(e) (Requirement for emergency procedures plan while transiting state waters), with Wash. Admin. Code §§ 317-21-225, -230, -235. Compare R.I. Gen. Laws § 46-12.5-18 (Personnel policies—illicit drugs and alcohol use), with Wash. Admin. Code § 317-21-240. Compare R.I. Gen. Laws § 46-12.5-18(2)(3) (Drug testing and records management), with Wash. Admin. Code § 317-21-240, -250, -255. Compare R.I. Gen. Laws § 46-12.5-19 (Personnel policies—record keeping), with Wash. Admin. Code § 317-21-260, -265. Compare R.I. Gen. Laws § 46-12.5-23 (Operating

were preempted or otherwise invalidated by federal law. Intertanko relied on the body of federal regulations already enacted which impose specific requirements for tankers, or allow the Coast Guard to promulgate specific regulations.¹⁸⁶ In addition, Intertanko relied on several international treaties to which the United States has assented.¹⁸⁷ Intertanko argued that the BAPS at issue were impliedly preempted, or otherwise nullified, by federal statutes and treaty obligations through the Supremacy Clause, Commerce Clause, and Foreign Affairs Clause of the Constitution.¹⁸⁸

The court began its discussion of preemption by distinguishing between express and implied preemption.¹⁸⁹ According to the court, "explicit preemption occurs when Congress so declares, [and i]mplicit preemption is present if the scheme of federal regulation is so pervasive as to indicate that Congress left no room for state action."¹⁹⁰ Judge Coughenour then continued his analysis, and based most of the opinion almost entirely on what he and the defendants and intervenors¹⁹¹ believed to be a non-preemptive intent of Congress in enacting *all* the provisions of OPA '90.¹⁹²

1. *Legislative Intent*

The foundation of the defendant's argument is based on OPA '90 section 1018, that portion dealing with liability and cleanup compensation schemes, which clearly does allow for additional, unlimited liability on the part of the states following an oil spill or pollution event.¹⁹³ The court, however, ascribes this non-preemp-

procedures—technology requirements), *with* Wash. Admin. Code § 317-21-540. It is interesting to note that Washington State did not, however, enact any double hull or other vessel construction requirements, perhaps in light of their experience, and the holding in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

186. The Tank Vessel Act of 1936; the Ports and Waterways Safety Act of 1972 (PWSA); the Port and Tanker Safety Act of 1978 (PTSA); and the Oil Pollution Act of 1990 (OPA '90). *Intertanko*, 947 F. Supp. at 1489.

187. *Id.*

188. *Id.*

189. *Id.* at 1490.

190. *Id.* (citing *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978)).

191. The defendants in the suit were the State of Washington, certain state officials and four county prosecutors. Three environmental groups intervened: the Natural Resources Defense Council, the Washington Environmental Counsel and Ocean Advocates, Inc. *Id.* at 1498.

192. *Id.* at 1491-93.

193. 33 U.S.C. § 2718(c) (1994); *see supra* note 145.

tive intent to all other portions of OPA '90.¹⁹⁴ This interpretation is erroneous.

The relevant portion of section 1018 is located in Title I, Oil Pollution Liability and Compensation, and reads in relevant part:

(a) PRESERVATION OF STATE AUTHORITIES . . . Nothing in this Act shall—

(1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional *liability* or requirements with respect to—

(A) the *discharge* of oil or other pollution by oil within such State; or

(B) any *removal activities in connection with such a discharge*;

. . . .

(c) ADDITIONAL REQUIREMENTS AND LIABILITIES, PENALTIES—Nothing in this Act . . . shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof—

(1) to impose additional liability or additional requirements; or

(2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;

relating to the *discharge, or substantial threat of a discharge, of oil*.¹⁹⁵

The court began its analysis of this provision by recognizing that “[t]he starting point for statutory interpretation is consideration of the language employed by Congress, and consideration of the statute as a whole, including its history and purposes.”¹⁹⁶

OPA '90 comprises nine titles addressing different and distinct areas of concern: Title I, Oil Pollution Liability and Compensation; Title II, Conforming Amendments; Title III, International Oil Pollution Prevention and Removal; Title IV, Prevention and Removal; Title V, Prince William Sound Provisions; Title VI, Miscellaneous Provisions; Title VII, Oil Pollution Research and Development Pro-

194. *Intertanko*, 947 F. Supp. at 1493.

195. 33 U.S.C. § 2718(a) (emphasis added).

196. *Intertanko*, 947 F. Supp. at 1491 (citing *United States v. van den Berg*, 5 F.3d 439, 442 (9th Cir. 1993)).

gram; Title VIII, Trans-Alaska Pipeline System; and Title IX, Oil Spill Fund Transfers.¹⁹⁷

Title I governs and establishes the liability scheme for oil spills and provides mechanisms for the recovery costs and compensation following an oil spill, while Title IV, Prevention and Removal, sets federal standards for tanker design and construction, personnel requirements, and operations and manning, in addition to requiring that the President prepare a National Contingency Plan for the removal of oil following a discharge.¹⁹⁸ Titles I and IV are therefore separate and distinct, and deal with different areas of concern.

The court interprets the non-preemptive language of the savings clause in Title I, "Nothing in this Act shall (1) affect . . . the authority of any State," as applying to *all nine* Titles of OPA '90, and in conclusory fashion implants a general non-preemptive intent to the entire act.¹⁹⁹ Such a misreading might lead to the erroneous conclusion that Congress specifically meant for the states to supplement construction and design standards, such as double hulls, a result that was clearly not intended.²⁰⁰

This conclusion is faulty for several reasons. First, the savings clause does not appear in any generally applicable, preamble-like section addressing the whole of OPA '90, but rather, was placed within a specific section. Second, the section containing the savings clause deals specifically and exclusively with liability, penalties, and removal activities, which by their nature are concerned with events *following* the unlawful discharge, or substantial threat of a discharge, of oil. These provisions in no way relate to preventive measures, such as are found in a separate and distinct section, Title IV, Prevention and *Removal*.²⁰¹

197. 33 U.S.C. §§ 1501-1524.

198. *Id.*

199. "Pursuant to the broad language of section 1018, it follows that none of the provisions of OPA '90 preempt the ability of the states to add to federal requirements in the areas addressed by the Act." *Intertanko*, 947 F. Supp. at 1491.

200. See *supra* text accompanying notes 166-67 for a discussion of Congressional intent on the double hull issue.

201. This section deals with removal only in a preventive sense—it requires the President and the tank vessel operator to prepare a removal plan *in advance of an actual spill*. Removal refers to cleanup activities whereby oil or other fuel remaining in a leaking vessel's tanks, and any on the water's surface, are siphoned to a rescuing vessel, *following the discharge or spill*.

The court has correctly made reference to the history of the Act in order to determine its true interpretation.²⁰² Following that course, it is clear that no general preemptive intent can be inferred for the whole of OPA '90.

The legislative history of OPA '90 in effect spans fifteen years, taking into account all Congressional efforts to enact a similar, comprehensive scheme for oil pollution control.²⁰³ The primary point of contention between the House of Representatives and the Senate had always been the preemption issue; the House was for, and the Senate against, preemption of state laws.²⁰⁴ In fact, a bill similar to OPA '90 had passed both houses in 1986, but died in committee because of the inability to agree on the preemption issue.²⁰⁵

This legislative deadlock was broken when, on March 24, 1989, the tanker *Exxon Valdez* struck Bligh Reef in Prince William Sound, Alaska, and spilled nearly eleven million gallons of thick crude oil.²⁰⁶

In the extensive and intense debate that followed:

Some House Conferees were particularly concerned that the OPA not be interpreted to expand the authority of states over areas traditionally reserved to the federal government. While attempts were made during negotiations to include language that specified what areas were preempted and what areas were not, the Senate was leery of doing so. The only concession the Senate would make on this point was to include language in the Congressional Conference Report stating that the OPA does not disturb the Supreme Court decision in *Ray v. Atlantic Richfield Company*. . . .

The House Conferees were particularly concerned that states might perceive section 1018 as a license to expand their authority with regard to vessel construction, manning, licensing, or other matter related to oil spill prevention and response, as discussed in *Ray*.²⁰⁷

202. *Intertanko*, 947 F. Supp. 1484.

203. *Wilkinson et al.*, *supra* note 166, at 221.

204. *Randle*, *supra* note 167, at 10119.

205. *Id.*

206. Elizabeth R. Millard, *Anatomy of an Oil Spill: The Exxon Valdez and the Oil Pollution Act of 1990*, 18 *Seton Hall Legis. J.* 331, 340-41 (1993).

207. *Wilkinson et al.*, *supra* note 166, at 222-23. The authors are the Majority and Minority Counsels of the Merchant Marine and Fisheries Committee, U.S.

Therefore, the bill finally passed as OPA '90 in no way represents a clear, all-encompassing non-preemptive intent.

Finally, the *Intertanko* court relied on a letter dated September 28, 1993, issued by the Washington State Congressional Delegation to the Commandant of the Coast Guard.²⁰⁸ The letter expressed concern that the Coast Guard might invalidate the BAPS for vessels transiting Washington waters bound for Canada. However, use of this Congressional delegation's opinion is not persuasive due to obvious constituency concerns, and in any case, is certainly not representative of Congressional intent as a whole.

2. *Pervasiveness of the Federal Scheme*

Intertanko has argued that the Washington BAPS are invalid under a theory of implied field preemption due to the comprehensive regulation of oil tankers through federally-enacted statutes.²⁰⁹ There is merit to this assertion. A casual inventory of the Code of Federal Regulations in Title 33 (Navigation), and Title 46 (Shipping), reveals at least 715 separate regulations relating to oil tankers and the orderly regulation of shipping in general. A complete listing or inventory is beyond the scope of this Comment, but reference to the sheer volume of regulation alone indicates an intention by Congress to occupy the field of interstate shipping.

Moreover, the *Intertanko* court concedes that the subject areas covered by the Washington Act (and therefore, presumably, Rhode Island's OSPPCA), "are comprehensively regulated by federal statutes, regulations and treaty obligations."²¹⁰ The court attempted to counter *Intertanko's* preemption argument by simply asserting that *Intertanko's* theory was "largely foreclosed by the nonpreemption language of OPA '90."²¹¹ In light of the preceding discussion this reasoning seems unpersuasive.

House of Representatives, one of the agencies which presented evidence in the congressional hearings deliberating OPA '90. *Id.* at 181.

208. *International Ass'n of Indep. Tanker Owners v. Lowry*, 947 F. Supp. 1484, 1492 (W.D. Wash. 1996).

209. *Id.* at 1493.

210. *Id.*

211. *Id.*

D. *Tug Escort Provisions*

The question remains whether the tug escort provisions²¹² may somehow "save" this portion of Rhode Island's OSPPCA should the double hull mandates be preempted. This analysis can take one of two paths. First, a tug escort requirement could be deemed an excessive burden on interstate commerce because of the added cost in vessels, fuel and personnel. Tug escort provisions were discussed in *Ray*, as they were part of the previous Washington State "Tanker Law" at issue in that decision.²¹³ The *Ray* plurality determined that the tug escort provisions were not a construction or design standard, and were not preempted to the extent that the Coast Guard had not promulgated rules for tug escorts in Washington waters, or specifically determined that they were not necessary.²¹⁴ The *Ray* court further determined that the tug escort requirement did not violate the Commerce Clause because the cost was considered negligible, estimated then at "less than one cent per barrel of oil"²¹⁵ for a 120,000 DWT tanker. A similar analysis today would have to depend on current costs, the amount of vessel traffic in Rhode Island waters, and the availability of a sufficient number of tugs to accompany every single-hulled barge. According to Stephen G. Morin of Rhode Island's Department of Environmental Management, the tug requirement is impractical: "The problem with that is there are just simply not enough tugboats."²¹⁶

The *Ray* court also likened the tug escort provision to local pilotage rules, citing *Cooley v. Board of Wardens*.²¹⁷ This analogy does not directly translate to the situation in Rhode Island. In *Cooley*, the Court upheld the police power of Pennsylvania to regulate local pilots in the Port of Philadelphia, citing the Act of Congress of 1789, which "declared that all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regu-

212. "Environmental protection requirements for tank vessels. (a) Effective June 1, 1997, no tank vessel shall transport oil or hazardous material on or over the waters of the state, in conditions of limited visibility unless the tank vessel (i) has a double hull or (ii) is accompanied by a tugboat escort." R.I. Gen. Laws § 46-12.5-24(a) (1996) (emphasis added).

213. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 169 (1978).

214. *Id.* at 178.

215. *Id.* at 179-80. These figures represent the applicable conditions in 1978.

216. Abbott, *supra* note 19, at A1.

217. 53 U.S. (12 How.) 299 (1852).

lated in conformity with the existing laws of the States."²¹⁸ This holding recognized that there were certain areas of peculiarly local concern, which did not "want of a national and uniform regulation."²¹⁹ This may be applicable in Puget Sound, known to be a bustling and hazardous area for navigation, but it is debatable for Block Island Sound, a generally open body of water free of natural hazards and used by numerous vessels which merely pass by Rhode Island on their way to Boston and other points North. The holding does have limited applicability for interior Narragansett Bay, where state law requires a state-licensed pilot on board the vessel.²²⁰ This is not to say, however, that because a state may constitutionally require a pilot in certain localized areas, it may also impose additional construction or design standards, or navigational rules in those areas.

The second possible path would be simply to characterize the tug escort provision as a navigational rule, subject to regulation with all other navigational rules, under the administration of Congress and the United States Coast Guard. In construing tug escort and other generic navigational operating regulations, a federal court would likely give deference to the Coast Guard, the federal administrative agency given the task of implementing Congressional mandates in the area. Case law supports this conclusion. In *Wood v. Amerada Hess Corp.*,²²¹ the Federal District Court for the Southern District of New York was required to determine the scope and applicability of certain federal pilotage laws, and deferred to the judgment of the Coast Guard stating: "[S]tatutory interpreta-

218. *Id.* at 302 (quoting The Act of Congress 2d March, 1837 5 Stat. at Large 153).

219. *Id.*

220. The act states in relevant part:

Vessels required to employ state licensed pilot—"Vessel" defined.—

(a) Every foreign vessel, regardless of gross tonnage or draft, and every American vessel under register, regardless of gross tonnage or draft, . . . entering or departing from any port of the state or traversing the waters of the state north of a line drawn from Point Judith to Sakonnet Point, shall take and employ a pilot licensed under this chapter and shall be subject to the provisions of this chapter. Notwithstanding any of the above provisions, any vessel carrying or towing a barge or similar conveyance carrying more than one thousand (1,000) gross tons of any oil, petroleum, petroleum distillate, or any by-product thereof, shall be defined as a vessel and shall be subject to the provisions of this chapter.

R.I. Gen. Laws § 46-9-2 (a), (c) (1996).

221. 845 F. Supp. 130 (S.D.N.Y. 1994).

tion by an agency responsible for the administration of that statute is entitled to substantial deference Where, as here, the Coast Guard's interpretation of its own regulations is within reasonable limits, it would be inappropriate for the courts to overrule it."²²²

With respect to Washington's Act, and by analogy, to Rhode Island's, the Coast Guard's interpretation of OPA '90, particularly as it relates to the navigational and equipment provisions of Washington's BAPS, is helpful. In response to the enactment of the BAPS, Rear Admiral J.C. Card, Chief of the United States Coast Guard's Office of Marine Safety, Security, and Environmental Protection, issued a letter to Barbara Herman, Director of Washington State's Marine Safety Office. Card said, in relevant part:

Many U.S. statutes and regulations enforced by the Coast Guard are in furtherance of our international commitment. Should widely disparate state requirements be implemented, the possibility arises that compliance with federal and state regulations either becomes a physical impossibility or the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. A patchwork of differing and conflicting coastal state and local regulatory initiatives would be confusing to the users and may actually degrade maritime safety and environmental protection. While [OPA '90 specifically allows the states to impose additional liability requirements], the Coast Guard does not regard this as a Congressional expression altering the traditional relationship between federal and state governments. Rather it permits states to impose additional liabilities or requirements . . . in a manner that does not contravene the federal scheme.²²³

CONCLUSION

The liability requirements of Rhode Island's Environmental Injury Compensation Act²²⁴ are clearly permissible in light of the First Circuit's holding in *Ballard Shipping*, as well as OPA '90's

222. *Id.* at 139 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984); *Atlantic States Legal Found. v. Eastman Kodak Co.*, 12 F.3d 353, 358 (2d Cir. 1993); *Campos v. Puerto Rico Sun Oil Co.*, 536 F.2d 970, 974 (1st Cir. 1976)).

223. Vincent Taylor, *Oil Tanker Group Challenges State's Spill Prevention Rules*, Drug Detection Report, Sept. 5, 1995, available in 1995 WL 10428780, at *4.

224. R.I. Gen. Laws §§ 46-12.3-1 to -8 (1996).

explicit authorization and the corresponding legislative history. OPA '90 fully intends for a complementary, integrated scheme in this area to allow the states the legitimate exercise of their police powers to compensate themselves and their citizens *following an oil spill*.

However, the double hull provisions would not survive constitutional scrutiny as evidenced by the full and deliberate Congressional debate, and the recognition that these costly measures are a significant burden on the shipping industry, and in turn, on the oil-consuming public as a whole. The specific reference to the holding in *Ray v. Atlantic Richfield Company* in the legislative history of OPA '90 should dispel any debate about state-mandated double hull requirements which conflict with the complex, gradual federal scheme.²²⁵

Finally, although the navigational, equipment and tug escort requirements are not so expressly governed, the pervasiveness of the federal scheme and the interpretation by the Coast Guard of their function should preempt those provisions. The *Intertanko* decision is, of course, not binding on the First Circuit, and may be appealed. The analysis used by the court is not very persuasive, and a different outcome on appeal is possible.

Furthermore, there have been new developments in this area. The Coast Guard, under increasing pressure from Congress, has published final rules concerning required equipment for all tank vessels. The rules now require that such basic navigational items as radar, a searchlight, a VHF radio, a compass and navigational charts be carried and used by vessels towing barges.²²⁶ In addition, the tug operators must carry lines capable of pulling the barge without parting, and they must regularly inspect the lines for wear and snarls.²²⁷

More rules are in the developmental stage. Congress is researching the Oil Spill Prevention and Response Improvement

225. In an interesting development, the United States government has been sued by Maritrans, a leading United States barge transportation corporation, for the effective loss of 37 of its barges due to be phased out by the double hull requirements of OPA '90, on a takings clause theory. Maritrans seeks 200 million dollars in damages. Joel Glass, *US Faces Single-Hull Compensation Lawsuit*, Lloyd's List Int., Aug. 24, 1996, available in 1996 WL 11840254, at *1.

226. Navigational—Safety equipment, 61 Fed. Reg. 35073-74 (1996) (to be codified at 33 C.F.R. § 164.72).

227. *Id.*

Act,²²⁸ which will make some changes to OPA '90. Rear Admiral Card has testified before the Committee on Environment and Public Works in reference to the bill, and has tentatively given Coast Guard approval to some of the provisions.²²⁹ It is noteworthy that several of the requirements in Rhode Island's OSPPCA have made their way into the proposed federal revisions, no doubt due to the efforts of Senator John Chafee who chairs that Senate committee.²³⁰ Specifically, Admiral Card has given approval to a section which requires either a crew member on board all single hull barges over 5000 gross tons, and an operable anchor, or an emergency system on the towing vessel to retrieve the barge in case of emergency, or any comparable alternatives.²³¹ In addition, fire suppression systems on board towing vessels are being investigated, and Admiral Card has given Coast Guard approval for the basic requirement, although he feels that an in-depth study needs to be done. It appears that Rhode Island, Washington State and Congress are meeting somewhere in the middle.

These legislative steps and Coast Guard promulgations bolster the premise that the enactment of navigational and equipment regulations are the province of the federal government, and best implemented in a coordinated and integrated national or regional scheme. Moreover, these recent legislative steps implicate a reference to the traditional role of the Congress to regulate commerce "among the states" and in the maritime field. The official interpretation of OPA '90 by the United States Coast Guard should assist a reviewing court to hold for preemption, and end the "alarming process of Balkanization of the national marine safety system into disparate local regimes."²³²

Rhode Island's attempt to protect its most valuable resource is both understandable and commendable.²³³ Federal efforts to enact

228. 1997 U.S. H.B. 238 (SN).

229. Congressional Testimony by Federal Document Clearing House: Statement of Rear Adm'l. James C. Card before the Senate Committee on Environment and Public Works, June 4, 1996, available in 1996 WL 10164720 [hereinafter Card].

230. David Barnes, *Coast Guard Urged to Issue Barge Safety Rules*, Traffic World, June 10, 1996, available in 1996 WL 8354722, at *1.

231. Card, *supra* note 229.

232. Richard du Moulin, *Editorial*, Seattle Post-Intelligencer, July 16, 1996, at A7, available in 1996 WL 6449165.

233. However, recent developments in Rhode Island's plan to develop the Quonset Point Industrial Complex bring into question the suitability of enacting

protective legislation for coastal areas subject to the constant dangers of oil-laden vessel traffic have been inexcusably slow, and, at times, woefully inadequate. But there has been progress, and more is on the way. Spurred by the efforts of states such as Rhode Island and Washington, Congress and the Coast Guard have been forced to admit their inadequacies, and OPA '90 and the proposed amendments to it show that progress is being made. However, the states must remember that the battle with Congress for control over interstate commerce and maritime affairs is over; it was lost in 1789.

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regulations perceivably hostile to the shipping industry. Rhode Island voters recently passed a 72 million dollar bond issue to develop the former navy base at Quonset Point into one of the major container cargo ports on the East Coast. The state plans to lease land to a private developer who will upgrade piers and dredge a portion of Narragansett Bay to allow deep draft ships to dock there. William J. Donovan, *The Real Work at Quonset Point*, Prov. J. Bull., Nov. 7, 1996, at E1, available in 1996 WL 14166123. According to Governor Lincoln Almond, "Cargo containers represent the opportunity to make Quonset a leading port in the Northeast [for containerized cargo and automobile imports]. Approving the bond will allow this facility to be properly upgraded, help provide for construction of the third rail (line) and help maximize Quonset's potential for the state in the form of jobs and increased tax revenue." Paul Davis & William J. Donovan, *Freight Line Would Be Life Line*, Prov. J. Bull., Oct. 11, 1996, at F1, available in 1996 WL 12468830 (quoting Gov. Almond). Although the OSPPCA is aimed at oil-carrying vessels only, it might be thought of as fostering a regulatory environment hostile to the shipping industry, while at the same time attempting to attract large numbers of container ships to boost the state's economy. *But see* R.I. Gen. Laws § 46-9-1(d) (1996). "It is further the intent of the general assembly not to place in jeopardy Rhode Island's position as an able competitor for waterborne commerce from other ports and nations of the world, but rather to continue to develop and encourage that commerce." *Id.*