

Pepperdine Law Review

Volume 39 | Issue 3

Article 3

4-15-2012

Overreach on the High Seas?: Whether Federal Maritime Law Preempts California's Vessel Fuel Rules

Bradley D. Easterbrooks

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/plr>

 Part of the [Environmental Law Commons](#), and the [Law of the Sea Commons](#)

Recommended Citation

Bradley D. Easterbrooks *Overreach on the High Seas?: Whether Federal Maritime Law Preempts California's Vessel Fuel Rules*, 39 Pepp. L. Rev. 3 (2013)

Available at: <http://digitalcommons.pepperdine.edu/plr/vol39/iss3/3>

This Comment is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized administrator of Pepperdine Digital Commons. For more information, please contact Kevin.Miller3@pepperdine.edu.

Overreach on the High Seas?: Whether Federal Maritime Law Preempts California's Vessel Fuel Rules

- I. INTRODUCTION
- II. BACKGROUND
 - A. *Admiralty Jurisdiction and Substantive Maritime Law*
 - B. *Concurrent Legislative and Regulatory Powers*
 - C. *Concurrent Jurisdiction and International Law*
- III. CARB ENACTS OFFSHORE ENVIRONMENTAL REGULATIONS
 - A. *California's First Attempt at Emissions Regulations*
 - B. *Retooled: California's Current Ocean-Going Vessel Fuel Regulations*
 - C. *CARB's Unintended Consequences*
- IV. WHETHER CALIFORNIA'S VESSEL FUEL RULES ARE PREEMPTED
 - A. *Whether the Clean Air Act Preempts the Vessel Fuel Rules*
 - B. *MARPOL Annex VI: An International Framework*
 - C. *The Submerged Lands Act and Extraterritorial Concerns*
 - D. *Federal Interest in Uniformity: Common Law Preemption in Maritime Law*
 - 1. State Regulation Is Not Afforded a Presumption Against Preemption when It Bears upon Maritime Commerce
 - 2. Balancing the Federal Interest in Uniformity with the State's Interest in Regulation
- V. CONCLUSION

I. INTRODUCTION

Some Californians still remember the casino gambling boats that, decades ago, were anchored off the Los Angeles coastline. In the 1930s, gambling was illegal in California, but people could take a ferry and board

the *Rex*, a floating casino anchored just three miles from the coast.¹ The state's territorial boundary—and thus its jurisdiction to enforce its laws—ended three miles from its coastline.² Eventually, California ended the practice of allowing offshore gambling when the Attorney General unilaterally sent law enforcement to lay siege to the *Rex* and sink its gambling equipment, a move that was challenged as unconstitutional at the time.³

Similarly today, California seeks to regulate maritime activity off its coast in ways that appear constitutionally suspect.⁴ In 2007, the California Air Resources Board (CARB) enacted regulations to reduce ocean-going vessel emissions, measured by limits on certain chemicals in diesel fuel.⁵ The rules were to be enforced against vessels traveling within twenty-four miles of the California coastline, which is twenty-one miles beyond the state's territorial boundary.⁶ The Pacific Merchant Shipping Association (PMSA) challenged the regulations in court, and the Ninth Circuit held that the emissions caps were preempted by the Clean Air Act (CAA).⁷ CARB subsequently retooled the regulations, framing them as direct fuel content requirements instead of emissions caps, and enacted the current Vessel Fuel Rules (VFR) in 2009.⁸ California's claim that it has the power to prescribe specific fuel content requirements for vessels traveling in interstate and international waters is a relatively novel contention. No state has ever asserted such a broad extraterritorial regulatory authority, especially in light of the historic constraints placed on state regulation under federal maritime law.⁹

One of the most obvious historic constraints on state jurisdiction in the field of maritime law has been the Constitution itself. Article III of the U.S. Constitution gives federal courts jurisdiction over admiralty and maritime

1. See *The Era of the Gambling Ships & the Battle of Santa Monica Bay*, LAALMANAC.COM, <http://www.laalmanac.com/history/hi06ee.htm> (last visited Jan. 19, 2012) (“1928 saw the appearance of the first of the gambling ships that floated off the Los Angeles County coastline. Although it was illegal to conduct a gambling operation in California, the state’s jurisdiction only extended three miles offshore. There was nothing in Federal law that forbid gambling, so operators of floating gambling casinos merely had to anchor just outside the three mile limit.”).

2. See *id.*

3. See *id.* Despite the shipowner’s contention that its practices were legal under federal law, California’s then-Attorney General, Earl Warren, sent ships to lay siege to the *Rex* in 1939. *Id.* After eight days under siege, the *Rex* surrendered, and its gambling equipment was tossed into the sea. *Id.* That incident was not the *Rex*’s last brush with danger on the high seas. *Id.* After being put into war service during World War II, she was captured and sunk by a German submarine off the coast of Africa. *Id.*

4. See *infra* notes 143–47 and accompanying text.

5. See *infra* notes 143–47 and accompanying text.

6. See *infra* notes 144–53 and accompanying text.

7. *Pac. Merch. Shipping Ass’n v. Goldstene (PMSA I)*, 517 F.3d 1108, 1110 (9th Cir. 2008); see also *infra* note 154 and accompanying text.

8. See *infra* notes 161–71 and accompanying text.

9. See *infra* note 55 and accompanying text.

cases.¹⁰ This jurisdictional grant has been used by federal courts to develop a federal common law in maritime.¹¹ This law reaches as far as the admiralty court jurisdiction extends.¹² Because federal law is supreme over state law, a concurrent federal-state maritime jurisdiction has developed, in which states retain only a right to supplement, but not otherwise contravene, federal maritime law as espoused by Congress and the federal courts.¹³

In accordance with these principles, federal common law in maritime (in addition to congressional legislation) may preempt state regulations that are inconsistent, even if Congress has not acted. In *Southern Pacific Co. v. Jensen*, the Supreme Court held that a state may supplement federal maritime law as long as its regulation does not interfere with, inter alia, federal interests in the uniformity of maritime law in its interstate and international relations.¹⁴ Attempts to construe the reach and limits of this holding, however, have been compared to navigating “a sailboat into a fog bank.”¹⁵

Making a determination as to the permissibility of California’s VFR under federal law requires just such an endeavor. California’s strong interest in pollution regulation overlaps and may compete with a number of federal interests, including the *Jensen* interest in uniformity. Although states have historically exercised their police powers to regulate pollution¹⁶—and some state air pollution regulations that bear upon maritime commerce have been upheld¹⁷—states have generally not attempted to enforce extraterritorial pollution regulations against interstate and foreign nationals engaged in maritime commerce. In fact, not even the federal government has chosen to

10. U.S. CONST. art. III, § 2. See also *infra* note 41 and accompanying text.

11. See *infra* notes 57–71 and accompanying text.

12. See *infra* notes 57–71 and accompanying text.

13. See *infra* notes 72–142.

14. 244 U.S. 205, 216 (1917), *superseded by statute*, Longshoremen’s & Harbor Worker’s Compensation Act, Pub. L. No. 98-426, 44 Stat. 1424 (1984) (codified as amended at 33 U.S.C. §§ 901–950 (2006)).

15. See *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 624 (1st Cir. 1994) (“[O]ne might tack a sailboat into a fog bank with more confidence.”); David J. Bederman, *Uniformity, Delegation and the Dormant Admiralty Clause*, 28 J. MAR. L. & COM. 1 (1997) (discussing broadly the history and limits of preemption under federal common law principles in maritime law); Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273 (1999) (discussing preemption in admiralty generally).

16. See *infra* note 275.

17. See, e.g., *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960). In *Huron*, the Court considered whether Detroit’s smoke emissions regulation interfered with the federal interest in the uniformity of maritime commerce regulations. *Id.* The Court compared compliance with the smoke abatement, applied indiscriminately to all vessels within the city, to local pilotage laws that must be obeyed by vessels entering local jurisdictions. See *id.* at 447–48. This regulation was applied to vessels only within city limits. See generally *id.* at 442, 447–48.

enforce its own fuel content standards on foreign-flagged ships in these waters.¹⁸ Yet California's VFR seek to double down on novelty: to regulate fuel content on vessels while they are beyond its territorial limits, and to enforce these regulations against both national- and foreign-flagged vessels engaged in international maritime commerce.

Additionally, the twenty-four mile band of ocean water that is subject to the VFR is an area where the United States has already enacted its own pollution regulations in accordance with its international agreements.¹⁹ California's regulations, therefore, are now competing with federal legislation, international frameworks, and the federal interest in the uniformity of the maritime law.²⁰ If a competing patchwork of fuel regulations sprouts up along the Pacific and Atlantic coasts, with each state making its own fuel standards in competition with a federal fuel standard, it is arguable that federal interests in a uniform maritime law would be obstructed.²¹ Under the circumstances, the VFR might thereby be preempted by federal maritime law principles established pursuant to the Article III jurisdictional grant on the basis of the competing federal statutory law.²²

This interference is not simply theoretical or hypothetical. As many as fifty percent of vessels impacted by the VFR have chosen to avoid federal shipping lanes and navigate around California's regulated waters.²³ These avoidance routes take the ships through a Naval training yard, creating vessel traffic confusion and disrupting Naval training activities.²⁴ The end result is ironically negative: a scientific analysis by CARB indicates that pollution levels may have actually *increased* as a result of the implementation of the VFR, because the longer avoidance routes result in more emissions.²⁵

Whether California's regulations are preempted, and on what ground, are novel questions. There is no case law directly on point to dispose of this question, arguably because no state has attempted to regulate this broadly beyond its borders with regulations bearing on such national and international interests. Because the field of environmental regulation in maritime implicates congressionally enacted legislation, these rules may be preempted on a number of statutory grounds. Namely, the CAA,²⁶ the

18. See *infra* notes 226–38 and accompanying text.

19. See *infra* notes 123–28 and accompanying text.

20. See *infra* Part IV.

21. See *infra* notes 78–79, 224 and accompanying text.

22. See *infra* notes 78–79, 224 and accompanying text.

23. See *infra* notes 187–93 and accompanying text.

24. See *infra* notes 187–93 and accompanying text.

25. See *infra* notes 187–93 and accompanying text.

26. See generally Clean Air Act, 42 U.S.C. §§ 7401–7431, 7491–7492, 7501–7509a, 7511–7515, 7521–7525, 7541–7554, 7571–7574, 7581–7590, 7601–7627, 7641–7642, 7651–7651o, 7661–7661f, 7671–7671q (2006).

Submerged Lands Act (SLA),²⁷ and the International Convention for the Prevention of Pollution from Ships (MARPOL)²⁸ all pose potential conflicts with the VFR. Additionally, the federal interest in the uniformity of maritime law may provide a common law basis for preemption even where no statutory conflict exists.

The VFR are currently being challenged in federal court. The PMSA is seeking an injunction in federal district court, and its motion for summary judgment seeking this injunction was denied.²⁹ That decision was appealed, and the Ninth Circuit affirmed the district court's denial of summary judgment.³⁰ Because the PMSA contends that the Ninth Circuit's holdings as to federal law were in error, it filed a petition for writ of certiorari with the Supreme Court, which is pending as this Comment goes to publication.³¹ Certainly, the precedential value of that case's outcome, as well as issues addressed in this Comment, will have a long-term impact on the limits of state regulation in the field. The extent to which states may exercise their police powers in ocean waters beyond their borders will be informed by this ongoing litigation. This Comment takes no position on the wisdom of California's environmental regulations or the science behind the policy, although it highlights the historical fact that California—and specifically, Southern California—has been confronted with a serious air pollution problem.³² Rather, this Comment addresses only the jurisdictional and preemption questions under current case precedent and shows that the VFR are likely preempted.³³ Specifically, the regulations may be preempted by the CAA and MARPOL,³⁴ and they are likely preempted by general principles of maritime law as espoused by the Supreme Court (the Ninth Circuit's decision in *PMSA II* notwithstanding).³⁵ Moreover, although it is unlikely that the statutory framework of the SLA preempts the VFR by itself, the territorial boundary that the SLA codifies is a factor that strongly favors preemption by general maritime law principles.³⁶

27. Submerged Lands Act, 43 U.S.C. §§ 1301–1303, 1311–1315, 1331–1356a (2006).

28. International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 1340 U.N.T.S. 61. The MARPOL Convention was codified into United States law as the Act to Prevent Pollution from Ships. 33 U.S.C. §§ 1901–1915 (2006).

29. *See Pac. Merch. Shipping Ass'n v. Goldstene*, No. 2:09-cv-01151-MCE-EFB, 2009 WL 2777778 (E.D. Cal. Aug. 28, 2009) (denying plaintiff's motion for summary judgment).

30. *Pac. Merch. Shipping Ass'n v. Goldstene (PMSA II)*, 639 F.3d 1154 (9th Cir. 2011).

31. *Id.*, petition for cert. filed, No. 10-1555, 2011 WL 2552174 (U.S. June 23, 2011).

32. *See infra* notes 298–300 and accompanying text.

33. *See infra* notes 194–346 and accompanying text.

34. *See infra* notes 199–269 and accompanying text.

35. *See infra* notes 270–346 and accompanying text.

36. *See infra* notes 255–77 and accompanying text.

Part II gives a background on Article III's jurisdictional grant of maritime jurisdiction to the federal courts and the substantive federal law that proceeds from that grant.³⁷ Part III provides an overview of CARB's 2007 regulations, which are no longer in effect, and its 2009 VFR, which are currently being enforced.³⁸ Part IV discusses whether the VFR are preempted by congressional legislation, international legal frameworks, or constitutionally-derived federal maritime principles.³⁹ Part V concludes.⁴⁰

II. BACKGROUND

A. Admiralty Jurisdiction and Substantive Maritime Law

Article III of the United States Constitution grants the federal courts maritime jurisdiction.⁴¹ Specifically, Section 2 states that the “judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . [and] to all Cases of admiralty and maritime Jurisdiction”⁴² The Judiciary Act of 1789 granted the district courts with general subject matter jurisdiction over admiralty and maritime cases pursuant to Article III: “The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.”⁴³ A determination as to the extent of this jurisdiction, and whether that jurisdiction would require the development of substantive common law, would be decided by the courts.

37. See *infra* notes 41–142 and accompanying text.

38. See *infra* notes 143–93 and accompanying text.

39. See *infra* notes 194–346 and accompanying text.

40. See *infra* notes 347–50 and accompanying text.

41. U.S. CONST. art. III, § 2. It seemed obvious to the Framers of the Constitution that disputes on the high seas so implicated national and international interests that the federal judiciary should be granted general jurisdiction in maritime. See THE FEDERALIST NO. 80, at 538 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“The most bigotted idolizers of state authority have not thus far shewn a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.”). Despite Hamilton’s passionate conviction, even admiralty jurisdiction was the subject of some debate prior to the Constitution’s ratification. See JAMES WINTHROP, LETTERS OF AGRIPPA (1787), reprinted in 4 THE COMPLETE ANTIFEDERALIST 81, 81–82 (Herbert J. Storing ed., 1981) (“Pennsylvania, with one port and a large territory, is less favourably situated for trade than the Massachusetts, which has an extensive coast in proportion to its limits of jurisdiction. Accordingly a much larger proportion of our people are engaged in maritime affairs. We ought therefore to be particularly attentive to securing so great an interest. It is vain to tell us that we ought to overlook local interests.”). Nevertheless, with ratification, the Admiralty Clause was included in the Constitution with Hamilton’s rationale as its support.

42. U.S. CONST. art. III, § 2.

43. 28 U.S.C. § 1333 (2006).

In developing the jurisdictional test to determine whether a case is “of admiralty or maritime jurisdiction”⁴⁴ the Supreme Court initially recognized an English common law rule that based jurisdiction on the location of the conduct forming the basis of the suit.⁴⁵ Under the test, admiralty jurisdiction would be found only if the conduct sued upon occurred on the high seas or tidewaters.⁴⁶ These waters required an ebb and flow of a tide (generally speaking, seawaters), with the presence of such a tide being dispositive.⁴⁷ Therefore, if the conduct sued upon occurred on these waters, the case arose in admiralty; but if the conduct occurred somewhere else, admiralty jurisdiction would not extend to the case, even if the conduct was maritime in nature.⁴⁸

As the country grew in size, technological advances forced changes to the Supreme Court’s jurisdictional test. When the steamboat was invented, interstate and international commercial traffic began to be conducted on lakes and rivers in the interior of the country.⁴⁹ Between 1814 and 1834, steamboat arrivals in New Orleans increased from twenty to 1200 per year.⁵⁰ Interior waters that lacked the ebb and flow of the tide or which were too far upstream to register one had generally not been considered to be within

44. *Id.* The words “admiralty” and “maritime” are generally defined synonymously.

45. *The Plymouth*, 70 U.S. 20, 21 (1865), *superseded in part by statute*, Extension of Admiralty Jurisdiction Act, ch. 526, 62 Stat. 496 (1948) (codified as amended at 46 U.S.C. § 30101 (2006)).

46. *Id.* In England, the admiralty courts were forced to compete with the courts of law for jurisdiction. *Id.* There, the law courts successfully restricted the reach of the admiralty courts to conduct occurring on waters that were affected by the ebb and flow of a tide, and only if those tidewaters were beyond the confines of a county. *See id.*

47. *Id.* If a civil case arose out of conduct occurring on land, in waters that were not affected by a tide, or on tidewaters that were “within” a county, the case would fall within the jurisdiction of the common law courts, not the admiralty courts. *See id.* England’s approach would become the initial basis for admiralty jurisdiction in the United States, where jurisdiction would be found only if the conduct occurred on tidewaters. *See, e.g., Peyroux v. Howard*, 32 U.S. (7 Pet.) 324, 330, 334 (1833) (finding no jurisdiction where a portion of the voyage was on a river above the tidewaters and stating that “a man shall not sue in the admiralty only because it is a vessel” (internal citations and quotations omitted)); *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428, 429 (1825) (stating that admiralty jurisdiction extends to conduct occurring “upon the sea, or upon waters within the ebb and flow of the tide,” and holding that a contract to hire a seaman will sound in admiralty if the work is to be “substantially performed” on these waters), *overruled in part by The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851).

48. *See generally Peyroux*, 32 U.S. (7 Pet.) at 330. For example, if a contract to ship goods on the sea was executed on land, a claim arising from its breach would not fall within the admiralty jurisdiction under the traditional approach. *Id.*

49. *See generally Today in History: August 26*, THE LIBRARY OF CONGRESS, <http://memory.loc.gov/ammem/today/aug26.html> (last visited Jan. 20, 2012).

50. *Id.*

maritime jurisdiction.⁵¹ With the steamboat's invention, these waters became heavily trafficked by steamboats engaged in interstate commerce.⁵²

In its *Genesee Chief* decision in 1851, the Supreme Court determined that such waters necessarily fell within the reach of the admiralty courts.⁵³ In doing so, the Court overturned its long-standing precedent defining maritime waters as tidewaters, extending the scope of the admiralty jurisdiction to all "navigable waters," or waters that connected ports between states.⁵⁴ Later, in *Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, the Supreme Court added an additional constraint, holding that in order for a claim to sound in admiralty, it must also be connected to traditional maritime

51. See Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214, 1215 (1954).

52. See *id.*

53. *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 453 (1851) (upholding a congressional act extending admiralty jurisdiction to the Great Lakes on the grounds that admiralty jurisdiction extends to all "navigable waters"). The Great Lakes lack the ebb and flow of a tide in a traditional sense. See *id.* at 457. In *Genesee Chief*, the Court considered whether to uphold Congress's extension of that jurisdiction to the lakes. *Id.* Rather than uphold Congress's asserted power to extend the admiralty jurisdiction, the Court held that the Act was constitutional because the admiralty jurisdiction, under the Constitution, necessarily extends to all "navigable waters," or waters connecting "ports and places in different states [or countries]." See *id.* at 451. In doing so, the Court overturned precedent requiring that the waters have a tide. See *supra* note 46 and accompanying text; see generally Marva Jo Wyatt, *Cogsa Comes Ashore . . . and More: The Supreme Court Makes Inroads Promoting Uniformity and Maritime Commerce in Norfolk Southern Railway v. Kirby*, 30 TUL. MAR. L.J. 101, 111–18 (2006).

54. *Genesee Chief*, 53 U.S. (12 How.) at 453. In overturning long-held precedent limiting admiralty jurisdiction to the tidewaters, the Court in *Genesee Chief* reasoned that the limitation to the English rule was defensible in the earlier cases because at the time:

[C]ourts of admiralty went into operation [in the United States], the definition which had been adopted in England was equally proper here. In the old thirteen states the far greater part of the navigable waters are tide-waters. And in the states which were at that period in any degree commercial, and where courts of admiralty were called on to exercise their jurisdiction, every public river was tide-water to the head of navigation. And, indeed, until the discovery of steamboats, there could be nothing like foreign commerce upon waters with an unchanging current resisting the upward passage. The courts of the United States, therefore, naturally adopted the English mode of defining a public river, and consequently the boundary of admiralty jurisdiction.

Id. at 455. The Court went on to say:

[However, i]t is evident that a definition that would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States.

Id. at 457. Not only was this the first time that the Supreme Court made significant changes to the constitutional scope of the admiralty jurisdiction, but by referencing the invention of steamboat technology, it indicated that technological advancement could have an impact on the jurisdiction of the admiralty courts. See Wyatt, *supra* note 53, at 117 ("The Court in *The Genesee Chief* recognized that changes in technology, unforeseen at the time the Framers drafted the Constitution but which later fundamentally expanded maritime commerce, called for a change in that era's view of admiralty jurisdiction.").

activity.⁵⁵ These principles have been maintained to this day as the general parameters of maritime jurisdiction.⁵⁶

The question of whether the admiralty court should apply state or federal substantive law to a particular case once jurisdiction is established is frequently an elusive one.⁵⁷ The Judiciary Act of 1789 grants the federal district courts with admiralty jurisdiction over “[a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.”⁵⁸ The “saving to suitors” clause vests states with concurrent jurisdiction in admiralty, but the text of the clause itself does not appear to indicate Congress’s intent as to which substantive law should be applied in the case before the court—state or federal.⁵⁹ The answer to this question has often been the subject of much debate.⁶⁰ In 1907, the Supreme Court in *The Hamilton* held that Congress’s power to make substantive maritime law stemmed from its jurisdictional grant in Article III, and that the states may supplement the substantive law pursuant to the “saving to suitors” clause in the Judiciary Act:

The same argument that deduces the legislative power of Congress from the jurisdiction of the national courts, tends to establish the legislative power of the state where Congress has not acted. Accordingly, it has been held that a statute giving damages for

55. 513 U.S. 527, 527 (1995) (“[A] court first must assess the general features of the type of incident involved to determine if the incident has a potentially disruptive impact on maritime commerce. If so, the court must determine whether the character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity.” (internal citations and quotations omitted)).

56. *Id.*; see, e.g., *Connor v. Alfa Laval, Inc.*, Nos. 09-67099, 09-91848, 09-93726, 2011 WL 3101810, at *5–6 (E.D. Pa. July 22, 2011) (recognizing *Grubart* as the “modern standard”).

57. See generally David P. Currie, *Federalism and the Admiralty: “The Devil’s Own Mess,”* 1960 SUP. CT. REV. 158, 165.

58. 28 U.S.C. § 1333(1) (2006). The “saving to suitors” clause allows suitors to seek state remedies in admiralty cases, where appropriate. See *infra* notes 63–70.

59. See 28 U.S.C. § 1331(1) (2006).

60. See *Old Dominion S.S. Co. v. Gilmore (The Hamilton)*, 207 U.S. 398 (1907) (affirming a district court decision that allowed state claims for loss of life that occurred during a collision on the high seas). In *The Hamilton*, the appellant challenged the state’s authority to create substantive tort liability in maritime while asserting its right to a federal limitation on liability provision. *Id.* at 403. The Court reasoned that state lawmaking authority in the field was constitutionally grounded in its concurrent jurisdiction in the field. *Id.* at 404 (stating that to doubt a state’s power to create substantive maritime law “cannot be serious. The grant of admiralty jurisdiction, followed and construed by the judiciary act of 1789, saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it, leaves open the common-law jurisdiction of the state courts over torts committed at sea.” (internal citations and quotations omitted)).

death caused by a tort might be enforced in a state court, although the tort was committed at sea.⁶¹

This principle of concurrent jurisdiction was illustrated here because the federal court applied substantive state law as a supplement to the federal law because Congress had not acted, even though the claimants had brought their claim in a federal district court.⁶²

At this early period, where state and federal law in maritime conflicted, deciding which substantive law to apply remained disputed.⁶³ This issue was resolved in *Pope & Talbot, Inc. v. Hawn*,⁶⁴ where the Supreme Court held that because Article III's jurisdictional grant conferred a "national power"⁶⁵ to determine the maritime law's "substantive as well as its procedural features,"⁶⁶ the Constitution required the application of federal law, even when maritime claims are brought in a state court or a federal

61. *Id.* at 404.

62. *See id.* at 405–07.

63. In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), the Court held that the Constitution required federal district courts, when sitting in diversity, to apply substantive state law unless the matter concerned a federal question. *Id.* ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts."). Unstated was whether the Court's broad pronouncement that there is "no federal general common law" would be applied to its admiralty cases. *See id.* However, federal common law in maritime has long recognized some traditional maritime causes of action (e.g. "maintenance and cure," among others) that predate state law and are not even recognized at common law. *See, e.g., Barnes v. Andover Co., L.P.*, 900 F.2d 630, 633 (3d Cir. 1990) (discussing the maritime cause of action for maintenance and cure, a claim for "the living allowance for a seaman while he is . . . recovering from injury or illness . . . [and] payment of medical expenses incurred in treating the seaman's injury or illness"). Although maintenance and cure was first recognized and defined as a federal common law maritime claim by the Supreme Court in *The Osceola*, 189 U.S. 158, 175 (1903), the duty originated in European (and specifically English) tradition dating back to the medieval period. *See id.* at 169. It therefore seems obvious that *Erie* could not possibly apply in maritime cases, essentially because traditional maritime claims would be extinguished if substantive state law were applied. The issue was directly addressed in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953). There, the defendant argued that, under *Erie*, substantive state law should be applied to his case because the district court's jurisdiction was found based on diversity of citizenship. *Id.* at 410–11. If so, Pennsylvania's contributory negligence standard—which was not recognized in maritime—barred the plaintiff's recovery because the plaintiff had been contributorily negligent. *Id.* at 409. The Supreme Court rejected this argument. *Id.* at 409–11. *Erie*, it reasoned, was "designed to ensure that litigants with the same kind of case would have their rights measured by the same legal standards of liability," regardless of whether a case was decided in state or federal court. *Id.* at 410. However, if the Court applied *Erie's* principle in admiralty cases, it would be "bring[ing] about the same kind of unfairness [*Erie*] was designed to end." *Id.* at 411. Stated simply, if the Court applied *Erie* to maritime claims, the problem *Erie* attempted to fix would be recreated because the applicable substantive law in a given case would depend on whether the plaintiff claimed federal jurisdiction based on diversity or based on the court's admiralty jurisdiction. *See generally id.*

64. 346 U.S. 406 (1953).

65. *Id.* at 409.

66. *Id.* (quoting *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1924)).

court sitting in diversity.⁶⁷ Therefore, as a result of the jurisdictional grant, substantive federal maritime law is considered paramount in cases involving maritime matters, though not exclusive.⁶⁸ This rule has since been entitled a “reverse *Erie*”⁶⁹ doctrine, requiring the state courts and the district courts sitting in diversity to apply federal maritime law (and state law only to the extent it supplements it) in cases involving maritime claims.⁷⁰ Therefore, when a matter that falls within maritime jurisdiction (such as vessel traffic off the coast of California) is before a state or federal court, principles of state law may only supplement, but not interfere with or contravene, the substantive federal maritime law as it is espoused and applied by the federal courts and Congress.⁷¹

B. Concurrent Legislative and Regulatory Powers

This federal supremacy has required the courts to consider the extent of the preemptive effect of federal maritime law in cases where a state regulatory scheme attempts to supplement it.⁷² In a seminal case, *Southern Pacific Co. v. Jensen*, the Supreme Court held that the application of a state

67. *Id.* The Court went on to state that “[w]hile states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court.” *Id.* at 409–10 (footnote omitted); *see also supra* note 63. The reasons for granting supremacy over maritime law principles with the federal government are similar to those reasons for granting the federal judiciary jurisdiction in admiralty in the first place. *See* THE FEDERALIST NO. 80, *supra* note 41 (discussing the national interests implicated by maritime law); Joel K. Goldstein, *Federal Common Law in Admiralty: An Introduction to the Beginning of an Exchange*, 43 ST. LOUIS U. L.J. 1337, 1337 (1999) (“Most scholars and practitioners of admiralty law have long relied upon two central assumptions regarding their subject. First, they have understood that uniformity was a requisite of maritime law such that, generally speaking, national, rather than state, law governed most maritime events and transactions. Second, they have believed that in order to preserve the uniformity of maritime law, federal admiralty courts are empowered to fashion federal common law.” (footnote omitted)).

68. *See infra* notes 69–70 and accompanying text.

69. *See* *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 626 (1st Cir. 1994) (stating that “the extent to which state law may be used to remedy maritime injuries is constrained by a so-called ‘reverse-*Erie*’ doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards” (internal citations and quotations omitted)).

70. The Supreme Court, in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 410–11 (1953), distinguished *Erie* on the grounds that *Erie* was designed to eliminate the unfairness of allowing the determination of substantive law to be based on whether a case was brought in federal or state court. *Id.* In *Erie*, that unfairness was resolved by requiring the application of state law in federal diversity cases. *Id.* Because substantive maritime law is generally created by the federal courts and Congress, the Court reasoned that it would be consistent with *Erie*’s fairness principles to require the application of federal law in diversity cases involving maritime claims. *Id.*

71. *See id.* at 409–10; *see also supra* notes 63–70.

72. *See infra* notes 73–80 and accompanying text.

worker's compensation statute to maritime employees, who resided and worked in the state, was unconstitutional, even though Congress had not passed any competing legislation.⁷³ The Court was confronted with the issue of whether New York's Workmen's Compensation Act could be used by the state to require maritime employers to compensate injured employees under the Act's rules.⁷⁴ The Court held that the New York law "conflicts with the general maritime law, which constitutes an integral part of the Federal law under . . . the Constitution, and to that extent is invalid."⁷⁵ Reasoning that because "Congress has paramount power to fix and determine the maritime law," where Congress does not act, "the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction."⁷⁶ The *Jensen* Court formulated a test by which to judge the constitutionality of state regulation in maritime:

[N]o [state] legislation is valid if it [(1)] contravenes the essential purpose expressed by an act of Congress, or [(2)] works material prejudice to the characteristic features of the general maritime law, or [(3)] *interferes with the proper harmony and uniformity of that law in its international and interstate relations*. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws *by the Constitution itself*.⁷⁷

Accordingly, the Court concluded that the state's workers' compensation statute interfered with the uniformity of maritime commerce because "[i]f New York can subject foreign ships coming into her ports to such obligations . . . other states may do likewise."⁷⁸ Such a scheme would conceivably result in a patchwork of state regulatory regimes. It continued:

The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded. . . . The legislature exceeded its authority in attempting to

73. 244 U.S. 205, 217–18 (1917), *superseded by statute*, Longshoremen's & Harbor Worker's Compensation Act, Pub. L. No. 98-426, 44 Stat. 1424 (1984) (codified as amended at 33 U.S.C. §§ 901–950 (2006)).

74. *Id.* at 207–11.

75. *Id.* at 212.

76. *Id.* at 215.

77. *Id.* at 216 (emphasis added).

78. *Id.* at 217.

extend the statute under consideration to conditions like those here disclosed.⁷⁹

New York's Worker's Compensation Act was thus invalidated by the "uniformity" prong of *Jensen's* test.⁸⁰

This decision was particularly significant because the New York law did not conflict with an act of Congress.⁸¹ Instead, the Court relied on general principles of maritime law—federal common law—to hold that New York's application of its worker's compensation scheme to maritime employment cases was preempted.⁸² Although the Court was quick to note that its holding was not an absolute bar against supplemental state maritime regulation,⁸³ *Jensen* stands for the principle that where state regulations affect maritime commerce, they have a significant preemption hurdle to overcome.⁸⁴

Notably, the Court stated that *Jensen's* test is constitutionally required, and not subject to congressional manipulation.⁸⁵ In fact, only the first prong of the *Jensen* test relates directly to conflicts principles vis-à-vis congressional legislation, but all three prongs are discussed as having originated in the Constitution.⁸⁶ The implication, of course, is that even where it acts, Congress may be constrained by the limits of the Constitution as defined by the second and third prongs of the *Jensen* test.⁸⁷ The Court held precisely this three years later in *Knickerbocker Ice Co. v. Stewart*.⁸⁸ In

79. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 217 (1917), *superseded by statute*, Longshoremen's & Harbor Worker's Compensation Act, Pub. L. No. 98-426, 44 Stat. 1424 (1984) (codified as amended at 33 U.S.C. §§ 901–950 (2006)).

80. *Id.* at 217–18.

81. *Id.*

82. *Id.* at 218.

83. *See id.* at 216 (indicating that some state regulations of maritime commerce "cannot be denied" validity).

84. *See* Bederman, *supra* note 15, at 6 (discussing that "[t]he Court's holding obviously recognized the possibility of express preemption by Congress, but the concern was plainly focussed [sic] on preventing states from legislating at variance with the judge-made 'general maritime law.'"). Although *Jensen* did not venture this far, Justice Field, in a concurring opinion for a separate opinion, indicated a presumption in favor of complete field preemption. *See Jensen*, 244 U.S. at 217 ("The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free." (quoting *Bowman v. Chi. & N.W. Ry. Co.*, 125 U.S. 465, 508 (1888) (Field, J., concurring))).

85. *See Jensen*, 244 U.S. at 216 ("This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself." (emphasis added)).

86. *See id.*

87. *See supra* notes 85–86 and accompanying text.

88. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160 (1920). The Court stated that Congress's:

that case, the Court addressed Congress's attempt to supersede the effect of *Jensen* by expressly delegating to the states the authority to enact worker's compensation regulations in maritime.⁸⁹ The Court invalidated this legislation and stated that the principles espoused in *Jensen* were constitutionally required:

The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the federal government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.⁹⁰

To the extent the state worker's compensation legislation conflicted with the *Jensen* test, it was preempted, even though Congress had authorized it.⁹¹

Over the course of the decades following these decisions, the outer limits of the *Jensen* preemption test have been difficult to define.⁹² The

[P]ower to legislate concerning rights and liabilities within the maritime jurisdiction, and remedies for their enforcement, *arises from the Constitution* The definite object of the grant was to commit direct control to the federal government, to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation, and to establish, so far as practicable, *harmonious and uniform rules* applicable throughout every part of the Union.

Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended, or changed, except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it to be dealt with according to its discretion—*not for delegation to others*.

Id. at 164 (emphasis added).

89. *See id.*

90. *Id.* at 160–64.

91. *See id.* at 166; *see also* Bederman, *supra* note 15, at 21–22 (“What followed for the majority in *Knickerbocker* . . . was that the grant of admiralty jurisdiction in Article III of the Constitution imposed a substantive limit on Congress's national law-making powers granted under Article I. Congress was invited to legislate in the maritime realm, but when a subject implicated harmony, Congress was obliged to legislate affirmatively and uniformly, and certainly not delegate its law-making power to the states with the understanding that they would impose non-uniform rules.”).

92. 1 FRIEDEL, BENEDICT ON ADMIRALTY § 112, at 7–36 (7th ed. 1987) (“The *Jensen* doctrine, though easily stated, is not easily applied.”). The Supreme Court long ago rejected a rigid per se rule that all state regulation of maritime activities is constitutionally invalid. In *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 338 (1973), for example, a unanimous Court explained

application of *Jensen* can best be understood on a case-by-case basis, in piecemeal fashion.⁹³ For example, state pilotage laws, which require incoming vessels to hire state-approved pilots to navigate the ship into a harbor or port, arguably conflict with *Jensen* because they directly interfere with the uniformity of the regulation of vessels as they enter state ports.⁹⁴ However, court decisions have upheld these laws on the ground that they involve uniquely local concerns and that states have historically regulated the practice.⁹⁵ In fact, when Congress authorized state pilotage legislation with the Lighthouse Act in 1789, it was simply reinforcing historical state practice and the Court's policy judgment that states were better equipped to regulate the pilotage of vessels into their own harbors and ports.⁹⁶ The Lighthouse Act, having since been recodified without significant modification, remains in effect, providing that "pilots in the bays, rivers, harbors, and ports of the United States shall be regulated only in conformity with the laws of the States."⁹⁷ Despite arguments that the Lighthouse Act does not authorize pilotage regulations beyond a state's territorial limits,⁹⁸ pilotage regulations have been upheld even where they extend beyond the state's territorial boundary of three nautical miles from the baseline.⁹⁹

that *Jensen* and *Knickerbocker* have been "limited by subsequent holdings of [the] Court." In *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373 (1959), the Court explained that *Jensen*'s limitation on state authority "still leaves the States a wide scope." See also *Just v. Chambers*, 312 U.S. 383, 388 (1941) (state may modify or supplement maritime law); *Md. Cas. Co. v. Cushing*, 347 U.S. 409, 429 (1954) (Black, J., dissenting) (except in limited circumstances, "states are free to make laws relating to maritime affairs").

93. See generally *supra* note 92.

94. See *infra* notes 258–70 and accompanying text.

95. See *infra* notes 258–70 and accompanying text.

96. 46 U.S.C. § 8501(a) (2006). The language is virtually identical to the language of the original 1789 legislation, which declared that "[u]ntil further provision is made by Congress, all pilots in bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States. . . ." Lighthouse Act of 1789, ch. 9, 1 Stat. 53, 54 (1789). The Act remains on the books.

97. See 46 U.S.C. § 8501(a) (2006).

98. See *Gillis v. Louisiana*, 294 F.3d 755, 762 n.12 (5th Cir. 2002).

99. See *Wilson v. Mcnamee*, 102 U.S. 572 (1880) (upholding New York's authority to regulate pilots in waters extending fifty miles from its port). More recently, two circuit court cases have reaffirmed the principle, although for different reasons. See, e.g., *Gillis*, 294 F.3d 755 (state jurisdiction over pilotage not limited to state territorial waters); *Warner v. Dunlap*, 532 F.2d 767, 772 (1st Cir. 2000) (stating that "there is no statutory or other basis for imposing a three-mile limit on [pilotage] regulation"). In each of these cases, the reviewing court was seeking to determine whether pilotage regulations could extend beyond the states' legislatively granted waters under the SLA, and concluded that they could. Compare *Warner*, 532 F.2d 767, with *Gillis*, 294 F.3d 755. Even if one were to interpret the pilotage regulations as unique because Congress had delegated the authority to regulate pilotage under the Lighthouse Act, a *Jensen* analysis is still dispositive because it is a constitutional requirement. See *supra* notes 85–91 and accompanying text.

A modern application of *Jensen*, in *Ballard Shipping Co. v. Beach Shellfish*,¹⁰⁰ is instructive as to how the uniformity interest has been applied and balanced with state interests in recent cases.¹⁰¹ In *Ballard*, the First Circuit stated that the application of *Jensen* involves balancing the federal interest in uniformity with the state interest in enacting the specific regulation.¹⁰² It noted that there is “no preemption where the relevant state law is procedural rather than substantive.”¹⁰³ Where the state law is substantive, however, state and federal interests should be balanced and accommodated.¹⁰⁴ It concluded that state regulation of “primary conduct”—or, the “out-of-court behavior of ships”—would pose the “most direct risk” of being preempted under the uniformity test.¹⁰⁵ Rhode Island’s compensation statute, which was challenged in *Ballard*, did not regulate the primary conduct of ships by creating additional forms of liability, but instead dealt with the amount of liability imposed on activity that was already unlawful.¹⁰⁶ After narrowly construing the statute,¹⁰⁷ the court held that, “providently construed,” it was not preempted.¹⁰⁸

Similarly, in a modern Ninth Circuit application of *Jensen*’s principles in *Pacific Merchant Shipping Ass’n v. Aubry*,¹⁰⁹ the court determined that

100. 32 F.3d 623 (1st Cir. 1994).

101. See *infra* notes 102–08 and accompanying text.

102. *Ballard*, 32 F.3d at 628–29.

103. *Id.* at 628 (citing *Am. Dredging Co. v. Miller*, 510 U.S. 443 (1994)).

104. *Id.* at 628–29.

105. See *id.* at 629 (“State regulation of primary conduct in the maritime realm is not automatically forbidden, but such regulation presents the *most direct risk* of conflict between federal and state commands, or of inconsistency between various state regimes to which the same vessel may be subject.” (emphasis added) (internal citations omitted)). Although the court noted that the state’s interest in preventing oil pollution in its waters was weighty, and the federal interest was relatively less substantial because the state regulation did not govern primary conduct, the court ultimately did not have to conduct a full balancing test because it could point to congressional legislation that had just adopted the state’s position. *Id.* at 629, 632. The Oil Pollution Act of 1990 did not apply retroactively to the case, but the court reasoned that it was “compelling evidence” that Congress’s own balancing of the interests weighed against preemption. *Id.* at 631. See also Young, *supra* note 15, at 300 (criticizing the balancing test discussed in *Ballard* on the grounds that “[i]n most cases, . . . there will be no prior legislative weighing to which a court may defer, and the court will have to weigh the interests itself in the first instance. . . . [I]n close cases, a pure interest balancing test can provide little guidance as to the correct outcome.”).

106. *Ballard*, 32 F.3d at 629 (emphasis added).

107. In *Ballard*, the plaintiff sued for economic damages in response to an oil spill, and the defendant shipping company argued that the Supreme Court’s holding in *Robins Drydock & Repair Co. v. Flint*, 275 U.S. 303 (1927), barred liability for economic damages. See *Ballard*, 32 F.3d at 628–29. *Robins Drydock* had held that liability in maritime cases for damages caused by vessels would not extend to suits for economic damages alone. *Robins Drydock*, 275 U.S. at 309. The *Ballard* court construed the Rhode Island statute as merely assigning additional liability (economic damages) for already-illegal conduct. *Ballard*, 32 F.3d at 628–29. Because the bar on economic damages was not a unique feature of the maritime law, the state law was therefore procedural, not substantive, and could be upheld because it did not regulate the primary conduct of the vessel. See *id.*

108. *Ballard*, 32 F.3d at 631.

109. 918 F.2d 1409 (9th Cir. 1990).

California's interest in protecting its citizens' overtime wages on vessels that spent 90% of their time moored in a California port and never traveled interstate was not outweighed by the federal government's interest in uniformity.¹¹⁰ In discussing its construction of the rule, the court stated that its:

[R]eview of relevant case authority leads us to conclude that the general rule on preemption in admiralty is that states may supplement federal admiralty law as applied to matters of local concern, so long as state law does not *actually conflict* with federal law or *interfere* with the *uniform working* of the maritime legal system. The questions, then, are (1) whether applying California's overtime provisions to maritime employees on the high seas contravenes an act of Congress, and (2) whether applying the provisions would unduly disrupt uniformity in maritime law.¹¹¹

In sum, because Article III's grant of federal jurisdiction in maritime has provided a basis for federal substantive lawmaking supremacy in the field, state law will fail where it expressly or impliedly contravenes the purpose of congressional legislation, or if it interferes with the constitutionally-derived federal interest in uniformity of maritime commerce in its international and interstate relations.¹¹²

C. Concurrent Jurisdiction and International Law

The United Nations Convention on the Law of the Sea (UNCLOS), which the United States signed but did not ratify,¹¹³ addresses the extent of a

110. *Id.* at 1424–25.

111. *Id.* at 1422.

112. *See generally id.*; *see also* 1 THOMAS J. SCHOENBAUM, ADMIRALTY & MAR. LAW § 4-3 (4th ed. 2005) (“A . . . distinctive feature of admiralty preemption is that the judge-made general maritime law, when in conflict with state law, is supreme. Therefore, established rules of the general maritime law [as determined by the federal courts] may override state statutory and decisional law just as do acts of Congress.”).

113. Because UNCLOS was not ratified, it does not bind the United States and “need not be applied or respected by state courts or legislatures unless expressly executed by a statute or order emanating from the federal political branches.” Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1840 (1998). Although ratification has been sought by the President in the past, the U.S. Senate has not done so. *See id.* at 1840 n.83. Ratification has failed even under circumstances in 2004 where the Senate Foreign Relations Committee voted unanimously (19-0) in favor of ratification. John A. Duff, *The United States and the Law of the Sea Convention: Sliding Back from Accession and Ratification*, 11 OCEAN & COASTAL L.J. 1, 2 (2006).

nation's territorial waters and just how far a state may regulate in the field.¹¹⁴ Even though UNCLOS has not been ratified, for the purposes of jurisdictional boundaries, it has been treated as international law and relied upon by U.S. presidents in making offshore territorial determinations.¹¹⁵ Federal Courts of Appeals have followed suit and treated UNCLOS as authoritative.¹¹⁶ The Supreme Court has also indicated a willingness to treat its basic principles as "customary international law."¹¹⁷

Under UNCLOS, a "State has the right to establish the breadth of its territorial sea up to a limit not exceeding [twelve] nautical miles, measured from baselines determined in accordance with this Convention."¹¹⁸ "The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea."¹¹⁹ Even though a state's

114. See United Nations Convention on the Law of the Sea pt. II, § 2, arts. 3–16, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter *UNCLOS*]. Naturally, where UNCLOS refers to "States," it is generally contemplating nations, not member-states of a federal system. Also, for terminology purposes, UNCLOS defines a state's "baseline" as the "low-water line along the coast as marked on large-scale charts officially recognized by the coastal State." See *id.* at pt. II, § 1, art. 5.

115. In 1988, President Ronald Reagan issued an executive proclamation declaring that the United States' territorial waters extended twelve nautical miles from the baseline. Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988). In making this proclamation, President Reagan directly cited UNCLOS for support. See *id.* ("[B]y the authority vested in me as President by the Constitution of the United States of America, and in accordance with international law, do hereby proclaim the extension of the territorial sea of the United States . . . [and its territories and possessions] . . . The territorial sea of the United States henceforth extends to 12 nautical miles from the baselines of the United States determined in accordance with international law. In accordance with international law, as reflected in the applicable provisions of the 1982 United Nations Convention on the Law of the Sea, within the territorial sea of the United States, the ships of all countries enjoy the right of innocent passage and the ships and aircraft of all countries enjoy the right of transit passage through international straits."). Similarly, President Bill Clinton cited UNCLOS when recognizing the contiguous zone as extending twenty-four nautical miles from the baseline. See Proclamation No. 7219, 64 Fed. Reg. 48,701 (Aug. 2, 1999) ("The contiguous zone of the United States extends to 24 nautical miles from the baselines of the United States determined in accordance with international law, but in no case within the territorial sea of another nation. *In accordance with international law, reflected in the applicable provisions of the 1982 Convention on the Law of the Sea*, within the contiguous zone of the United States the ships and aircraft of all countries enjoy the high seas freedoms of navigation and overflight and the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms, such as those associated with the operation of ships, aircraft, and submarine cables and pipelines, and compatible with the other provisions of international law reflected in the 1982 Convention on the Law of the Sea." (emphasis added)).

116. Just three weeks after UNCLOS went into effect, the Ninth Circuit cited it as authority when defining the rights of foreign vessels to "innocent passage" in Hawaiian waters. See *Barber v. Hawai'i*, 42 F.3d 1185, 1195–96 (9th Cir. 1994). For a broader discussion of the circuit courts' reliance on UNCLOS, see Duff, *supra* note 113, at 13–16.

117. See *United States v. Alaska*, 503 U.S. 569, 588 n.10 (1992). In discussing the United States' "international seaward boundary," the Court cited the United States' brief, which stated that "[t]he United States has not ratified [UNCLOS], but has recognized that its baseline provisions reflect customary international law." *Id.* (brackets in original).

118. *UNCLOS*, *supra* note 114, at pt. II, § 2, art. 3.

119. *Id.* at pt. II, § 1.

sovereignty extends into the territorial waters, all foreign vessels have a “right of innocent passage” throughout the territorial sea,¹²⁰ defined as a right to “(a) travers[e] that sea without entering internal waters”¹²¹ or “(b) proceed[] to or from internal waters or a call at such roadstead or port facility.”¹²²

Beyond the twelve-mile territorial limit, UNCLOS establishes a “contiguous zone,” which rests between the twelfth and twenty-fourth nautical mile from the baseline.¹²³ Within this belt of water, the state’s territorial sovereignty is diminished.¹²⁴ In this zone, UNCLOS limits the coastal state to “prevent[ing] infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea . . . [and] punish[ing] infringement of [these] laws and regulations committed within its territory or territorial sea.”¹²⁵

Beyond the twenty-four mile zone, UNCLOS establishes an Exclusive Economic Zone, extending two hundred miles from the baseline.¹²⁶ In this zone, the state’s sovereignty is the most diminished, as a state only retains “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources” of the waters and submerged lands below.¹²⁷ To the extent that the Outer Continental Shelf—a geographic underwater land mass adjacent to the coast—is located beyond two hundred miles, the state can, in some circumstances, extend its Exclusive Economic Zone rights to the edge of the shelf.¹²⁸

In the 1940s, California eyed its resource-rich coastal waters and claimed the first three nautical miles from the baseline as its sovereign territory. The state began issuing oil exploration licenses in these waters, and the Supreme Court was presented with the issue of whether the state’s

120. *See id.* at pt. II, § 3, art. 17.

121. Internal waters, generally speaking, are waters in the interior of a state, or an enclosed bay, and thus treated as an equivalent of the land territory of a nation-state. In order for a harbor or bay to qualify, it must meet the following definition: “If the distance between the low-water marks of the natural entrance points of a bay does not exceed 24 nautical miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.” *Id.* at pt. II, § 2, art. 10.

122. *See id.* at pt. II, § 3, art. 18.

123. *See id.* at pt. II, § 4, art. 33 (“The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.”).

124. *Id.*

125. *Id.*

126. *Id.* at pt. V, art. 57.

127. *Id.* at pt. V, art. 56.

128. *See id.* at pt. VI.

territorial claim was valid.¹²⁹ California argued that, as a coastal state, it retained sovereignty over a three-mile belt adjacent to its coastline that it had possessed when it entered the Union.¹³⁰ California pointed to its 1849 constitution, which predated its admission to the United States, and that claimed a boundary line three miles west of its coastline.¹³¹ California maintained that the United States had ratified California's territorial boundary as defined in its constitution by admitting it into the Union without requiring a change to this constitutional provision.¹³²

The Supreme Court disagreed. The Court held that the boundary lines of coastal state members of the United States extend only to each state's respective coastline.¹³³ It rejected California's claim to a three-mile band, and instead stated that "the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil."¹³⁴

In response, Congress passed the SLA,¹³⁵ effectively overturning the Supreme Court's decision and granting coastal states a boundary line extension of three geographical miles beyond the coastline.¹³⁶ The legislation delegated to coastal states the resource exploration rights that California had initially claimed—namely, the right to own and regulate resource exploration of the submerged lands under the three-mile belt of ocean water along its coastline.¹³⁷ Through subsequent litigation, the SLA

129. *United States v. California (California I)*, 332 U.S. 19, 38 (1947). California argued that it "own[ed] the resources of the soil under the three-mile marginal belt as an incident to those elements of sovereignty which it exercises in that water area." *Id.* at 29.

130. *See id.* at 33 (addressing the history of coastal state boundaries and concluding that "a definite three-mile belt in which an adjacent nation can, if it chooses, exercise broad, if not complete dominion, has apparently at last been generally accepted throughout the world").

131. *Id.* at 29–30; *see also* CAL. CONST. art. XII, § 1 (1849) ("The boundary of the State of California shall . . . [run] to the Pacific Ocean, and extend[] therein three English miles . . .").

132. *See California I*, 332 U.S. at 29–30.

133. *See id.* at 41 (holding that security and commerce interests necessitate federal dominion over all waters extending beyond a state's coastline).

134. *Id.* at 38–39.

135. 43 U.S.C. §§ 1301–1315 (2006).

136. *See* Aaron L. Shalowitz, *Boundary Problems Raised by the Submerged Lands Act*, 54 COLUM. L. REV. 1021, 1026 (1954) (noting that the purpose of the SLA was to change the law as laid down by the Supreme Court in *California* and move the territorial boundaries of coastal states to three geographical miles from their respective coastlines). The Supreme Court confirmed this interpretation in its 1978 holding in *United States v. California (California II)*, 436 U.S. 32, 37 (1978) (stating that the "very purpose of the Submerged Lands Act was to undo the effect" of its 1947 *California I* decision).

137. *See* 43 U.S.C. § 1311 (2006). The statute granted the coastal states the natural resources under these waters by declaring that:

(1) [T]itle to and ownership of the lands beneath the navigable waters within the boundaries of the respective states, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they

has been broadly interpreted to extend a coastal state's territorial boundary itself, with dominion over the submerged lands along with the waters above.¹³⁸ Therefore, California's territorial boundary today is three nautical miles westward of its baseline.¹³⁹

The congressional grant of ownership and regulatory authority over the three-mile belt along state coastlines has led to controversy over whether certain state regulatory powers extend into and beyond this three-mile boundary. Notably, states have exercised limited police powers in coastal waters long before Congress passed the SLA;¹⁴⁰ but states have been barred from exercising other traditional state powers such as setting liability standards in these waters.¹⁴¹ Although UNCLOS allows nation-states to regulate in the contiguous zone for the purpose of controlling pollution,¹⁴² no federal court has yet held that an individual coastal state like California may enforce its environmental regulations in this zone against foreign-flagged vessels engaged in interstate and international commerce.

are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States.

Id.

138. See 43 U.S.C. § 1312 (2006) ("The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line . . ."); *California II*, 436 U.S. at 33–34 (holding that the SLA granted "dominion over the submerged lands and waters within" to the state of California, against the competing claims of the United States (emphasis added)).

139. See *California II*, 436 U.S. at 33–34.

140. See *infra* notes 261–73 and accompanying text.

141. See, e.g., *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 228 (1986) (holding that the Death on the High Seas Act (DOHSA) preempted Louisiana's wrongful death statute, notwithstanding a DOHSA savings clause); *Green v. Vermilion Corp.*, 144 F.3d 332 (5th Cir. 1998) (holding that general maritime law preempted Florida worker's compensation statute); *Flying Boat, Inc. v. Alberto*, 723 So. 2d 866 (Fla. Dist. Ct. App. 1998) (same conclusion); *Rand v. Hatch*, 762 So. 2d 1001 (Fla. Dist. Ct. App. 2000) (medical malpractice law preempted). *But see* *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955) (in the absence of federal regulation governing the insurance warranty claim in question, state regulation may supplement the maritime law); *Latman v. Costa Cruise Lines*, 758 So. 2d 699 (Fla. Dist. Ct. App. 2000) (state unfair trade practice law not preempted as applied against cruise lines docking in Florida).

142. *UNCLOS*, *supra* note 114, at pt. XII, § 5, art. 211 (stating that modern coastal states may establish "requirements for the prevention, reduction, and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports").

III. CARB ENACTS OFFSHORE ENVIRONMENTAL REGULATIONS

A. California's First Attempt at Emissions Regulations

On January 1, 2007, CARB began enforcing emissions regulations that prohibited diesel-powered vessels¹⁴³ with emission rates above certain limits from operating within twenty-four miles of the California baseline.¹⁴⁴ The regulations specifically limited emissions of diesel particulate matter (PM), sulfur oxides (SOx), and nitrogen oxides (NOx).¹⁴⁵ In addition to regulating these emissions, vessels entering this twenty-four mile zone, the Regulated California Waters (RCW),¹⁴⁶ would be required to keep records detailing the type of fuel used in each engine operated within the RCW.¹⁴⁷

The PMSA, representing affected industry interests, contemporaneously filed suit and sought to enjoin California's implementation of the regulations.¹⁴⁸ The PMSA contended that the regulations were preempted on

143. The regulation applies to "auxiliary" diesel engines, although the regulation states that it regards all diesel-powered vessel engines as falling under this category. CAL. CODE REGS. tit. 13, § 2299.1(d)(2) (2010) ("Auxiliary engine" means an engine on an ocean-going vessel designed primarily to provide power for uses other than propulsion, except that all diesel-electric engines shall be considered 'auxiliary diesel engines' for purposes of this regulation.").

144. *Id.* § 2299.1 (titled "Emission Limits and Requirements for Auxiliary Diesel Engines and Diesel-Electric Engines Operated on Ocean-Going Vessels Within California Waters and 24 Nautical Miles of the California Baseline").

145. *Id.* § 2299.1(e). The emissions themselves were not directly monitored under the regulation. *Id.* Rather, vessels were prohibited from creating emissions in excess of those that would occur if the vessels were using low-sulfur fuels:

[N]o person subject to this section shall operate any auxiliary diesel engine, while the vessel is operating in any of the Regulated California Waters, which emits levels of diesel PM, NOx, or SOx in exceedance of the emission rates of those pollutants that would result had the engine used the following fuels: (A) Beginning January 1, 2007: 1. marine gas oil, as defined in subsection (d); or 2. marine diesel oil, as defined in subsection (d), with a sulfur content of no more than 0.5 percent by weight; (B) Beginning January 1, 2010: marine gas oil with a sulfur content of no more than 0.1 percent by weight.

Id. SOx emissions would be measured by the concentration of SOx in the diesel fuel used, and no direct measurement would be made of the PM or NOx emitted. *See id.* These pollutant levels are generally dependent on the grade and level of refinement. *See* Seth Mansergh, Note, *Out the Smokestack: Retooling California's Marine Vessel Rules for Federal Authorization*, 39 GOLDEN GATE U. L. REV. 331, 335 (2009). Mansergh details that:

Although there is a wide variety of grades of fuel for use in ocean-going vessels over 400 gross tons, they are all classified according to their level of refinement. One of the defining characteristics of these different grades of marine fuel is the fuel's concentration of sulfur. Generally, fuels with a higher level of refinement have a lower concentration of sulfur. Highly refined distillate fuels, like marine gas oil, or marine diesel oil, contain the lowest concentrations of sulfur. On the other end of the refinement spectrum, heavy fuel oil has relatively high concentrations of sulfur. Correspondingly, in the middle are various grades of medium fuel oil.

Id. (internal footnotes omitted).

146. CAL. CODE REGS. tit. 13, § 2299.1(b)(1) (2010).

147. *Id.* § 2299.1(e)(2).

148. *See* Pac. Merch. Shipping Ass'n v. Cackette (*Cackette*), No. CIV. S-06-2791 WBS KJM, 2007 WL 2492681 (E.D. Cal. Aug. 30, 2007) (granting summary judgment and enjoining the

multiple grounds,¹⁴⁹ including by the CAA.¹⁵⁰ The PMSA prevailed on its motion for summary judgment, and the district court ordered that the implementation of these regulations be enjoined on the ground that they were preempted by the CAA.¹⁵¹ Citing the CAA, the district court held that

implementation of CARB's emissions regulations), *aff'd sub. nom. PMSA I*, 517 F.3d 1108 (9th Cir. 2008) (affirming on the ground that California's offshore emissions regulations were preempted under the CAA).

149. *Id.* at *3 (discussing the plaintiff's four claims for relief: (1) preemption by the CAA; (2) preemption by the Submerged Lands Act; (3) preemption by the Ports and Waterways Safety Act; and (4) violation of the Commerce Clause of the U.S. Constitution). For further discussion of each of these issues, see *infra* Part IV.

150. *Cackette*, 2007 WL 2492681, at *3. The CAA is codified at 42 U.S.C. §§ 7401–7671Q (2006). Its modern form was first signed into law in 1970 by President Richard Nixon, who at the time said, “I think that 1970 will be known as the year of the beginning, in which we really began to move on the problems of clean air and clean water and open spaces for the future generations of America.” *40th Anniversary of the Clean Air Act*, EPA.GOV, <http://epa.gov/oar/caa/40th.html> (last updated Jan. 21, 2012). In 1989, President George H.W. Bush proposed amendments designed to further curb acid rain, urban air pollution, and toxic air emissions. *Overview—The Clean Air Act Amendments of 1990*, EPA.GOV, http://epa.gov/oar/caa/caaa_overview.html (last updated Dec. 19, 2008). The proposals passed Congress with overwhelming bipartisan majorities in both houses and were signed into law in 1990. *Id.*

151. *Cackette*, 2007 WL 2492681, at *3. The district court first reasoned that the CAA “makes ‘the States and the Federal Government partners in the struggle against air pollution.’” *Id.* at *2 (quoting *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990)). However, “[u]nlike regulation of pollution from stationary sources, regulation of motor vehicles has been primarily a federal project.” *Id.* (citing *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1078–79 (D.C. Cir. 1996)) (further citations omitted). In fact, Congress had expressly preempted motor vehicle emissions in the CAA. *Id.* (“No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as a condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.” (quoting 42 U.S.C. § 7543(a) (2006))). Despite this broad preemption—enacted to prevent a patchwork of state regulations pertaining to motor vehicle emissions—Congress actually granted California a specific exemption from the motor vehicle emissions preemption. *See Motor & Equip. Mfrs. Ass’n v. EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979) (“The states acting after 1965 were Johnnies-come-lately to the field compared to California, which had undertaken statewide efforts as early as 1958. Congress’s entry into the field and the heightened state activity after 1965 raised the spectre of an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for the manufacturers. Acting on this concern, Congress in 1967 expressed its intent to occupy the regulatory role over emissions control to the exclusion of all the states all, that is, except California.”). Accordingly, motor vehicles manufactured for use in the United States must comply with either California or EPA specifications. *Motor Vehicle Mfrs. Ass’n of U.S. v. N.Y. State Dep’t of Env’tl. Conservation*, 17 F.3d 521, 526–27 (2d Cir. 1994). The parties in *Cackette* did not dispute that ocean-going vessel emissions regulations, however, did not fall within the motor vehicle emissions exemption. *Cackette*, 2007 WL 2492681, at *5. Rather, they agreed that those vessels were governed by section 209(e) of the CAA, *id.*, which is a catch-all section for nonroad engines and vehicles, see 42 U.S.C. § 7543(e)(2) (2006) (governing all “[o]ther nonroad engines or vehicles”). Unlike California’s exemption for motor vehicles, no such exemption was made with regard to its regulation of nonroad sources of emissions. On the other hand, no express preemption was expressed by Congress, either. Rather, section 209(e)(2) states:

“California cannot promulgate any ‘standards or other requirements relating to emissions’ for nonroad engines unless approved by the EPA.”¹⁵² Because it concluded the regulations were preempted by the CAA, the district court did not address whether the regulations were also preempted under the alternate grounds for relief suggested by the PMSA.¹⁵³

On appeal, the Ninth Circuit affirmed.¹⁵⁴ The court agreed with the district court’s holding that the CAA impliedly preempted CARB’s regulations.¹⁵⁵ The court also concluded that because the regulations were preempted under the CAA, it need not address the alternative grounds for relief.¹⁵⁶ California was left to consider whether it should seek express

(A) In the case of any nonroad vehicles or engines other than those referred to [above], the Administrator shall, after notice and opportunity for public hearing, authorize California to adopt and enforce standards and other requirements relating to the control of emissions from such vehicles or engines if California determines that California standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such authorization shall be granted if the Administrator finds that—

- (i) the determination of California is arbitrary and capricious,
- (ii) California does not need such California standards to meet compelling and extraordinary conditions, or
- (iii) California standards and accompanying enforcement procedures are not consistent with this section.

42 U.S.C. § 7543(e)(2) (2006). At the time of the district court’s ruling in *Cackette*, only the D.C. Circuit Court of Appeals had expressed an opinion as to whether section 209(e) preempted state regulation of nonroad engine emissions, which held that such regulations are impliedly preempted because they require California to seek authorization from the EPA before implementation. *See Engine Mfrs. Ass’n*, 88 F.3d at 1087 (“Obviously, if no state regulation were preempted, California would have no need to seek authorization for its regulations Thus, the California authorization provision assumes the existence of a category of sources that are subject to preemption.”); *but see id.* at 1105 (Tatel, J., concurring in part and dissenting in part) (reasoning that only the regulation of new nonroad engines is impliedly preempted, not the regulation of used nonroad engines). The district court concluded that the majority in *Engine Manufacturers Ass’n v. EPA* had the better argument. *See Cackette*, 2007 WL 2492681, at *6 (“This court adopts the *EMA* majority and finds that CAA § 209(e)(2) preemption covers both new and non-new nonroad vehicles and engines. This court’s conclusion is bolstered by the passage of time since the *EMA* decision without Congressional action. The D.C. Circuit decided *EMA* over ten years ago. Had the *EMA* court incorrectly gauged Congressional intent, Congress has had more than enough opportunity to amend the CAA.”). It therefore held that CARB’s emissions regulations as applied to ocean-going vessels were preempted by the CAA. *Id.*

152. *Cackette*, 2007 WL 2492681, at *6 (citing 42 U.S.C. § 7543(e)(2)(A) (2006)).

153. *Id.* at *3.

154. *PMSA I*, 517 F.3d 1108, 1115 (9th Cir. 2008).

155. *Id.* The Ninth Circuit reviewed de novo. *Id.* at 1113. It adopted the majority’s holding in *Engine Manufacturers Ass’n v. EPA*, which held that the CAA impliedly preempts state regulations of nonroad engine emissions, including regulations of both new and non-new engines. *See id.* at 1114–15. The Ninth Circuit additionally held that the regulations did not fall within the “in-use” requirement exception of the CAA, which allows states to create “‘carpool lanes, restrictions on car use in downtown areas, and programs to control extended idling of vehicles.’” *Id.* at 1115 (quoting *Engine Mfrs. Ass’n*, 88 F.3d at 1094). Rather, it concluded, the “plain language” of the regulations pertained to emissions, which were preempted. *Id.*

156. *Id.* (“Because the Clean Air Act preempts here, we, like the district court, find it unnecessary to decide whether the Submerged Lands Act also preempts the state rules at issue.”).

authorization from the EPA¹⁵⁷ or alternatively retool the regulations to avoid preemption under the CAA.¹⁵⁸ Conveniently, both the district court¹⁵⁹ and the Ninth Circuit¹⁶⁰ offered small hints as to how California might go about recrafting the regulations.

B. Retooled: California's Current Ocean-Going Vessel Fuel Regulations

In addition to seeking EPA authorization¹⁶¹ (which it is no longer seeking),¹⁶² CARB retooled the regulations and enacted its current VFR, effective July 1, 2009, requiring ocean-going vessels that call on California

157. The Ninth Circuit had held that the regulations were preempted by the CAA without EPA authorization. *See id.* at 1114 (citing 42 U.S.C. § 7543(e)(2)(A)). In May 2008, California indicated it was seeking EPA authorization. *See California to Discontinue Enforcement of the Ocean-Going Vessel Auxiliary Diesel Engine Regulation*, CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY AIR RESOURCES BOARD, 1 (May 7, 2008), available at <http://www.arb.ca.gov/ports/marinevess/documents/Auxenforce050708.pdf>. At the time of this publication, authorization has not been received.

158. California would eventually decide to attempt both simultaneously. *See generally* Mansergh, *supra* note 145, at 345–50 (discussing the alternatives and arguing that CARB should seek EPA authorization); Harry Moren, *Ninth Circuit Prevents California from Regulating Toxic Maritime Emissions*, 35 *ECOLOGY L.Q.* 639, 644 (2008) (briefly advocating for retooled regulations that avoid preemption).

159. *See Cackette*, No. CIV. S-06-2791 WBS KJM, 2007 WL 2492681, at *9 (E.D. Cal. Aug. 30, 2007), *aff'd sub nom. PMSA I*, 517 F.3d 1108 (9th Cir. 2008) (noting in dicta that “[r]egulations that merely govern fuel quality characteristics are permissible under CAA § 211, which allows California to regulate motor vehicle fuels without an EPA waiver.”) (citing 42 U.S.C. § 7545(c)(4)(B) (2006)). However, that section expressly allows California to regulate the fuel content for motor vehicles, stating that any state with a motor vehicle emissions waiver (California) “may at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive.” 42 U.S.C. § 7545(c)(4)(B) (2006) (emphasis added). Left unstated is whether this section also encompasses fuel regulations for nonroad engines and vehicles, such as ocean-going vessels. *See Cackette*, 2007 WL 2492681, at *9 (taking no opinion as to the “applicability of this provision to nonroad sources” (emphasis in original)). For further analysis of this question, see *infra* Part IV.A.

160. *See PMSA I*, 517 F.3d at 1115. Here, the Ninth Circuit discussed in dicta the possibility that California could regulate the fuel content of nonroad vehicles under the “in-use requirements” exception. *Id.* (reasoning that the “EPA interprets the Clean Air Act to extend this allowance of in-use requirements to regulations of nonroad engines.” (citing Preemption of State Regulation for Nonroad Engine and Vehicle Standards, 40 C.F.R. Part 85 (1994))); *see also* 42 U.S.C. § 7543(d) (2006) (“Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.”). For further analysis of this question, see *infra* Part IV.A.

161. *See California Environmental Protection Agency News Release—Ships off California's Coast Must Adhere to World's Strictest Diesel Emission Regulation*, CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY AIR RESOURCES BOARD (July 24, 2008), <http://www.arb.ca.gov/newsrel/nr072408b.htm>.

162. E-mail from Peggy Taricco, California Air Resources Board, to the author (Mar. 17, 2011, 15:41 PST) (on file with author) (“At this time we are not seeking authorization for the Ocean-going Vessel Auxiliary Diesel Engine Regulation that was suspended due to a court order.”).

ports to use low-sulfur fuels while passing through the RCW.¹⁶³ CARB sought to avoid preemption under the CAA by reframing the VFR as fuel content regulations, rather than as direct emissions caps.¹⁶⁴ This change was one of style, not substance. The two versions of these regulations have an identical effect: both versions cap diesel fuel sulfur content at 0.5% by weight, although the old version did so indirectly vis-à-vis an emissions cap, whereas the new version does so with a direct fuel content requirement.¹⁶⁵ The territorial breadth of the RCW—extending twenty-four nautical miles from the California baseline—remains the same.¹⁶⁶ The current VFR list a number of exceptions, including an exemption for vessels that are not calling at a California port, as well as an exemption for vessels that are owned or operated by a local, state, federal, or foreign government.¹⁶⁷

Beginning August 1, 2012, the VFR cap the sulfur content of marine gas oil at 1.0% and diesel oil at 0.5%.¹⁶⁸ On January 1, 2014, the sulfur content of both will be limited to 0.1%.¹⁶⁹ The penalty for violating these fuel requirements is heavy, and includes fines and injunctive relief.¹⁷⁰ Fines range between \$45,500 and \$182,000 per violation, depending on the number of times the vessel has been cited for a violation.¹⁷¹

163. CAL. CODE REGS. tit. 13, § 2299.2(a) (2010) (requiring “low sulfur marine distillate fuels in order to reduce emissions of particulate matter . . . on ocean-going vessels within . . . [Regulated California Waters].”).

164. Both the district court and Ninth Circuit indicated, in dicta, that fuel regulations might survive CAA preemption. *See supra* notes 159–60.

165. The new rules require all ocean-going vessels to use either marine gas oil, with a maximum of 1.5% sulfur content by weight, or marine diesel oil, with a maximum of 0.5% sulfur content by weight. Tit. 13, § 2299.2(e)(1)(A). Similarly, the previous version of the VFR capped emissions that would be generated by marine diesel oil with a 0.5% sulfur content by weight. *Id.* § 2299.1(e)(1)(A)(2). It appears that, practically speaking, the difference is one of semantics; however, it is technically conceivable that, under the previous rules, compliance with the emissions standard could be accomplished without strictly adhering to the fuel standard, which is not possible with the new rules because they directly regulate fuel content. *See id.* § 2299.2(e)(1)(A).

166. *Id.* § 2299.2(b)(1). The RCW encompass all waters within three, twelve, and twenty-four nautical miles of the California baseline, with a few exceptions. *Id.* Section 2299.2 states that the RCW encompasses waters within three nautical miles, *id.* § 2299.2(b)(1)(D), twelve nautical miles, *id.* § 2299.2(b)(1)(E), and twenty-four nautical miles, *id.* § 2299.2(b)(1)(F), of the state’s baseline. The former three- and twelve-mile alternatives are encompassed by the twenty-four-mile definition and are meaningless if it withstands scrutiny. *Id.* Indeed, the inclusion of these alternatives, when viewed in tandem with the section’s severability clause, *id.* § 2299.2(k), lends itself to the inference that CARB anticipated a challenge to the state’s claim of authority to regulate as far as twenty-four nautical miles from the baseline. Should the twenty-four- or twelve-mile alternatives fail on grounds that California may not regulate beyond its own territorial waters, those definitions could be severed, allowing the Vessel Fuel Rules to remain in place with a more limited RCW extending three nautical miles from the California baseline.

167. *Id.* § 2299.2(c)(3).

168. *Id.* § 2299.2(e)(1)(B)(2).

169. *Id.* § 2299.2(e)(1)(B)(3).

170. *Id.* § 2299.2(f).

171. *Id.*

C. CARB's Unintended Consequences

In enacting the regulations, CARB considered, and rejected, the contention that the VFR would actually result in an increase in air pollution in Southern California.¹⁷² In contrast, the U.S. Navy had argued that, coupled with CARB's proposed vessel speed reduction proposals,¹⁷³ the fuel restriction would cause vessels to avoid long-established, federally designated shipping lanes that were routed through the proposed RCW, and would send the ships straight into the Point Mugu Sea Range.¹⁷⁴ This traffic, it reasoned, would interfere with Naval training in the Sea Range and cause additional pollution:

Coupl[ing] [the proposed vessel speed reductions] with the more expensive fuel requirements, we are concerned that this could influence commercial shipping to traverse the Sea Range instead of the Santa Barbara Channel. Under present definitions, traversing the Sea Range would avoid most of the new fuel requirements as well as most of the area covered by the proposed speed reduction regulation. Again, aside from the significant impacts to the military mission this would *serve to increase air pollution* in [Southern California].¹⁷⁵

The Navy argued that the increased traffic in the Sea Range would pose a hazard to its activities and create safety concerns.¹⁷⁶ CARB rejected these concerns.¹⁷⁷ It had commissioned a separate study to address the issue, and concluded that “we do not believe ship operators will choose to traverse

172. *Final Statement for Reasons of Rulemaking*, CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY AIR RESOURCES BOARD 46–47 (July 24, 2008), available at <http://www.arb.ca.gov/regact/2008/fuelogv08/fsor.pdf>.

173. The vessel speed reduction proposals have not yet been enacted by CARB. For more information, see *Vessel Speed Reduction for Ocean-Going Vessels*, CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY AIR RESOURCES BOARD, <http://www.arb.ca.gov/ports/marinevess/vsr/vsr.htm> (last visited Jan. 26, 2012).

174. *Final Statement for Reasons of Rulemaking*, *supra* note 172, at 46–77.

175. *Id.* at 46 (emphasis added). The vessel speed reductions have not been enacted. Only the fuel regulations are currently in effect. See *Vessel Speed Reduction for Ocean-Going Vessels*, *supra* note 173.

176. See *Final Statement for Reasons of Rulemaking*, *supra* note 172, at 46–47. See also Leora Broydo Vestel, *In Response to California Fuel Regulation, Cargo Ships Chart More Precarious Routes*, GREEN: A BLOG ABOUT ENERGY AND THE ENVIRONMENT (Mar. 23, 2010, 8:36 AM), <http://green.blogs.nytimes.com/2010/03/23/in-response-to-california-fuel-regulation-cargo-ships-chart-more-precarious-routes/>.

177. *Final Statement for Reasons of Rulemaking*, *supra* note 172, at 46.

through the Point Mugu Sea Range. . . . [A]ctual changes in shipping routes are likely to be negligible.”¹⁷⁸

Notably, CARB alternatively determined that, in the event the regulations did cause vessels to take avoidance routes through the Sea Range, the emissions of nitrogen, hydrocarbons, and carbon dioxide (a greenhouse gas) would actually be *increased*.¹⁷⁹ CARB’s study included a model that projected a 2–11% increase in these emissions if half of the impacted shipping vessels chose to traverse the avoidance routes.¹⁸⁰ CARB concluded that these projected increases “constituted significant adverse environmental impacts from the regulation even though the impact on air quality and carbon dioxide levels are very small in comparison to existing levels and emissions.”¹⁸¹ Even so, CARB maintained that these adverse impacts created by an overall *increase* in emissions were outweighed by the local benefits—specifically, the localized reductions in particulate matter (PM) and sulfur oxide (SOx) pollution near the Ports of Los Angeles and Long Beach—and would not likely materialize because the model was based on “worst-case scenarios” which were “not likely to occur.”¹⁸²

Almost immediately after the regulations went into effect, CARB’s “worst-case scenarios” occurred.¹⁸³ According to news reports, “[j]ust after the regulations went into effect . . . ships that normally would have approached the harbor along the coast, inside the Santa Barbara Channel, began traveling south of the Channel Islands [through the Sea Range].”¹⁸⁴ Officials blamed the avoidance routes on the fact that the cost savings associated with using an avoidance route averaged a hefty \$30,000, or roughly one percent of the entire cost of a trans-Pacific shipment.¹⁸⁵ According to CARB’s own estimates, the cost to the industry of complying with the VFR totals \$360 million annually, or \$1.5 billion by 2014.¹⁸⁶ These cost estimates were based on the difference in the price of fuel only, and did not take into consideration the additional costs that have arisen as a result of compliance, including reported engine and fuel-pump problems created by

178. *Id.* at 46–47.

179. *Id.* at 47.

180. *Id.* (“Based on this analysis, ARB estimated that there could be small increases in oxides of nitrogen (NOx), hydrocarbons (HC) and carbon dioxide, (CO2), a greenhouse gas, if the regulation is implemented and causes half of the vessel traffic or all of the vessel traffic in the Santa Barbara Channel to take an avoidance route through the Sea Range.”).

181. *Id.*

182. *Id.*

183. Vestel, *supra* note 176.

184. *Id.*

185. *Id.* Industry-wide, the VFR are estimated to cost \$360 million annually, or about \$1.5 billion by 2014.

186. *PMSA II*, 639 F.3d 1154, 1159 (9th Cir. 2011).

the use of the cleaner fuel.¹⁸⁷ The estimated percentage of vessels choosing to take the avoidance route is fifty percent,¹⁸⁸ which happens to be the same percentage that CARB identified as an unlikely “worst-case” scenario prior to the enactment of the VFR.¹⁸⁹

The Navy’s projections that ships taking the avoidance routes would interfere with Naval training activities in the Sea Range have also materialized:

The Navy has also been coping with the changing traffic patterns. The new route has sharply increased the number of commercial ships traveling within the the [sic] Navy’s Point Mugu Sea Range, where hundreds of military exercises—including missile defense tests—are conducted each year, according to Tony Parisi, head of the sustainability office for the Naval Air Systems Command Ranges. These ships “go right through the most heavily used parts of the range,” he said. The Navy is working with the Marine Exchange to provide ships with timely information so they can avoid areas where tests or training are occurring. While only one exercise has been delayed so far by shipping traffic, the Navy worries that as the economy improves and traffic increases, holdups may become more frequent. “If we have to cancel an event, a squadron may have to deploy into a war zone without the needed training,” Mr. Parisi said. “That’s our biggest concern.”¹⁹⁰

In light of these developments, it can be said that CARB’s projections were accurate, but only to the extent that its worst-case scenarios became reality.¹⁹¹ CARB responded to these developments by extending the reach of the RCW an additional twenty-four miles from the Channel Islands, which are located off the coast of Southern California, in hopes of encompassing the avoidance routes with a 48-mile regulated area in the Southern portion of the state.¹⁹² CARB officials assert that the change might encourage the shippers to switch back to the traditional shipping routes,

187. *ARB Eyes Expanded Clean-Fuel Rule to Crack Down on Shippers*, INSIDE WASH. PUBLISHERS (Oct. 1, 2010), <http://environmentalnewsstand.com/Inside-Cal/EPA/Inside-Cal/EPA-10/01/2010/menu-id-305.html>.

188. Vestel, *supra* note 176.

189. *See supra* note 182 and accompanying text.

190. Vestel, *supra* note 176.

191. *See supra* notes 153–59 and accompanying text.

192. *See* Leora Broydo Vestel, *California Widens Clean-Fuel Zone for Ships*, GREEN: A BLOG ABOUT ENERGY AND THE ENVIRONMENT (June 24, 2011, 10:53 AM), <http://green.blogs.nytimes.com/2011/06/24/california-widens-clean-fuel-zone-for-ships/>.

although at least some shippers have stated that it will result in the creation of additional avoidance routes.¹⁹³

IV. WHETHER CALIFORNIA'S VESSEL FUEL RULES ARE PREEMPTED

Federal preemption of state regulation is grounded in the Supremacy Clause of the United States Constitution, which states that the Constitution, treaties, and laws of the United States are the “supreme Law[s] of the Land.”¹⁹⁴ Although a thorough discussion of this principle would be well beyond the scope of this Comment, a state law will generally fail a preemption test if federal law is intended to preempt the state’s action or is otherwise in conflict, demonstrated by a number of factors.¹⁹⁵ Therefore, although California’s VFR were retooled to avoid preemption under the CAA, those efforts do not necessarily shield the VFR from other alleged grounds for preemption.¹⁹⁶ This section focuses on the issue of whether CARB’s current regulations should withstand a preemption challenge.¹⁹⁷ Because CARB’s previous 2007 regulations were enjoined in *PMSA I* when

193. *ARB Eyes Expanded Clean-Fuel Rule to Crack Down on Shippers*, *supra* note 187.

194. U.S. CONST. art. VI, cl. 2 (“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.”); *see also* SCHOENBAUM, *supra* note 112, at § 4-3 (“The principles of preemption to resolve conflicts between federal and state law rest upon the authority of Article VI of the U.S. Constitution, which declares federal law to be the supreme law of the land.”).

195. *See generally* SCHOENBAUM, *supra* note 112, at § 4-3 n.1. Federal law will preempt state law under four general circumstances: (1) express preemption, (2) implied preemption, (3) conflict preemption, and (4) field preemption. *Id.* Express preemption is shown where Congress “explicitly state[s]” that state regulation on the subject is preempted. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Preemption is not express, but implied, where the intent to preempt is inferred from the “structure and purpose” of the law enacted. *Id.* State law may also be preempted where it otherwise conflicts with federal law, such that compliance with both state and federal law would be a “physical impossibility.” *See Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963). Finally, field preemption is shown where:

[S]tate law . . . regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a “scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” or where an Act of Congress “touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”

English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Preemption principles are sometimes approached uniquely in maritime commerce because, in addition to the possibility for congressional legislation in the field, the federal courts have developed a federal common law in maritime that itself may preempt state law. *See supra* notes 73–112 and accompanying text; *see also* discussion *infra* Part IV.D regarding the applicability of maritime preemption principles to the instant regulation.

196. As discussed above, because the emissions regulations were held to be impliedly preempted under the CAA, the Ninth Circuit did not address whether the PMSA’s alternative preemption claims were meritorious. *See supra* note 156 and accompanying text.

197. On the other hand, the policy question—whether the Vessel Fuel Rules are advisable, or, alternatively, should be repealed—is well beyond the scope of this Comment.

the Ninth Circuit held that they were preempted by the CAA, it makes sense to begin by addressing the issue of whether the CAA preempts the current VFR.¹⁹⁸

A. Whether the Clean Air Act Preempts the Vessel Fuel Rules

The key distinction between the rules enacted in 2007 and the current VFR that were enacted in 2009 is that the former directly regulated vessel emissions,¹⁹⁹ whereas the latter directly regulate fuel content²⁰⁰ (with the stated purpose of reducing emissions).²⁰¹ This difference is significant because the Ninth Circuit in *PMSA I* actually indicated that the difference between the regulation of fuel content, as opposed to emissions, was “[t]he key issue [of the] case.”²⁰² There, the court held that the CAA preempted the emissions regulations, but added, in dicta, that the VFR would not have been preempted by the CAA if they had been enacted as fuel content regulations.²⁰³ Although California attempted to frame the VFR as “in-use requirements,” which indirectly regulated fuel content, the court found that the regulations were plainly emissions standards and therefore were

198. See *infra* notes 199–220 and accompanying text.

199. See *supra* notes 144–47.

200. See *supra* note 165 and accompanying text.

201. The stated purpose of the Vessel Fuel Rules is to “reduce emissions” from ocean-going vessels. See *Final Statement for Reasons of Rulemaking*, *supra* note 172, at 1 (“In this rulemaking, the Air Resources Board . . . is adopting a new regulation and an airborne toxic control measure . . . to reduce emissions of diesel particulate matter (PM), nitrogen oxides (NOx), sulfur oxides (SOx), and ‘secondarily’ formed PM (PM formed in the atmosphere from NOx and SOx) from main and auxiliary diesel engines, and auxiliary boilers, operated on ocean-going vessels within 24 nautical miles of the California baseline . . .” (emphasis added)). The current fuel regulations are thus an indirect way of enacting what California was enjoined from enacting directly. As shown above, the only practical difference between the two versions of the regulations is that the 2007 rules cap emissions according to a fuel content standard, whereas the 2009 rules omit the stated purpose from the text and enact effectively identical fuel content standards as content requirements (requiring 0.5% sulfur content by weight for marine diesel oil). See *supra* note 165. This raises its own question: May California act indirectly where it may not directly? Perhaps yes, although this is not decided. See *infra* notes 205–20 (discussing the potential applicability of the CAA’s “in-use requirements” authorization to ocean-going vessels).

202. *PMSA I*, 517 F.3d 1108, 1114 (9th Cir. 2008) (“The key issue in this case is whether the Marine Vessel Rules constitute ‘standards . . . relating to the control of emissions from [] vehicles or engines,’ and thus are preempted, or whether the VFR are mere ‘in-use requirements’ under § 209(d) that are not preempted. We hold that they are standards.” (brackets in original)).

203. See *id.* at 1115 (“Even if vessel operators may comply with the Marine Vessel Rules by fuel switching, the emission limits set by the Marine Vessel Rules are analyzed separately from these means of compliance.”).

preempted.²⁰⁴ Nevertheless, the Ninth Circuit added that, had the regulations been enacted as direct restrictions of fuel content, they would have passed muster under section 209(d) of the CAA (regarding “in-use requirements”), stating that the section applies to nonroad engines and vehicles.²⁰⁵ In its discussion, the court relied on the D.C. Circuit’s opinion in *Engine Manufacturers Ass’n v. EPA*, which held that the in-use requirements exception applied to nonroad engines.²⁰⁶ If ocean-going vessel engines are nonroad engines under this section, then California is legislatively authorized to make in-use requirements for ocean-going vessels under the CAA.²⁰⁷

On further study, however, the application of section 209(d) to ocean-going vessels in this context is not so clearly in accordance with Congress’s intent.²⁰⁸ Section 209(d) of the CAA, which authorizes states to make “in-use requirements,” expressly applies to motor vehicles only.²⁰⁹ Only by inference is that section applied to nonroad engines and vehicles.²¹⁰ Moreover, the EPA and the court in *Engine Manufacturers Ass’n* did not appear to contemplate ocean-going vessels when they applied the section to nonroad engines.²¹¹ Indeed, in extending the section’s application to such

204. *Id.*; see also *supra* note 165 and accompanying text (the difference is largely one of semantics, although it may be conceivable to comply without using the low-sulfur fuel, however unlikely). The Ninth Circuit reasoned:

[California argues that] the Marine Vessel Rules are a permissible in-use requirement because the Rules regulate the sulfur content of the fuel used by ocean-going vessels. However, the plain language of the Rules regulates emissions, not fuel. The Marine Vessel Rules create a limit on emissions (i.e. emissions must not be greater than what would be emitted using the specified fuels) that is presumed to be met if the specified fuels are used. Cal. Code Regs. tit. 13 § 2299.1(e). Supplying a presumed mode of compliance does not alter the nature of the general requirement limiting emissions. Indeed, the Marine Vessel Rules do not impose an in-use fuel requirement because no particular fuel is required to be used at all.

PMSA I, 517 F.3d at 1115. Of course, the alternative—rules that directly require a particular fuel—was not at issue in this case. However, the dicta indicates a positive result under the CAA.

205. See *PMSA I*, 517 F.3d at 1115 (citing Air Pollution Control, 59 Fed. Reg. 36,969, 36,973–74 (July 20, 1994) (“It should be noted that section 209(e)(2) of the Act does not prevent California or other states from regulating nonroad engines and vehicles in use.”)).

206. *Id.* (citing *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1094 (D.C. Cir. 1996)).

207. See *supra* note 160; see also Clay J. Garside, Comment, *Forcing the American People to Take the Hard NOx: The Failure to Regulate Foreign Vessels Under the Clean Air Act As Abuse of Discretion*, 79 TUL. L. REV. 779, 789–90 (2005) (“The relevant Clean Air Act provisions [applicable to ocean-going vessels] are found in section 213 entitled ‘Nonroad engines and vehicles.’ That Congress contemplated the EPA’s authority to regulate nonroad engines and vehicles to include regulation of marine vessels generally is apparent from the statutory history of the Clean Air Act and the fact that the EPA has always interpreted its authority to include marine vessels.” (footnote omitted)).

208. See *infra* notes 209–20 and accompanying text.

209. 42 U.S.C. § 7543(d) (2006) (“Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed *motor vehicles*.” (emphasis added)).

210. See *supra* note 160 and accompanying text.

211. The EPA defines nonroad engines as follows:

engines, these authorities contemplated that section 209(d) would be applied to tractors and lawnmowers—not ocean-going vessels.²¹² In explaining why section 209(d) was applicable to nonroad engines, the EPA reasoned that nonroad engines such as lawnmowers are “location-specific” and “primarily effect local users” only.²¹³ Indeed, a state’s interest in regulating the use of

[A] nonroad engine is any internal combustion engine:

- (i) in or on a piece of equipment that is self-propelled or serves a dual purpose by both propelling itself and performing another function (such as garden tractors, off-highway mobile cranes and bulldozers); or
- (ii) in or on a piece of equipment that is intended to be propelled while performing its function (such as lawnmowers and string trimmers); or
- (iii) that, by itself or in or on a piece of equipment, is portable or transportable, meaning designed to be and capable of being carried or moved from one location to another. Indicia of transportability include, but are not limited to, wheels, skids, carrying handles, dolly, trailer, or platform.

Air Pollution Control, 59 Fed. Reg. at 36,971. The definition does not mention engines on ocean-going vessels. *See id.* Indeed, the word “vessel” does not appear anywhere in this section of the EPA’s interpretation of nonroad engine regulations. *See id.* Likewise, *Engine Manufacturers Ass’n* contemplated similar types of nonroad engines when it held that the in-use exception applies to such nonroad engines. *See Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1078 (D.C. Cir. 1996) (“Nonroad engines are internal combustion engines that are used in a wide variety of off-highway equipment including lawnmowers, bulldozers, and locomotives.”); *see also id.* at 1103 (including “locomotives and small construction and farm equipment”).

212. The EPA discusses “the location-specific nature of in-use regulations” and reasons that:

In-use regulations, such as time of use or place of use restrictions (e.g. high occupancy vehicle lanes) are typically very site specific. An in-use regulation suitable for California, or in part of California, may have little or no relevance or practicality to the type of in-use regulation suitable for another area. Such regulations which primarily effect local users are more appropriately controlled and implemented by local and state governments.

Air Pollution Control, 59 Fed. Reg. 36,969-01, 36,974. This rationale simply does not extend to the type of nonroad engines contemplated by the VFR, as they regulate vessel conduct on the high seas, outside the state of California, and bearing upon international maritime commerce. *See supra* notes 161–71 and accompanying text. In fact, the majority in *Engine Manufacturers Ass’n* explained that the rationale supporting in-use requirements was based on the local, “intra-state” effect of the regulations. *See Engine Mfrs. Ass’n*, 88 F.3d at 1083 (“The preemption sections, however, do not preclude a state or locality from imposing its own exhaust emission control standards upon the resale or reregistration of the automobile. Nor do they preclude a locality from setting its own standards for the licensing of vehicles for commercial use within that locality. Such regulations would cause only minimal interference with interstate commerce, since they would be directed primarily to intrastate activities and the burden of compliance would be on individual owners and not on manufacturers or distributors.”). *Engine Manufacturers Ass’n*, moreover, was not a maritime case, and the majority also used a balancing approach used to address these preemption issues under the CAA. *See id.* at 1089 n.42 (“Here . . . the court is dealing with a provision that balances various competing interests—for example, the policy of locally appropriate regulation as against manufacturers’ economic interest in uniform regulation—so it is impossible to say that the literal text ‘frustrates’ the purpose of § 209(e).”). An in-use regulation that bears upon maritime commerce—which carries a weighty interest in uniformity—beyond the borders of the state, as the Vessel Fuel Rules do, might therefore fail under an application of this balancing test referenced by *Engine Manufacturers Ass’n*. *See infra* Part IV.D.

213. *See supra* note 212.

lawnmowers is heightened because such vehicles are not involved in interstate transportation.²¹⁴ However, it stretches the imagination to contend that the “in-use requirements” section that Congress first intended in order to allow states to create carpool lanes²¹⁵ for “registered or licensed motor vehicles,”²¹⁶ and which has since been held to include nonroad engines like lawnmowers, could, by subsequent inference, also authorize the regulation of foreign-flagged vessels engaged in international trade in the contiguous zone. Nevertheless, it appears that the Ninth Circuit’s dicta went unchallenged in *PMSA II* because the court did not address it, and the PMSA did not raise the issue of CAA preemption.²¹⁷

Moreover, even if the Ninth Circuit’s dicta that the CAA authorizes the VFR should stand, the preemption analysis does not end there.²¹⁸ In a maritime context, even if Congress has delegated a specific regulatory authority to the states, the delegation may itself be unconstitutional where the regulatory power bears upon maritime commerce.²¹⁹ The VFR, therefore, must survive a maritime law preemption analysis, even if Congress has delegated its powers to the states.²²⁰

B. MARPOL Annex VI: An International Framework

The United States has also enacted vessel fuel content regulations through an international framework, MARPOL.²²¹ MARPOL was ratified by the United States in 2008.²²² The relevant portion of MARPOL, Annex VI, caps the sulfur content in fuel oil used by ocean-going vessels at 4.5%, with a 1.5% limit in some special control areas.²²³ As discussed in Part IV.D, this may be an assertion of a federal interest in less stringent and

214. See *supra* note 212.

215. Carpool lanes for motor vehicles are a specific type of regulation contemplated by the EPA when interpreting section 209(d). See Air Pollution Control, 59 Fed. Reg. at 36,974 (referencing high-occupancy vehicle lanes as the type of regulation authorized by section 209(d)). Such an interpretation is consistent with the D.C. Circuit’s definition of this allowance. See *Engine Mfrs. Ass’n*, 88 F.3d at 1094 (“[T]he longstanding scheme of motor vehicle emissions control has always permitted the states to adopt in-use regulations—such as carpool lanes, restrictions on car use in downtown areas, and programs to control extended idling of vehicles—that are expressly intended to control emissions.”).

216. 42 U.S.C. § 7543(d) (2006).

217. See *Pac. Merch. Shipping Ass’n v. Goldstene*, No. 2:09-cv-01151-MCE-EFB, 2009 WL 2777778 (E.D. Cal. Aug. 28, 2009), *aff’d*, *PMSA I*, 517 F.3d 1108 (9th Cir. 2008). The PMSA does not raise the issue of CAA preemption in its complaint seeking an injunction preventing the implementation of the 2009 Vessel Fuel Rules.

218. See *infra* note 219 and accompanying text.

219. See *supra* notes 85–91 and accompanying text.

220. See *infra* Part IV.D.

221. See *infra* notes 223–54 and accompanying text.

222. See International Convention for the Prevention of Pollution from Ships, *supra* note 28; see also *Moren*, *supra* note 158, at 643.

223. International Convention for the Prevention of Pollution from Ships, *supra* note 28.

uniform fuel content regulations that should factor into a preemption analysis under *Jensen*.²²⁴ Additionally, Annex VI of MARPOL, which also was ratified by the United States in 2008,²²⁵ raises additional questions of preemption under the framework itself.

The United States entered MARPOL to discourage a patchwork of international regulation that would put the United States at a competitive trade disadvantage.²²⁶ After its entrance into MARPOL, the EPA was tasked with developing, promulgating, and enforcing fuel standards for ocean-going vessels that were consistent with Annex VI.²²⁷ Because MARPOL is an international treaty that must be ratified by other nations before it is binding on them, the EPA has been hesitant to enforce MARPOL's fuel requirements against foreign-flagged vessels, including those vessels that call on American ports.²²⁸ Currently, the EPA enforces Annex VI only against American-flagged vessels.²²⁹ The EPA's decision not to enforce Annex VI against foreign vessels is worth noting here because California has claimed the power to regulate in a field where even the federal government has recognized limits to its authority.²³⁰ In fact, CARB referenced the fact that the EPA does not enforce the Annex VI regulations against foreign-flagged vessels in support of its decision to enact its own Rules—a tacit

224. See *infra* Part IV.D.

225. Moren, *supra* note 158, at 643.

226. See *supra* notes 78–79 and accompanying text; see also C. Jonathan Benner, *State Clean Air Regulation Takes A Long Sea Voyage*, 21 NAT. RESOURCES & ENV'T 27, 30 (2006) (“While there is no question that the United States has authority to regulate air emissions on its national-flag vessels, differential, domestic-only regulation of the relatively small U.S.-flag fleet would have placed that domestic industry at a cost and competitive disadvantage with other nations while having relatively little impact on the global problem of marine emissions.”).

227. See 33 U.S.C. § 1903 (2006); Control of Emissions From New Marine Compression-Ignition Engines at or Above 30 Liters Per Cylinder, 68 Fed. Reg. 9746-01 (Feb. 28, 2003) (promulgating “emission standards for new marine diesel engines installed on vessels flagged or registered in the United States These standards are equivalent to the internationally negotiated standards for oxides of nitrogen and will be enforceable under U.S. law for new engines built on or after January 1, 2004”).

228. See Control of Emissions From New Marine Compression-Ignition Engines at or Above 30 Liters Per Cylinder, 68 Fed. Reg. 9746-01 (applying marine diesel engine standards to U.S.-flagged vessels only); see also Benner, *supra* note 226, at 30–31 (“Although EPA has consistently declined to apply domestic U.S. emissions standards to engines in non-U.S. vessels that are only temporarily within the United States as part of the passenger or cargo operations, the question of EPA’s authority and jurisdiction to impose standards on foreign vessels remains in dispute”).

229. See Control of Emissions From New Marine Compression-Ignition Engines at or Above 30 Liters Per Cylinder, 68 Fed. Reg. 9746-01 (Feb. 28, 2003) (applying fuel requirement standards to “vessels flagged or registered in the United States”).

230. See Benner, *supra* note 226, at 28 (“California’s proposed regulations unilaterally construct a jurisdictional framework that arguably exceeds even the powers of the federal government to regulate air emissions from non-U.S.—flag ships.”).

admission by CARB that it knew it was regulating in an area where even the federal government had acknowledged its powers were limited.²³¹

In determining whether Annex VI preempts the VFR, the Ninth Circuit panel in *PMSA II* noted that the statute contains a savings clause, which states that the requirements of Annex VI “supplement,” but do not amend, any other authorities.²³² It appears that because the savings clause is framed in broad terms, the panel assumed that the clause speaks for itself on the matter (it did not further explain why the California regulations would be encompassed by the clause, nor did it cite to any additional authority in support of this interpretation).²³³ And because of the novelty of California’s regulations, there is no case precedent interpreting the savings clause in this context. True, the language of the savings clause is broad.²³⁴ However, in *Offshore Logistics Inc. v. Tallentire*,²³⁵ the Supreme Court held that the federal Death on the High Seas Act preempted Louisiana’s wrongful death statute even though the law included a comparable savings clause because general principles of maritime law required preemption.²³⁶ Additionally, there is an apparent conflict between California’s law and the core purpose of Annex VI. Annex VI was designed to establish an international framework that would prevent the development of a patchwork of fuel regulations among member countries²³⁷ and may be undermined where a state or province within a member country enacts the very patchwork that membership was intended to preclude.²³⁸

231. Mansergh, *supra* note 145, at 336–37 (“[W]hen CARB evaluated the EPA’s emission standards for ocean-going vessels, it concluded that they were too limited in their application. CARB wanted its version of the Marine Vessel Rules to cover auxiliary engines from both U.S. and non-U.S.-flagged vessels, and it wanted them to take effect immediately without having to wait for new engines to be built in compliance.” (footnotes omitted)).

232. *PMSA II*, 639 F.3d 1154, 1180 (9th Cir. 2011) (“MARPOL contains an express savings clause.” (citing 33 U.S.C. § 1911 (2006) (“Authorities, requirements, and remedies of this chapter supplement and neither amend nor repeal any other authorities, requirements, or remedies conferred by any other provision of law. Nothing in this chapter shall limit, deny, amend, modify, or repeal any other authority, requirement, or remedy available to the United States, or any person, except as expressly provided in this chapter.”))).

233. *Id.* at 1181.

234. See 33 U.S.C. § 1911 (2006) (“Authorities, requirements, and remedies of this chapter supplement and neither amend nor repeal any other authorities, requirements, or remedies conferred by any other provision of law.” (emphasis added)). State law—and its own requirements and remedies—seems to be excepted with this language.

235. 477 U.S. 207 (1986).

236. In *Tallentire*, the Supreme Court held that DOHSA preempted Louisiana’s wrongful death statute, notwithstanding a DOHSA savings clause that provided that “[t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected” by DOHSA. *Id.* at 211. The Court cited *Southern Pacific Co. v. Jensen* for the proposition that “[n]o [state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress.” *Id.* at 228 (quoting *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917)); see also *Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325, 344 (1973) (acknowledging that *Jensen* “has vitality left”).

237. See *supra* note 226.

238. See *supra* note 226.

This outcome carries potential international risks. It is not inconceivable that California's precedent here might encourage local governments in other member countries to enact their own regulations, further harming the U.S. interest in uniformity that was the basis for its Annex IV membership.²³⁹ The Alaska Supreme Court contemplated this possibility in *Alaska v. Bundrant*.²⁴⁰ Alaska had enacted regulations limiting shellfish fishing in an area it called the "Bering Sea Shellfish Area," which stretched as far as sixty miles off the Alaskan coast.²⁴¹ The law did not specify whether the regulations applied to foreign-flagged fishing vessels, and it was therefore conceivable that the state would apply its regulations to all fishing vessels in the Bering Sea Shellfish Area.²⁴² In holding that the regulations were not preempted, the *Bundrant* court narrowly construed the state's regulations as enforceable against United States fisherman only, reasoning that:

[T]here is a potential for conflict with United States agreements with foreign nations concerning fishing practices on the high seas, for example the Soviet Bilateral agreements with the United States Enforcement of the Alaskan regulations against foreign nationals could be taken as . . . a unilateral step by the United States, inviting reciprocal moves by other nations. The state's response is that these regulations, being aimed at United States fishermen, will not be enforced against foreign nationals. . . . Indeed, to the extent these regulations are inconsistent with fishing rights granted to foreign nations pursuant to the treaty power, the Supremacy Clause dictates that they must yield.²⁴³

The Alaskan court's narrow construction of its fishing regulation is instructive because it represents the recognition that the federal interest in uniformity is weightier where a state's regulation tinkers with a pre-existing international framework.²⁴⁴ The VFR raise similar concerns where, as in *Bundrant*, the United States has entered an international agreement.²⁴⁵

This issue has been complicated further because a separate, bilateral agreement was recently negotiated between the United States and Canadian

239. See *supra* note 226 and accompanying text.

240. 546 P.2d 530 (Alaska 1976).

241. *Id.* at 533, 558.

242. See *id.* at 540.

243. *Id.* (citation omitted).

244. See *id.*

245. See *supra* text accompanying note 221.

governments creating an “Emission Control Area” (ECA) pursuant to Annex VI.²⁴⁶ These new emission standards will regulate the fuel used by all vessels—including vessels flagged in non-member countries—which operate an area of the ocean extending approximately two-hundred miles from the U.S. and Canadian baselines.²⁴⁷ They will begin to go into effect in August 2012,²⁴⁸ and will present an additional layer of potential conflict.²⁴⁹

California has argued that MARPOL, and the pending implementation of the bilateral ECA, should not preempt its regulations because the state will likely invoke a sunset clause²⁵⁰ and stop enforcing its regulations once the ECA goes into effect.²⁵¹ This argument was referenced by the Ninth Circuit in its own analysis of MARPOL preemption, stating that it is “reasonable to predict” that the VFR will sunset when the ECA takes effect.²⁵² However, California’s argument here cuts both ways: it can be summarized as a contention that the VFR are not preempted because they will likely be terminated soon—a tacit admission that the VFR stand on precarious ground as currently enacted and enforced. And the sunset clause does not address the question of whether the VFR are preempted today or at any time before they are actually sunsetted—either under Annex VI as it currently stands or when the ECA is implemented.

More to the point, whether the sunset clause will actually be invoked to terminate the VFR at this later date is a separate question. The VFR state that they will sunset when CARB’s Executive Officer determines the United

246. Susan B. Geiger, Barry M. Hartman, Mark Ruge & Yvette T. Wissmann, *International Maritime Organization (“IMO”) Approves Authority for U.S. to Impose Stringent New Air Emission Standards for Large Oceangoing Vessels*, K&L GATES (Apr. 6, 2010), <http://www.klgates.com/international-maritime-organization-imo-approves-authority-for-us-to-impose-stringent-new-air-emission-standards-for-large-oceangoing-vessels-04-06-2010/>. The ECA extends two-hundred miles from the U.S. and Canadian baseline.

247. *Id.* From August 2012 to 2015, the standards will cap fuel sulfur content at 1.0% by weight; and beginning in 2015, the standard will be 0.1% by weight. *Ocean Vessels and Large Ships*, EPA.GOV, <http://www.epa.gov/oms/oceanvessels.htm> (last visited Jan. 26, 2012).

248. *Ocean Vessels and Large Ships*, *supra* note 247.

249. The caps that were set by the United States and Canada during these negotiations likely took into consideration a number of factors—including the interest in the movement of foreign-flagged vessels in commerce off the coasts of America and Canada—in addition to pollution concerns. If individual states pass their own, more-stringent or otherwise different standards, they could undermine promises and obligations made by the United States during these negotiations and set in motion reciprocal moves by other countries with obligations on which the United States relies. This possibility was addressed in *Bundrant*, a comparable context, where the Supreme Court of Alaska held that its state’s fishing regulations were preempted if applied to foreign vessels. *See supra* notes 240–44 and accompanying text.

250. CAL. CODE REGS. tit. 13, § 2299.2(j)(1) (2010) (“The requirements specified in subsection (e) [establishing limits on sulfur content in vessel fuel] shall cease to apply if the United States adopts and enforces requirements that will achieve emissions reductions within the Regulated California Waters that are equivalent to those achieved by this section.”).

251. Brief for Appellee at 48, *PMSA II*, 639 F.3d 1154 (9th Cir. 2011) (No. 09-17765).

252. *PMSA II*, 639 F.3d at 1180 (“The Vessel Fuel Rules also contain a sunset clause, and it is reasonable to predict that, once the heightened standards established by the ECA go into effect, the Vessel Fuel Rules will be terminated.”).

States has adopted “equivalent” regulations so that the California regulations are no longer needed.²⁵³ This clause therefore places the authority to make the determination with the state. CARB could just as conceivably determine that the EPA has not acted sufficiently, a plausible outcome here because the ECA regulations will not be anywhere near as stringent as the California Rules will be when they are first implemented.²⁵⁴ The sunset clause also might fail to be invoked if California later decides to require even more stringent or qualitatively different standards, setting up additional conflicts with MARPOL. Therefore, reliance on California’s predictions about whether CARB’s Executive Officer will one day make a determination to sunset the VFR in the future is riddled with pitfalls. And as discussed *infra* Part IV.D, MARPOL’s international framework also weighs heavily as a factor favoring a finding of preemption given that it shows a strong federal interest in the uniformity of maritime law.

C. The Submerged Lands Act and Extraterritorial Concerns

In litigation over both the 2007 and 2009 versions of CARB’s regulations, the PMSA also argued that the SLA—setting California’s territorial limits at three miles from the baseline—preempted CARB’s regulations to the extent that they extend beyond this boundary.²⁵⁵ The Ninth Circuit never considered this question in *PMSA I* because it held that the regulations were preempted under the CAA, and did not reach this question.²⁵⁶ However, in *PMSA II*, the Ninth Circuit held that the SLA did not preempt the VFR, basing its holding primarily on case precedent

253. Tit. 13, § 2299.2(j)(1) (“Equivalent requirements may be from IMO regulations that are adopted and enforced by the United States or may be contained in regulations that are initiated by the U.S. Environmental Protection Agency. Subsection (e) shall remain in effect under this subsection until the Executive Officer issues written findings that federal requirements are in place that will achieve equivalent emissions reductions within the Regulated California Waters and are being enforced within the Regulated California Waters.”).

254. Even when the ECA goes into effect, its requirements will allow ten times the sulfur content in vessel fuel as compared with the California rules. As of August 2012, the date that these rules are proposed to take effect, California will limit sulfur content to 0.5% of vessel diesel oil by weight, see *supra* note 168, whereas the ECA standards will allow 1.0% sulfur by weight, see *supra* note 247, a twofold difference. This means that the EPA will allow significantly more sulfur content in vessel diesel oil, a disparity that CARB very well may decide is not sufficiently “equivalent” to sunset the Rules. As additional evidence that CARB is not planning to leave the field anytime soon, it is currently considering proposed amendments to the Rules that would *extend* their reach. See *supra* note 192 and accompanying text.

255. See *PMSA I*, 517 F.3d 1108 (9th Cir. 2008); *Pac. Merch. Shipping Ass’n v. Goldstene*, No. 2:09-cv-01151-MCE-EFB, 2009 WL 2777778 (E.D. Cal. Aug. 28, 2009).

256. See *supra* note 156.

upholding other forms of extraterritorial regulations, like pilotage regulations.²⁵⁷

The authority for states to make pilotage laws, which regulate the pilotage of a vessel as it calls on a port, has been based on a historically heightened interest in local regulation.²⁵⁸ In the few cases that have addressed the constitutionality of extraterritorial pilotage regulations—where the state’s pilotage laws are enforced beyond its territorial waters—the courts have upheld these laws under the same rationale that justifies state action in the first instance: that states have a strong and unique local interest in regulating vessel pilotage in their waterways.²⁵⁹ These holdings are reinforced by Congress’s blanket delegation of the pilotage lawmaking power to the states in the Lighthouse Act.²⁶⁰ Although both the First and Fifth Circuits—which have directly addressed the issue—relied heavily on the Lighthouse Act’s delegation of power to the states in upholding extraterritorial pilotage regulations, only the First Circuit indicated that the outcome hinged on a determination as to whether the Lighthouse Act’s grant

257. See *PMSA II*, 639 F.3d 1154, 1167 (9th Cir. 2011).

258. See *Cooley v. Bd. of Wardens*, 53 U.S. 299 (1852). In a case challenging the constitutionality of state pilotage regulations under the Commerce Clause, the Supreme Court held that the regulations were not preempted, despite their direct regulation of interstate vessels engaged in maritime commerce, in light of their pertinence to such a unique local concern. *Id.* at 319 (stating that the historical nature of pilotage laws is “local and not national; that it is likely to be the 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”).

259. See *Gillis v. Louisiana*, 294 F.3d 755, 756 (5th Cir. 2002). In *Gillis*, the Fifth Circuit upheld state pilotage regulations that reached as far as thirty miles from the Louisiana coastline. See *id.* at 756–57. Louisiana’s territorial boundary in the gulf is farther than three miles under the SLA, but its pilotage regulations nonetheless extended beyond that boundary. See *id.* The court rejected plaintiffs’ argument that the SLA, by establishing a state boundary at three nautical miles from the baseline, had thereby limited state jurisdiction over pilotage regulations to that boundary. See *id.* at 761. The court concluded that Congress did not intend to limit coastal states’ authority over pilotage regulations with the SLA, and that pilotage laws had historically rested within the jurisdiction of states. See *id.* The court also reasoned that Louisiana possessed a significant local interest in regulating the pilotage over the waters in question, an interest which outweighed plaintiffs’ argument that the authority conflicts generally with federal interests. See *id.* at 762.

260. *Warner v. Dunlap*, 532 F.2d 767 (1st Cir. 1976). In *Warner*, the First Circuit upheld a Rhode Island pilotage regulation that reached Block Island Sound off the Rhode Island coast, which happened to be situated well beyond the state’s three-mile territorial limit. *Id.* at 772. The question turned on the “factual determination as to whether Block Island Sound is a ‘bay’ within the meaning” of the Lighthouse Act. *Id.* at 768. Implicitly, the First Circuit would not have upheld a similar extraterritorial regulation that was not expressly authorized by federal legislation. Similarly, the *Gillis* court’s analysis of Louisiana’s pilotage regulation rested heavily on Congress’s intent to delegate the authority in the Lighthouse Act. See *Gillis*, 294 F.3d at 761 (“Rather than a limited grant of authority to the states over the specified bodies of water, the [Lighthouse Act] has been interpreted as an expression of Congress’s general intent *not* to limit the power already held by the states unless otherwise provided by Congress.”). Both the First and Fifth Circuit Courts’ emphasis of the Lighthouse Act’s express delegation of authority as a basis for upholding the state’s police power over pilotage may be a distinguishing feature that separates these pilotage cases from extraterritorial environmental regulations that may lack a similar delegation of power by Congress.

encompassed the body of water in question.²⁶¹ Even though these decisions did not address whether states are able to ground extraterritorial pilotage regulations on local interest or historical practice alone (without the congressional grant in the Lighthouse Act), state pilotage regulation was nonetheless the historical practice before *any* ocean waters fell within state territory.²⁶² Therefore, it is likely that the rationale supporting pilotage regulations—not the boundary defined in the SLA—is what should govern their reach.

The purpose behind Congress's enactment of the SLA also sheds some light on the question of its preemptive effect, because the statute was enacted with the purpose of expanding state jurisdiction,²⁶³ not limiting it. Before the SLA became law, states did not have any territorial claim to the waters beyond their shores.²⁶⁴ The SLA was nonetheless enacted to expand state territorial jurisdiction to these waters for purposes of resource exploration, not to define a limit to its regulatory powers.²⁶⁵ In *PMSA II*, the Ninth Circuit aptly noted that arguments that the SLA was intended to set a regulatory boundary “reads too much into the SLA itself and what Congress itself intended to achieve in 1953.”²⁶⁶ In holding that the SLA does not, by itself, preempt the VFR, the Ninth Circuit noted that there is no case precedent striking down an extra-territorial state regulation on the basis of the boundaries created by the SLA alone.²⁶⁷ If anything, it noted, the authorities have been consistent in upholding state regulation beyond the boundary established by the SLA where the state's interest in regulation was strong.²⁶⁸

Because it is unlikely that the SLA impliedly preempts the VFR, it stands to reason that the question of whether California has the power to enact the VFR will hinge on historical practice and local interest grounds (similar to extraterritorial pilotage laws) and not the SLA's territorial

261. *See supra* note 260.

262. Before passage of the SLA, a state's border ended at the coastal baseline. *See supra* notes 133–42. Nevertheless, state pilotage laws were upheld in *Cooley* in 1852. *See supra* note 258. Therefore, from a historic perspective, all pilotage laws were extraterritorial at one time.

263. *See supra* notes 135–42. The SLA was designed to supersede the Supreme Court's holding that California's territory—including territory existing for resource-exploration purposes—ended at its shoreline. *See id.*

264. *See supra* notes 135–42.

265. *See supra* notes 135–42.

266. *PMSA II*, 639 F.3d 1154, 1167 (9th Cir. 2011).

267. *Id.* at 1170.

268. *See id.* at 1170–74 (citing, *inter alia*, *Gillis v. Louisiana*, 294 F.3d 755 (5th Cir. 2002); *Warner v. Dunlap*, 532 F.2d 767 (1st Cir. 1976)).

boundaries.²⁶⁹ As will be shown, this analysis tracks the Supreme Court’s *Jensen* uniformity test, which is discussed below.

D. Federal Interest in Uniformity: Common Law Preemption in Maritime Law

General principles of maritime law developed as common law by the federal courts are frequently applied by courts as a separate constitutional preemption test.²⁷⁰ Therefore, even if a congressional statute or international framework does not itself preempt a state regulation, the federal laws may otherwise weigh as factors in making this final determination.²⁷¹ This section considers whether the VFR may be preempted by federal maritime principles.

1. State Regulation Is Not Afforded a Presumption Against Preemption when It Bears upon Maritime Commerce

Whether California’s VFR are preempted under general maritime law is a question implicating principles of field preemption, which generally arises where a state “regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.”²⁷² In cases where a state law is challenged under field preemption, the Supreme Court has frequently afforded state regulations a “presumption against pre-emption” if the states have a historic practice of regulating in the field.²⁷³

Depending on how one frames the VFR—as air pollution regulations, on the one hand, or as regulations of maritime commerce, on the other—there may be a strong argument that California is regulating in a field historically placed in the realm of the states. The Supreme Court has broadly pronounced that “[t]hroughout our history the several States have exercised their police powers to protect the health and safety of their citizens.”²⁷⁴ Air pollution regulations have been historically considered an exercise of the state police power to enact health and safety legislation.²⁷⁵ This historical

269. See *infra* notes 341–42 and accompanying text.

270. See *supra* notes 73–112 and accompanying text.

271. See *supra* notes 85–91 and accompanying text.

272. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

273. See generally *Wyeth v. Levine*, 555 U.S. 555, 129 S. Ct. 1187, 1195 n.3 (2009). This presumption is based on the Court’s deference to state powers under principles of federalism. See *id.* (“We rely on the presumption because respect for the States as ‘independent sovereigns in our federal system’ leads us to assume that ‘Congress does not cavalierly pre-empt state-law causes of action.’”) The presumption thus accounts for the historic presence of state law but does not rely on the absence of federal regulation.” (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

274. *Medtronic*, 518 U.S. at 475.

275. See *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) (“Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.”).

argument might favor California, because under general circumstances, where an area of law is implicated that “ha[s] been traditionally occupied by the States,” there is a presumption that Congress did not intend to preempt state action in the field.²⁷⁶ Such a presumption is overcome only where Congress has made “clear and manifest” its intention to preempt state action.²⁷⁷

However, these initial appearances may be misleading. It is just as appropriate to frame the VFR as maritime commerce regulations as it is to frame them as air pollution regulations, particularly in light of the fact that they directly prescribe the type of fuel to be used by vessels engaged in maritime commerce in international waters off the coast of California.²⁷⁸ As fuel content regulations, the VFR directly impact the primary conduct of the vessels, but only indirectly impact air emissions.²⁷⁹ This is particularly true because the VFR require vessels to make determinations about whether to use the low-sulfur fuel or pay a fine, whether to use the coastal sea lanes where the VFR are applied or to create alternative shipping routes, and whether to continue to carry their cargos to California ports at all. Construed as extraterritorial regulations bearing upon maritime commerce, California’s claim to a historical presence in the field becomes suspect.²⁸⁰ This tension was a key issue in *PMSA II*, which considered but declined to frame the VFR as a regulation of maritime commerce.²⁸¹

Moreover, even if the VFR are framed as air pollution regulations, they are not enforced in a vacuum. Because they directly regulate the fuel content of ocean-going vessels,²⁸² at a very minimum, they are air pollution regulations that substantially bear upon maritime commerce. As such, both the state and federal governments have historically exercised concurrent jurisdiction in this field.²⁸³ The Supreme Court’s decision in *United States v.*

276. See *English*, 496 U.S. at 79 (“Where . . . the field which Congress is said to have pre-empted includes areas that have been traditionally occupied by the States, congressional intent to supersede state laws must be clear and manifest.” (internal quotation marks and citations omitted)). This appears initially relevant because, under preemption principles, traditional state action in the field creates an assumption against preemption. See *id.*

277. See *id.*

278. See *supra* notes 145, 163.

279. See *supra* notes 172–93 and accompanying text.

280. See *PMSA II*, 639 F.3d 1154 (9th Cir. 2011).

281. *Id.* at 1167 (“While *PMSA* contends that the Vessel Fuel Rules operate in fields historically occupied by the federal government (e.g., maritime commerce, conduct at sea outside of state boundaries, and the definition of state boundaries), we agree with the District Court that these state regulations ultimately implicate the prevention and control of air pollution.”).

282. See *supra* notes 145, 163.

283. See *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) (“In the exercise of [police] power [to regulate pollution], the states and their instrumentalities may act, in

*Locke*²⁸⁴ likely controls under such circumstances. There, the State of Washington had enacted regulations to reduce oil tanker spills in its waters.²⁸⁵ At issue was whether the state's regulations were afforded a presumption against preemption because they were enacted as health and safety laws.²⁸⁶ The Court held that because the oil tanker regulations also bore upon maritime commerce, they should not be afforded the presumption against preemption, stating that where laws:

[B]ear upon national and international maritime commerce, . . . there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers. Rather, we must ask whether the local laws in question are consistent with the federal statutory structure, which has as one of its objectives a uniformity of regulation for maritime commerce. *No artificial presumption aids us* in determining the scope of appropriate local regulation . . . [despite] the historic role of the States to regulate local ports and waters under appropriate circumstances.²⁸⁷

The *Locke* Court held that the regulations, which required general navigation watch procedures, English language training for crew members, and maritime casualty reporting, were preempted despite the historical practice of state regulation of its local ports and waterways and the state interest in reducing the likelihood of toxic oil spills in its waters.²⁸⁸

many areas of interstate commerce and maritime activities, *concurrently* with the federal government.” (emphasis added)). In *Huron*, the Supreme Court upheld the criminal liability of a corporation that had violated a local ordinance limiting the amount of smoke that its vessel's boilers could emit *within* the city of Detroit, even though the boilers were otherwise in compliance with federal law. *Id.* at 444–47. Not addressed was whether the same could be applied outside the city limits. *See generally id.* *But see* United States v. *Locke*, 529 U.S. 89, 108–09 (2000) (holding, *inter alia*, that parts of the state of Washington's oil tanker equipment and employment regulations, enacted to confront oil pollution concerns, were preempted by the uniformity demands of an overlapping statutory scheme set up by Congress).

284. 529 U.S. 89 (2000).

285. *Id.* at 94.

286. *Id.* at 108.

287. *Id.* at 108–09 (emphasis added); *see also* Young, *supra* note 15, at 333–37, 337 n.420 (noting that “[t]he Court has suggested that the presumption against preemption is not so weighty in areas of ‘unique federal concern’ warranting the creation of federal common law” in maritime (citing *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507–08 (1988))). With this in mind, Young criticizes the Court's approach, arguing that the presumption against preemption should nonetheless be preserved in light of federalism concerns:

Congress's critical role in preemption decisions makes preemption by federal common law highly suspect. Both courts and commentators have noted the federalism concerns raised by formulation of federal law by a federal judiciary that incorporates none of the political safeguards of federalism; after all, “the States are represented in Congress but not in the federal courts.”

Young, *supra* note 15, at 335–36 (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 n.9 (1981)).

288. *See Locke*, 529 U.S. at 115–17.

Significantly, the Court did so where, as here, the state contended that congressional action had been insufficient in the field and that the state was appropriately supplementing federal law to reduce pollution in its waters.²⁸⁹

In light of *Locke*, which appears to apply broadly to maritime cases,²⁹⁰ the general presumption against preemption afforded to state regulation is inapplicable here because California's regulation bears upon maritime commerce, even if the regulation involves a traditional state concern.²⁹¹ Because the Ninth Circuit in *PMSA II* afforded the VFR a presumption against preemption,²⁹² it likely erred under current Supreme Court case law.²⁹³ Rather, in cases where the presumption against preemption is not applied, the federal interest in the uniformity of maritime law is balanced with the state's local interest in the regulation, particularly as outlined in

289. *See id.* at 117 (“When one contemplates the weight and immense mass of oil ever in transit by tankers, the oil’s proximity to coastal life, and its destructive power even if a spill occurs far upon the open sea, international, federal, and state regulation may be insufficient protection. Sufficiency, however, is not the question before us. The issue is not adequate regulation but political responsibility; and it is, in large measure, for Congress and the Coast Guard to confront whether their regulatory scheme, which demands a high degree of uniformity, is adequate.”).

290. *See id.* at 108 (“The state laws now in question bear upon national and international maritime commerce, and in this *area* there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers.” (emphasis added)).

291. *See supra* note 287 and accompanying text.

292. *PMSA II*, 639 F.3d 1154, 1167 (9th Cir. 2011).

293. In support of its determination to apply the presumption against preemption, the Ninth Circuit cited *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), which held that failure to warn civil claims brought under state law were not preempted by warning standards developed by the FDA scheme. *PMSA II*, 639 F.3d at 1166. *Wyeth* held that the presumption against preemption applied to state drug regulations because of the historical state practice of state health and safety regulations—even though the federal government had a long-standing presence in the drug regulation business vis-à-vis the FDA. *See Wyeth*, 129 S. Ct. at 1194–95. The Ninth Circuit’s reliance on *Wyeth*, to the exclusion of *Locke*, was likely in error. *Wyeth* did not overrule *Locke*. Rather, in both cases, the Supreme Court weighed the varying historical state and federal practices and came to a determination about whether the state’s historical presence in the field was significant enough to justify a presumption against preemption. In *Locke*, the Court looked to maritime commerce and held that the state’s presence in the field of port and waterway regulation was not substantial or long-standing enough to justify a presumption against preemption where its regulations bore upon maritime commerce. *See supra* notes 287–92 and accompanying text. On the other hand, the *Wyeth* Court concluded that, as to the field of drug manufacture and sale, the historical state presence was enough to afford state law a presumption against preemption. *See Wyeth*, 129 S. Ct. at 1194–95. The difference between these two cases was not that *Wyeth* changed the rule to be applied. *See id.*; *see also supra* notes 287–92 and accompanying text. Instead, the difference was that there was a different outcome to the initial question of whether a state’s historical presence in a particular field was significant enough to justify an artificial presumption against preemption. *See Wyeth*, 129 S. Ct. at 1194–95; *see also supra* notes 287–92 and accompanying text. Because *PMSA II* was a case involving state regulations bearing upon maritime commerce—not drug manufacture and sale—it is more appropriate to apply *Locke*, not *Wyeth*. *See PMSA II*, 639 F.3d at 1158.

Jensen and its progeny, without the benefit of an artificial presumption against preemption.²⁹⁴

2. Balancing the Federal Interest in Uniformity with the State's Interest in Regulation

Article III's grant of maritime jurisdiction has been interpreted to include a substantive federal lawmaking power, under which state regulation may supplement the substantive law, but may not interfere with the federal interest in the uniformity of maritime law in its interstate and international relations.²⁹⁵ Discerning the proper application of this uniformity requirement has been compared to the navigation of "a sailboat into a fog bank."²⁹⁶ This federal interest may be stronger in some cases than others, and the general approach is to balance the state interest in the regulation against the federal interest in the uniformity of maritime law.²⁹⁷

Considering California's interest first, the state's vessel fuel regulations were seemingly made with good intentions and pollution concerns in mind.²⁹⁸ Air pollution in the Southern California region is hugely problematic.²⁹⁹ CARB predicted that its strict fuel standards would save hundreds of lives that would otherwise end prematurely as a result of toxic diesel emissions.³⁰⁰ Although the science of this prediction is under

294. See *supra* notes 73–112 and accompanying text.

295. See *supra* notes 73–112 and accompanying text.

296. *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 624 (1st Cir. 1994) ("[O]ne might tack a sailboat into a fog bank with more confidence.").

297. See *supra* notes 100–12 and accompanying text.

298. CARB predicted that the enactment of its Vessel Fuel Rules would annually prevent 500 premature deaths that are caused by these SOx, NOx, and PM emissions. *Final Statement for Reasons of Rulemaking*, *supra* note 172, at 47.

299. Any Southern California resident, including this author, can speak fluently about smog clouds in Los Angeles that occasionally are so thick they inhibit views of the skyline. Indeed, Los Angeles smog has become a fixture of the region's identity. See, e.g., B. Drummond Ayres, Jr., *California Smog Cloud Is Cleaning Up Its Act*, N.Y. TIMES, Nov. 3, 1995, <http://www.nytimes.com/1995/11/03/us/california-smog-cloud-is-cleaning-up-its-act.html> ("The noxious haze of smog that hangs over Los Angeles and the surrounding urban basin has long been the thickest, unhealthiest and most infamous in the country, as much a symbol of the city to many people as Hollywood."). However, one need not look only to anecdotes. According to the American Lung Association, which publishes an annual air quality report, California is home to eight of the top ten "most polluted cities" in the nation for ozone pollution; five of the top ten for long-term particulate matter pollution (measured over one year); and seven of the top ten for short-term particulate matter pollution (measured over a twenty-four hour period). *State of the Air 2010*, AM. LUNG ASS'N, <http://www.lungusa.org/assets/documents/publications/state-of-the-air/state-of-the-air-report-2010.pdf> (last visited Jan. 27, 2012). In each of these categories, California's largest city, Los Angeles, is ranked first, second, and fourth respectively. *Id.* Only one other city, Bakersfield, California, can claim the honor of being ranked in the top five for each category, and this city is also located in Southern California. *Id.*

300. See also *California Environmental Protection Agency News Release*, *supra* note 161 ("An estimated 3,600 premature deaths between 2009 and 2015 will be avoided, and the cancer risk associated with the emissions from these vessels would be reduced by over 80 percent. . . . Diesel

dispute,³⁰¹ it is beyond the scope of this Comment to engage in a separate analysis of the science or to take a specific position on whether the remedy is prudent. Rather, this Comment assumes that the pollution concerns raised by California about diesel emissions from ocean-going vessels are legitimate and that these regulations will help to reduce that problem. On the other hand, air pollution does not uniquely impact California.³⁰² Nor is ocean-going air pollution a unique occurrence in the state.³⁰³ Air quality has been a matter of national focus for decades, as demonstrated by Congress's interest in passing of the CAA in 1970 and major amendments designed to broaden its reach in 1990.³⁰⁴ These facts undercut California's argument that its VFR should be upheld on grounds that they are unique and comparable to the local interests that support state pilotage regulations.³⁰⁵ State authority to make pilotage laws is based upon a determination that state ports and

exhaust contains a variety of harmful gases and over 40 other known cancer-causing compounds. Currently in California, diesel PM emissions from ocean-going vessels expose more than twenty-seven million people or 80% of California's total population, to cancer risk levels at or above 10 chances in a million.”).

301. See James E. Enstrom, *Critique of CARB Diesel Science, 1998–2010*, CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY AIR RESOURCES BOARD (Feb. 26, 2010), <http://www.arb.ca.gov/research/health/pm-mort/enstrom.pdf> (arguing evidence does not support the contention that PM emissions result in premature deaths in California); Henry I. Miller & James E. Enstrom, *California's Diesel Regulations Are Hot Air*, FORBES.COM (June 9, 2010), <http://www.forbes.com/2010/06/08/california-diesel-regulation-pollution-opinions-columnists-henry-i-miller-james-e-enstrom.html> (“[K]ey CARB research staff and CARB-funded scientists withheld or obfuscated epidemiologic findings that conflicted with their preconceived conclusions about PM2.5 health effects. In spite of the above null epidemiologic evidence and almost 150 pages of critical comments submitted to CARB in July 2008, the October 2008 Final CARB Staff Report (the ‘Tran Report,’ named after lead staffer Hien Tran) still claimed that PM2.5 and diesel particulate matter were responsible for the above-mentioned number of premature deaths.”). In fact, a lead staffer who informed CARB's report, Hien Tran, was demoted by CARB after it was revealed he had falsified his credentials, although CARB was not informed about this discovery until after its vote on diesel regulations. See *id.*; Lois Henry, *Valley Air Quality Rules Remain Awfully Murky*, THE BAKERSFIELD CALIFORNIAN, Sept. 26, 2011, <http://www.bakersfield.com/news/columnist/henry/x706716939/Xopxopxopxopxopxopxopxopxopx>. James Enstrom, a UCLA research professor, was not reappointed to his position after the university made a determination that his research did not align with the “mission of the department.” See Kelly Zhou, *UCLA Researcher James Enstrom Not Reappointed to Position*, DAILY BRUIN, Aug. 30, 2010, http://www.dailybruin.com/index.php/article/2010/08/ucla_researcher_james_enstrom_not_reappointed_to_position.

302. See *State of the Air 2010*, *supra* note 299. The American Lung Association's top ten list for “most polluted cities” under all three air pollution categories includes, among California cities, Pittsburgh, PA; Birmingham, AL; Salt Lake City, UT; Phoenix, AZ; Cincinnati, OH; Houston, TX; and Charlotte, NC. See *id.*

303. See, e.g., Lee van der Voo, *Seattle-to-Alaska Cruise Ships Pose Pollution Threat in Puget Sound*, MY EDMOND NEWS, Aug. 2008, <http://myedmondsnews.com/2010/08/seattle-to-alaska-cruise-ships-pose-pollution-threat-in-puget-sound/#ixzz1HGAIE9UF>.

304. See *supra* note 150 and accompanying text.

305. Defendant's Opposition to Motion for Summary Judgment, Pac. Merch. Shipping Ass'n v. Goldstene, No. 2:09-cv-01151-MCE-EFB (E.D. Cal. June 11, 2009).

internal waterways are so peculiarly unique to their location that the state has a heightened interest in such a characteristically local concern—so much so that Congress would be incompetent to act in the place of the states.³⁰⁶ Surely, the argument goes, the federal government would not be able to create a one-size-fits-all pilotage regime when internal waterways are so unique from one bay or canal to the next.³⁰⁷ However, CARB has not argued that the way in which California is polluted or the makeup of its coastline is somehow so unique that it renders Congress incompetent to set national standards for the regulation of vessel fuel. To the contrary, California has virtually made the opposite case: that it is regulating as long as it disagrees with Congress’s policy judgment in setting laxer standards,³⁰⁸ and that the state will quickly defer to Congress once it decides to toughen its national standards.³⁰⁹ Such a contention would be completely foreign to a pilotage regulation context, because Congress is not competent to make pilotage regulations. Additionally, unlike pilotage laws, where Congress delegated the entire field to the states with the Lighthouse Act, the fuel content of ocean-going vessels is already regulated by the federal government in Annex VI of MARPOL.³¹⁰ These distinctions weaken California’s argument that the VFR are necessitated by factors that are unique to its locality, rather than that they address a problem that can be addressed nationally, particularly in light of their bearing upon international ship traffic in extraterritorial waters. In sum, although Los Angeles has been on the receiving end of a significant amount of air pollutants emitted by large vessels,³¹¹ California’s strong interest in pollution reductions is mitigated by the fact that it is not uniquely competent to make those regulations.

The state’s asserted interest in favor of regulating must be balanced with the federal interest in a uniform, national policy. Where the state’s

306. See *Cooley v. Bd. of Wardens*, 53 U.S. 299 (1852). A requirement for a federal standard for pilotage laws based on uniformity interests was not contemplated by the Framers of the Constitution, the *Cooley* Court reasoned, because of the obviousness of the local state interest in setting local pilotage rules that were based on the peculiarities of their ports:

Indeed the necessity of conforming regulations of pilotage to the local peculiarities of each port, and the consequent impossibility of having its charges uniform throughout the United States, would be sufficient of itself to prove that they could not have been intended to be embraced within this clause of the Constitution; for it cannot be supposed uniformity was required, when it must have been known to be impracticable.

Id. at 314.

307. See *id.*

308. See *supra* note 231 and accompanying text.

309. See *supra* notes 250–57 and accompanying text.

310. See *supra* notes 221–31 and accompanying text.

311. See Traci Watson, *Ship Pollution Clouds USA’s Skies*, USA TODAY (Aug. 30, 2004), http://www.usatoday.com/news/nation/2004-08-30-ship-pollution_x.htm (“[The Southern California] region includes the nation’s two busiest ports, Long Beach and Los Angeles. The vessels there produce more pollution than any other single source in the area. Their emissions help push smog and soot to unhealthy levels in the region.”).

regulation is of vessel “primary conduct,” it will present the most direct risk of preemption because of its likely interference with the federal uniformity interest.³¹² More specifically, the First Circuit in *Ballard* defined “primary conduct” as the “out-of-court behavior of ships.”³¹³ Here, the VFR directly regulate the type of fuel used by foreign- and national-flagged vessels engaged in international maritime commerce.³¹⁴ Unlike *Ballard*, which upheld a Rhode Island oil spill liability law because it merely tinkered with the scope of damages that could be recovered for conduct that was already illegal under federal law,³¹⁵ the California regulation actually creates new grounds for liability for conduct that is otherwise legal (the use of high-sulfur diesel oil). Additionally, in response to the VFR, vessels are actually changing course and avoiding federal shipping lanes because of the cost of compliance,³¹⁶ a tangible illustration of the state’s impact on the primary conduct of these vessels. Although the Ninth Circuit in *PMSA II* found that increased compliance costs were insubstantial,³¹⁷ it is unlikely that shippers would be going to such lengths to create avoidance routes if the cost of compliance was truly negligible. Therefore, as an initial matter, the VFR have resulted in substantial disruptions to shipping routes, a change in the fuel required once a vessel enters the RCW, and an increase in the cost of commerce with the United States through its California ports—all tangible illustrations of the VFR’s interference with the federal interest in the harmony and uniformity of the maritime law.³¹⁸

Moreover, congressional legislation or federal treaties, if not preemptive in and of themselves, may nonetheless function as expressions of a federal interest in the field and weigh as factors in this analysis.³¹⁹ As discussed above, the SLA setting state territorial boundaries at three miles from the baseline probably does not preempt all extraterritorial state legislation by itself,³²⁰ but the Supreme Court has used the territorial boundary that the SLA creates as a factor in applying the uniformity-balancing test. In *United States v. Locke*, the Court explained that it had upheld a tug escort regulation

312. See *supra* notes 100–12 and accompanying text.

313. See *supra* note 105 and accompanying text.

314. See *supra* notes 163–71, 201 and accompanying text; *infra* note 333 and accompanying text.

315. See *supra* note 107.

316. See *supra* notes 183–93 and accompanying text.

317. See *PMSA II*, 639 F.3d 1154, 1159 (9th Cir. 2011) (stating that “it does not appear that such compliance would be technically impossible or even especially challenging” in light of the district court’s findings that the increased cost of compliance is approximately \$6.00 per twenty-foot shipping container, or about 12.5 cents per plasma television).

318. See *supra* notes 183–93.

319. See generally *infra* notes 322–40.

320. See *supra* Part IV.C.

in *Ray v. Atlantic Richfield Co.*³²¹ because it did not “affect vessel operations outside the jurisdiction” or “modify its primary conduct” outside the state’s territorial waters.³²² The Ninth Circuit has made similar pronouncements about the importance of the distinction between territorial and non-territorial waters when it upheld state pollution regulations within state territory. In *Chevron U.S.A., Inc. v. Hammond*, the Ninth Circuit upheld the legality of an Alaskan regulation barring certain polluting activities of oil tankers within state territorial waters, but the court made a point of adding that the federal interest in uniform environmental regulations is “paramount” beyond the three-mile boundary and indicated that the outcome of the case may well have been different if the regulation had extended beyond the state’s territorial boundary.³²³ “Of course,” the court noted, “as to environmental regulation of deep ocean waters, the federal interest in uniformity is paramount. Such regulation in most cases needs to be exclusive because the only hope of achieving protection of the environment beyond our nation’s jurisdiction is through international cooperation.”³²⁴ The *Hammond* court is unclear if it is broadly referring to all waters beyond the three-mile boundary as “deep ocean waters,” which would state a per se rule that the federal interest is paramount beyond this boundary.³²⁵ It is nevertheless apparent

321. 435 U.S. 151 (1978).

322. *United States v. Locke*, 529 U.S. 89, 112–13 (2000). In fact, the Supreme Court explained that “limited extraterritorial effect” on a Washington tug escort requirement in its decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). There, the Court held that a Washington state regulation requiring tug escorts within state territorial waters in Puget Sound was not preempted by a federal interest in uniformity. *Id.* at 151–53. The *Locke* Court reasoned that the tug escort regulation, as well as pilotage laws generally, are not preempted because of their limited effect on the conduct of vessels beyond state territorial waters. *Locke*, 529 U.S. at 112 (“[L]imited extraterritorial effect, not requiring the [vessel] to modify its primary conduct outside the specific body of water purported to justify the local rule. . . . Limited extraterritorial effect explains why *Ray* upheld a state rule requiring a tug escort for certain vessels, and why state rules requiring a registered vessel (i.e., one involved in foreign trade) to take on a local pilot have historically been allowed.” (internal citations omitted)). The Court made a similar determination in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 339 (1973), and upheld Florida oil spill liability regulations, yet stated that even where the regulations fall within state boundaries, they still must be consistent with the principles espoused in *Jensen*:

[A] State, in the exercise of its police power, may establish rules applicable on land and water *within its limits*, even though these rules incidentally affect maritime affairs, provided that the state action does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations. It was decided that the state legislation encountered none of these objections.

Id. at 339 (emphasis added) (internal quotations omitted).

323. See *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 495 (9th Cir. 1984) (“[T]here is no need for strict uniformity in regulating pollutant discharges into the *territorial waters*. To the contrary, Congress has repeatedly recognized the need for collaborative federal/state regulation of the marine environment *within three miles of shore*.” (emphasis added)).

324. *Id.* at 492 n.12.

325. The federal government has claimed territorial jurisdiction over the first twelve miles beyond the baseline and granted the states a limited territorial jurisdiction over the first three of those twelve. See *supra* note 115. Therefore, if *Hammond* stands for the principle that the federal

that the *Hammond* court is reasoning that the federal uniformity interest becomes much weightier as the state's regulation extends beyond its three-mile boundary, to the point of becoming completely paramount.

Although there is some case precedent upholding a state's exercise of non-environmental state police powers beyond the three-mile territorial boundary, these cases are distinguishable. In *Pacific Merchant Shipping Ass'n v. Aubry*,³²⁶ the Ninth Circuit upheld California labor laws applied to vessels *not* engaged in interstate navigation, that spent 90% of their time moored in a California port, and that employed only California *residents*.³²⁷ The Supreme Court has upheld the criminal prosecution of a Florida citizen by the state of Florida for violating fishing regulations applied in waters beyond the state's territorial boundaries.³²⁸ State pilotage laws have been upheld beyond state boundaries.³²⁹ And the Supreme Court of Alaska upheld state crab fishing regulations that applied to waters beyond the state's territory, but narrowly construed the regulations so that they would not apply to foreign nationals.³³⁰ However, with the exception of the pilotage cases—in which pilotage laws were upheld in light of the uniquely heightened local interest and historical practice³³¹—federal courts have upheld the application

government has exclusive jurisdiction over all waters beyond the three-mile boundary because they are international waters, see *Hammond*, 726 F.2d at 492 n.12, then it is not based on an entirely accurate footing.

326. 918 F.2d 1409 (9th Cir. 1990).

327. *Id.* Balancing state and federal interests, the Court concluded that the narrow circumstances of the case—where the law would make little impact on interstate or international maritime commerce, but only affect California citizens—warranted upholding the regulation. *Id.* at 1424–25 (“We conclude that the balance tips in favor of California in this case. Under California law, the Labor Commission is charged with enforcing state wage provisions to ensure the health, safety, and welfare of resident employees. . . . [Here] the record indicates that the maritime employees involved in this case are California residents, were interviewed and hired in California, and pay California taxes. Their contacts with the state are quite close: the vessels involved in this case do not make coastwise, intercoastal, or foreign voyages; [the vessel] is moored in a California harbor 90 percent of the time and works exclusively on oil rigs off the California coast; and [the vessel] is stationed exclusively off the California coast and visits only California ports.”).

328. *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941) (“If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress.”). The Supreme Court of Florida came to a similar conclusion in a case involving the prosecution of an American citizen for burglary and assault on a cruise vessel that had departed and returned to a Florida port. See *State v. Stepansky*, 761 So. 2d 1027 (Fla. 2000) (upholding the prosecution of an American citizen for an assault and burglary committed on a cruise ship located one-hundred miles off of Florida's coast at the time of the crime and that had departed and returned to a Florida port).

329. See *supra* notes 258–68.

330. *State v. Bundrant*, 546 P.2d 530 (Alaska 1976), *appeal dismissed for lack of jurisdiction*, *Uri v. Alaska*, 429 U.S. 806 (1976).

331. See *supra* notes 258–68 and accompanying text.

of state regulations beyond a state's territorial boundary only where the regulation has applied to United States citizens or residents, or where the regulation applied within the territorial jurisdiction of the state.³³² Conversely, they have never done so where the regulation bearing upon maritime commerce was applied to noncitizens beyond the state's boundary. Here, CARB's VFR are applied to foreign-flagged vessels in extraterritorial waters.³³³ Therefore, the extraterritorial application of the VFR to all vessels is novel and could not be upheld under these case precedents.

In addition to the VFR's weakness on these extraterritoriality grounds, the United States has already set its own fuel standards under MARPOL Annex VI, which are notably much laxer.³³⁴ Even if the standards promulgated under Annex VI are not themselves intended to preempt state regulations—an arguable point³³⁵—they are nonetheless an expression of federal policy considerations in the field of vessel fuel content. Moreover, Congress and the EPA have thus far made a decision to enforce the Annex VI rules against U.S.-flagged vessels only, in large part because the EPA has questioned its authority to enforce fuel content regulations against foreign vessels.³³⁶ California has thus asserted a power to regulate the conduct of foreign-flagged vessels where the EPA has been reluctant, which may further undermine the United States' international position and interfere with its interest in a uniform application of maritime law.

The Ninth Circuit in *PMSA II*, while recognizing that California's regulatory scheme "pushes a state's legal authority to its very limits," took a different approach to these cases,³³⁷ holding that CARB's VFR are not preempted under general principles of maritime law.³³⁸ It did so by applying cases upholding state environmental regulations that applied to foreign-flagged vessels,³³⁹ and cases upholding environmental regulations applied to

332. See *infra* notes 339–43.

333. See *supra* notes 161–71 and accompanying text.

334. See *supra* note 223.

335. See discussion *supra* Part IV.B.

336. See *supra* note 228.

337. *PMSA II*, 639 F.3d 1154, 1162 (9th Cir. 2011).

338. *Id.* at 1181–82.

339. See, e.g., *PMSA II*, 639 F.3d at 1170–71 (citing *Skiriotes v. Florida*, 313 U.S. 69 (1941)). There, the court cited *Skiriotes*, which upheld Florida's sponge fishing regulation applied to possible extraterritorial conduct, for the principle that state regulations may reach beyond their territorial boundary. *Id.* The *Skiriotes* decision, however, expressly stated that it was contemplating the permissibility of the regulation in the context of its application to Florida citizens. See *Skiriotes*, 313 U.S. at 76 ("[I]t would not follow that the State could not prohibit its own citizens from the use of the described divers' equipment at that place. No question as to the authority of the United States over these waters, or over the sponge fishery, is here involved. No right of a citizen of any other State is here asserted. The question is solely between appellant and his own State."). The Court's reliance on *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409 (9th Cir. 1990), is similarly problematic because *Aubry* contemplated the permissibility of the state overtime pay laws in terms of its application to California residents only. See *id.* at 1414 ("[A]ll . . . employees [affected by the California regulation] . . . are California residents who live in California when not on board ship.

conduct outside the state's territorial jurisdiction.³⁴⁰ But there appears to be no precedent, with the exception of pilotage laws,³⁴¹ where state regulations were upheld when they were applied to foreign-nationals or vessels in extraterritorial waters. Indeed, that is the unprecedented nature of this case. The *PMSA II* court "acknowledge[d] that these various decisions [to which it cited] may be distinguishable on a variety of grounds," but nonetheless concluded that their general thrust pointed to a holding in favor of California, especially in light of the "effects" of vessel pollution in California.³⁴² In doing so, the court set new precedent, but may have

The workers are hired in California, receive paychecks at California addresses, and pay California taxes."). This factor is critical, as *Fuller v. Golden Age Fisheries*, 14 F.3d 1405 (9th Cir. 1994), considered a similar overtime pay law enacted by the state of Alaska, but distinguished *Aubry* on the ground that the regulation applied to non-Alaska residents. See *id.* at 1409 (holding that the Alaska overtime pay law was preempted). Moreover, *State v. Stepansky*, 761 So. 2d 1027 (Fla. 2000), which upheld the criminal prosecution of a U.S. citizen for extraterritorial conduct occurring aboard a cruise ship that had departed from Florida, was not confronted with the applicability of Florida's criminal laws to foreigners on the high seas. See *PMSA II*, 639 F.3d at 1172 (citing *Stepansky*, 761 So. 2d at 1029–37).

340. The *PMSA II* panel cites the Supreme Court's *Huron* decision for the principle that a state may regulate air pollution caused by foreign-flagged vessels. See *PMSA II*, 639 F.3d at 1171 (citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 441 (1960) (upholding a smoke abatement law applied to ships docked within the city's port)). However, this regulation was not applied to vessels outside the state's territorial limits, but only to vessels docked *inside* the city of Detroit. *Huron*, 362 U.S. at 441. Similarly, the panel cites to *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984), for the same principle, although this case addressed only the applicability of the state's regulation of ballast discharge from oil tanks *within the territorial waters* of the state. See *PMSA II*, 639 F.3d at 1180 (citing *Hammond*, 726 F.2d at 484–501).

341. As discussed *supra* notes 305–18 and accompanying text, the paramount local interest involved in pilotage regulation makes these laws distinguishable from other regulations where Congress is competent to act and has acted, as with vessel fuel content regulations.

342. *PMSA II*, 639 F.3d at 1181. In upholding the VFR, the *PMSA II* court heavily relied on the applicability of the "effects" test commonly used with regard to regulations by one state affecting another state. See *id.* at 1167 ("Applying this effects test to the Vessel Fuel Rules, we conclude that there are genuine issues of material fact with respect to both the effects of the fuel use governed by California's regulations on the health and well-being of the state's residents as well as the actual impact of these regulations on maritime and foreign commerce."). In support of its application of this test, the court cited *Strassheim v. Daily*, 221 U.S. 280 (1911). *PMSA II*, 639 F.3d at 1170 (stating that "Justice Holmes observed that '[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power'" (citing *Strassheim*, 221 U.S. at 285)). However, *Strassheim* was a case addressing a state criminal law's applicability to conduct occurring in another state, and was not decided in a maritime context. See *Strassheim*, 221 U.S. at 284–85. Indeed, the applicability of the "effects test" is uncommon in a maritime preemption context, if it is applicable at all. This author found no prior federal circuit court decision that held that the test should be applied in a maritime context. However, there are some examples of its application in state court. See, e.g., *State v. Bundrant*, 546 P.2d 530, 555 (Alaska 1976) (applying an effects test to determine whether Alaska's extraterritorial crab fishing regulations were preempted where they applied to U.S. citizens). The panel ultimately applied the following test: "[A] state may regulate conduct occurring outside of its territorial boundaries if the

overlooked some critical distinctions in the case law that would have required a different outcome.³⁴³

If *PMSA II* is upheld, it will strongly tilt the scales in favor of state regulatory powers in matters bearing upon maritime commerce.³⁴⁴ A broad reading of *PMSA II* could authorize a number of new state regulatory schemes as long as the state is able to frame the purpose of the regulation in terms of traditional state police powers (health and safety laws).³⁴⁵ The thrust of the *Jensen* line of cases could therefore be transformed, leading to an explosion of state maritime regulation by affording states a strong presumption against preemption when states are able to frame their regulations in these terms. Such an outcome would have far-reaching consequences, and would likely result in the development of the very patchwork of state maritime regulations that was once thought preempted by general principles of maritime law.³⁴⁶

conduct has (or is intended to have) a substantial effect within the territory and the regulation itself is otherwise reasonable.” *PMSA II*, 639 F.3d at 1171 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402(1)(c), 403 (1987)). The panel concluded the regulation would not be preempted under this approach. *Id.* A strong argument can be made in California’s favor under the “effects test” approach, as fuel emissions occurring outside its boundaries substantially affect the state as the polluted air drifts onto its shores. However, the application of this test in a maritime preemption context (rather than an interstate context) is probably uncommon for a reason: its principles could be used to justify virtually limitless state regulation. How far out to sea might California plausibly claim to have the power to regulate under this approach? The air that comes to California’s shores certainly does not originate twenty-four miles from the baseline. Could California regulate the fuel used by vessels across the Pacific Ocean? Today, California is currently considering the extension of the regulated waters to forty-eight miles from its baseline, a logical extension under the “effects test” approach because conduct occurring between twenty-four and forty-eight miles is substantially affecting California. *See supra* note 192 and accompanying text. Nevertheless, to the extent that the effects test is applicable, it is applicable only as an additional hurdle to California’s regulatory authority, not in place of all other hurdles. The panel in *PMSA II* recognized this and applied the *Jensen* test. *See PMSA II*, 639 F.3d at 1178–81.

343. *See supra* notes 321–42; *see also PMSA II*, 639 F.3d at 1172–73 (citing *State v. Bundrant*, 546 P.2d 530, as persuasive authority in support of the principle that a state environmental regulation may sometimes reach beyond the SLA’s territorial boundary). The *PMSA II* panel did not address the *Bundrant* court’s narrow construction of the regulation, where it prevented its application to foreign nationals. *Id.* at 1154. Rather than upholding a broad application of the state’s regulations, the *Bundrant* court narrowly construed the state’s crab fishing rules as applicable to U.S. citizens only, reasoning that a broader construction of the regulation would have been preempted by federal interests in uniformity. *See supra* notes 240–44 and accompanying text.

344. The *PMSA II* court appears to acknowledge the unprecedented reach of California’s regulations, and thus the impact of its decision here. *See PMSA II*, 639 F.3d at 1181 (“We are clearly dealing with an expansive and even possibly unprecedented state regulatory scheme.”).

345. The *Jensen* Court overturned New York’s worker’s compensation regime as it applied to ships calling on the state’s ports. *See supra* notes 74–84 and accompanying text. As here, the state regulation addressed in *Jensen* involved a field where the state could claim a historic presence and a weighty interest in acting. *S. Pac. Co. v. Jensen*, 244 U.S. 205 (1917), *superseded by statute*, Longshoremen’s & Harbor Worker’s Compensation Act, Pub. L. 98-426, 44 Stat. 1424 (1984) (codified as amended at 33 U.S.C. §§ 901–950 (2006)).

346. The *PMSA II* panel appears to reject the contention that the mere potential for a patchwork of state regulations may itself require preemption. *See PMSA II*, 639 F.3d at 1181 (“[I]t appears that no other state in the Union has adopted, or is likely to adopt before the full implementation of the

V. CONCLUSION

California's VFR are a bold claim of state power to regulate in maritime, even when the affected conduct occurs outside its territory.³⁴⁷ Although an argument can be made that the VFR are a necessary response to California's unique air pollution problems,³⁴⁸ they may nonetheless conflict with congressional legislation, international frameworks, and general principles of maritime law.³⁴⁹ This Comment does not take a position on the wisdom of California's policy determinations, and it is conceivable that the VFR represent a needed change in the nation's pollution control laws in light of the concerns raised by CARB.³⁵⁰ If so, and if the VFR are indeed preempted, the impetus will fall to federal and state policymakers to address the consequences. California could pass a new version of the VFR that better conforms to federal interests in uniformity, or the United States could further bolster its regulations under MARPOL. The resolution of this issue will be far-reaching, as it will set precedent regarding the limits of an individual state's regulatory powers in this field. As California goes, so will the nation.

Bradley D. Easterbrooks*

ECA, any 'competing or conflicting' fuel use requirements."). However, it was not the materialization, but the simple possibility that other states might develop a patchwork of worker's compensation schemes that was referenced by *Jensen* in overturning New York's worker's compensation regime as it was applied to ocean-going vessels. *See Jensen*, 244 U.S. at 217 ("If New York can subject foreign ships coming into her ports to such obligations . . . other States may do likewise.").

347. *See supra* notes 161–71 and accompanying text.

348. *See supra* notes 298–304 and accompanying text.

349. *See supra* notes 199–346 and accompanying text.

350. *See supra* note 300 and accompanying text.

* J.D. Candidate, 2012, Pepperdine University School of Law; B.A. in Political Science and History, 2007, Boston College. I would like to thank Professor Robert Anderson IV for introducing me to this topic and for his encouragement. The purpose of this Comment is to raise and analyze the complicated legal questions arising from California's novel regulatory scheme, not to assess whether California's approach is prudent. The author, a Southern California resident, can personally attest to the need to confront air pollution in the region and hopes that the legal tensions discussed in this Comment will be resolved in a way that satisfies both state and federal interests.