RAY V. ATLANTIC RICHFIELD: A CASE FOR PREEMPTION

*By Patricia J. Neel**

> In the storm-tossed waters off Massachusetts last week, 7.6 million gal. of oil slid seaward. In the Delaware River, southwest of Philadelphia, 134,000 more gal. of deadly goo spread toward rich tidal marshes. In Los Angeles, the wreck of a blast-shattered tanker still lay smoldering at its berth. Suddenly, on East Coast and West, the U.S. was undergoing an ordeal by oil.[1]

Introduction

Transportation of oil by sea has increased enormously in the last decade,[2] causing catastrophic and widespread problems such as the tanker accidents described above. These problems may escalate in the future. In order to supply its ever-growing demand for oil products, the United States has turned increasingly to imports.[3] Since 1966, United States imports of oil and petroleum products have nearly tripled;[4] today approximately 300 million gallons a day arrive in United States ports.[5] To move this vast amount of oil economically, many large tankers have been constructed. From 1966 to 1970 the world fleet of supertankers increased from less than 2 million deadweight tons (DWT) to over 50 million DWT.[6] This dramatic rise in the number of tankers transporting oil has resulted in expanded problems of oil pollution, with consequent damage to the marine environment.[7] During the month of December,1976 alone, there were at least four serious accidents causing extensive damage in United States waters.[8] The

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* Member, second-year class.

1. *Oil is Pouring on Troubled Waters*, TIME, Jan. 10, 1977, at 45 [hereinafter cited as TIME]. This problem has received wide media attention in recent times. *See, e.g.*, *Blaze of Anger Over Oil Spills*, U.S. NEWS, Jan. 10, 1977, at 52; *Worst Oil Spill? Tanker Argo Merchant*, NEWSWEEK, Jan. 10, 1977, at 74; *Argo's Legacy*, SCIENCE NEWS, Apr. 9, 1977, at 230; *Oil In The Ocean*, SCIENCE, Dec. 16, 1977, at 1134.

2. S. REP. NO. 95-176, 95th Cong., 1st Sess. 2 (1977) [hereinafter cited as 1977 SENATE REPORT].

3. TIME, *supra* note 1, at 45.

4. *Id.*

5. *Id.*

6. 1977 SENATE REPORT, *supra* note 2, at 3.

7. *Id.*

8. *Id.* at 5-7.

SS Argo Merchant ran aground near Nantucket Island, dumping approximately 7 million gallons of oil into the ocean, the *SS Sansinena* exploded while moored in Los Angeles Harbor, killing eight persons and spilling approximately 20,000 gallons of oil into the harbor, the *SS Olympic Games* ran aground, spreading 133,000 gallons of crude oil over a twenty-two mile area of the Delaware River and the *SS Oswega Peace* struck a submerged object, causing a fracture in the hull that leaked 5,000 gallons of fuel into the Thames River at New London, Connecticut.[9] With the increasing use of oil tankers and the concomitant likelihood of tanker mishaps, both the federal government and the State of Washington have enacted legislation regulating the operation and design of tankers. The extent to which these two laws can coexist is the subject of this note.[10]

In 1972, Congress enacted the Ports and Waterways Safety Act (PWSA)[11] to promote safety and to protect the marine environment. Title I[12] gave the United States Coast Guard power to establish and operate vessel traffic control systems and to prescribe safety equipment and procedures. Title II[13] authorized the Coast Guard to establish federal regulations for the design, construction, maintenance and operation of tankers carrying oil or other hazardous pollutants in bulk. Early in 1977, President Carter announced his intention to institute new regulatory measures for the purpose of combating pollution from oil tankers.[14] The proposed amendments to the PWSA[15] establish a comprehensive program for the regulation of tanker design and operation, promote continued efforts to establish international standards for tanker regulations,[16] and set specific standards for tankers over 20,000 DWT in addition to those prescribed by the Coast Guard.[17] In 1975,

9. *Id.*

10. *See generally* Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019 (1977); Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977).

11. Ports and Waterways Safety Act of 1972, tit. I, §§ 101-107, 33 U.S.C. §§ 1221-1227 (Supp. V 1975) and tit. II, § 201, 46 U.S.C. § 391a (Supp. V 1975).

12. Tit. I, § 101, 33 U.S.C. § 1221 (Supp. V 1975). The Act actually provides that "the Secretary of the department in which the Coast Guard is operating" will have these powers. *Id.* This, in effect, has given the Coast Guard the powers enumerated in titles I and II of the Act.

13. Tit. II, § 201, 46 U.S.C. § 391a (Supp. V 1975).

14. 1977 SENATE REPORT, *supra* note 2, at 10.

15. *Proposed Amendments to the Port and Waterways Safety Act*, S. 682, 95th Cong., 1st Sess., 123 CONG. REC. S8748 (daily ed. May 26, 1977) [hereinafter cited as *Proposed Amendments*].

16. *Id.* § 303(a), at S8752. Section 303(a) of the *Proposed Amendments* provides that "[t]he Secretary [of the department in which the Coast Guard operates] and the Secretary of State shall undertake international negotiations, utilizing the appropriate international bodies or forums, to achieve acceptance of regulations promulgated or required under this Act as international standards." *Id.*

17. *Proposed Amendments* § 104(5), *supra* note 15, at S8751. Section 104(5) of the *Proposed Amendments* is as follows:

the State of Washington enacted its Tanker Law[18] for the purpose of decreasing the likelihood of oil spills on Puget Sound and its shorelines.[19] The state statute prohibits all tankers larger than 125,000 DWT from entering Puget Sound.[20] In addition, all oil tankers over 50,000 DWT are required to take on pilots licensed by the State of Washington[21] and, if such tankers lack the required safety and maneuvering capability, to employ a tug escort while navigating Puget Sound and adjacent waters.[22] This note analyzes the constitutional validity of the Washington Tanker Law. It begins with an examination of the district court opinion in *Ray v. Atlantic Richfield Co.*[23] The note then considers the effect of the Washington statute on the free flow of interstate commerce in the context of a commerce clause challenge. A detailed discussion then follows of the major issue of the case, whether the federal PWSA preempts the Washington Tanker Law. The preemption question is analyzed first by a review of the federal and state legislation and the scope of the preemption doctrine in general. The section concludes with an application of this doctrine to the facts of the *Ray* case. In ascertaining whether the PWSA has preempted the Tanker Law, the note

(5) Minimum Standards.—In addition to any standards prescribed by the Secretary pursuant to subsection (4) [of this section], or pursuant to any other law, any self-propelled vessel in excess of 20,000 deadweight tons which carries, or is designed to carry, oil in bulk, as cargo shall—

(A) not later than June 30, 1979, be equipped with—

(i) a dual radar system, one with short-range and one with long-range capabilities and each with true-north features;

(ii) a collision avoidance system;

(iii) a long-range navigation aid;

(iv) adequate communications equipment;

(v) a fathometer;

(vi) a gyrocompass;

(vii) up-to-date charts; and

(B) not later than June 30, 1983, be equipped with—

(i) a segregated ballast system;

(ii) a transponder, or such other appropriate position-finding equipment as the Secretary determines to be appropriate;

(iii) a gas inerting system; and

(iv) for any vessel the construction of which is contracted for, or actually commenced, after January 1, 1980, a double bottom (fitted throughout the cargo length of such vessel).

Id.

18. WASH. REV. CODE ANN. §§ 88.16.170-88.16-190 (Supp. 1976). For purposes of convenience, these sections of the Washington Revised Code Annotated are referred to as the Washington Tanker Law.

19. *Id.* § 88.16.170.

20. *Id.* § 88.16.190(1).

21. *Id.* § 88.16.180.

22. *Id.* § 88.16.190(2).

23. Atlantic Richfield Co. v. Evans, No. C 75-648 M (W.D. Wash., Sept. 24, 1976), *prob. juris. noted sub nom.* Ray v. Atlantic Richfield Co., 430 U.S. 905 (1977) (No. 76-930, 1977 Term).

examines six major factors: the interest of the State of Washington in protecting its natural resources, the pervasiveness of the federal scheme and the presence of a dominant federal interest, the discretionary authority of the federal regulatory agency, the Coast Guard, and finally, the possible effects of inconsistent state regulations and the current need for national uniformity in tanker regulation.

I. The District Court Opinion

On the day the Washington Tanker Law went into effect, Atlantic Richfield Company filed suit to enjoin enforcement of the state statute. Atlantic Richfield alleged that the Tanker Law was preempted by the PWSA, placed an undue burden on interstate commerce and interfered with the federal government in its conduct of foreign affairs.[24] Because of the substantial constitutional issues involved, a three-judge federal district court was convened in the Western District of Washington.[25] In a terse and perfunctory opinion, the district court held the Tanker Law null and void.[26]

The three-judge federal district court found that the Tanker Law was preempted by the PWSA, which established a "comprehensive federal scheme for regulating the operations, traffic routes, pilotage, and safety design specifications of tankers."[27] The court upheld Atlantic Richfield's contention that the provision of the Tanker Law requiring a local pilot on all tankers larger than 50,000 DWT had been preempted.[28] Because the Tanker Law prohibited a tanker enrolled in the coastwide trade from navigating Puget Sound without a local pilot, the court held that the statute was void due to a conflict with clear federal law on the subject.[29] The Tanker Law provision prohibiting all vessels over 125,000 DWT from entering Puget Sound was also found to have been preempted. The district court held that the PWSA gives the Coast Guard the authority to create traffic control systems for Puget Sound and that the Coast Guard had exercised that authority.[30] In addition, under the PWSA the Coast Guard may restrict or

24. Brief for Appellees at 10-12, Ray v. Atlantic Richfield Co., 430 U.S. 905 (1977) (No. 76-930, 1977 Term).

25. This three-judge federal district court was one of the last convened under the old rules. 28 U.S.C. §§ 2281-84 (1970). On August 12, 1976, Congress enacted a law abolishing three-judge district courts in most situations where the constitutionality of a state statute is challenged, except for reapportionment and certain other types of cases. *See* Pub. L. No. 94-381, §§ 1-3, 90 Stat. 1119.

26. Atlantic Richfield Co. v. Evans, No. C 75-648 M, slip op. at 6 (W.D. Wash., Sept. 24, 1976) *prob. juris. noted sub nom.* Ray v. Atlantic Richfield Co., 430 U.S. 905 (1977) (No. 76-930, 1977 Term).

27. *Id.*, slip op. at 3.

28. *Id.*, slip op. at 4.

29. *Id.* (citing 46 U.S.C. §§ 215, 364 (1970), which provides that vessels enrolled in the coastwise trade, not sailing under register as a foreign vessel, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the Coast Guard).

30. *Id.*

exclude tankers from Puget Sound under hazardous conditions.[31] Finally, in finding preemption of the safety design specifications of the Tanker Law for vessels of 40,000 to 125,000 DWT, the court noted that the purpose of the PWSA is "to establish a uniform set of regulations governing the types of ships permitted within the coastal waters of the United States and the conditions under which they would be permitted to operate."[32] The court also pointed out that Title II of the PWSA empowers the Coast Guard to regulate design, construction and maintenance of tankers operating in United States waters.[33] Washington's argument that the design specifications were not preempted because they could be avoided if the tanker had a tug escort was rejected by the court.[34] The opinion stated that Congress gave the Coast Guard the authority to require or not to require tug escorts in Puget Sound,[35] and the tug escort proviso of the Tanker Law was therefore also found to be preempted by the PWSA.[36]

The district court denied the motion by Washington state officials to dismiss the complaint on the grounds of sovereign immunity under the Eleventh Amendment.[37] The United States Supreme Court noted probable jurisdiction[38] and the case was heard before the highest court on October 31, 1977.

II. The Commerce Clause Issue

In the *Ray* case, Atlantic Richfield initially contended that the Washington Tanker Law violated the commerce clause of the United States Constitution.[39] Although the district court based its decision on preemption grounds, it is worthwhile to explore the commerce clause challenge.

31. *Id.* (citing 33 U.S.C. § 1221(3)(iv) (Supp. V 1975)).

32. *Id.*, slip op. at 3.

33. *Id.* (citing 46 U.S.C. § 391a (Supp. V 1975)).

34. *Id.*, slip op. at 3-4.

35. *Id.* (citing 33 U.S.C. § 1221(3)(iv) (Supp. V 1975)).

36. *Id.*, slip op. at 4.

37. The State of Washington challenged the jurisdiction of the federal courts, asserting sovereign immunity based on the Eleventh Amendment. *Id.*, slip op. at 2. Under the Eleventh Amendment and general policy surrounding it, a private person may not sue a state in a federal court without the state's consent. This immunity, however, does not preclude a federal court from taking jurisdiction of an action against a state officer to enjoin the enforcement of an unconstitutional state statute. In such a situation, the state official is seen as acting without lawful state authority since the state may not authorize violation of the United States Constitution and the action therefore is against the individual in a personal capacity. *Ex Parte* Young, 209 U.S. 123 (1908). In the present case, suit was brought against Evans, and then against Dixie Lee Ray in their official capacity as governors of the State of Washington to enjoin enforcement of a state statute that Atlantic Richfield contended was unconstitutional, thus placing the case within the *Young* holding. *Young* has never been overruled and a discussion as to whether the time is ripe for such overruling is beyond the scope of this note.

38. 430 U.S. 905 (1977).

39. Brief for Appellees at 57.

A. Commerce Clause Law

"The poor condition of American commerce and the proliferating trade rivalries between the states were the immediate provocations for the calling of the Constitutional Convention."[40] In response to the concerns of the framers of the Constitution, Congress was granted the power "[t]o regulate Commerce with foreign Nations, and among the several states . . . ."[41] This grant of national authority to Congress, which was designed to prevent Balkanization of the economy, has been the subject of extensive consideration by the courts.[42] Justice John Marshall's landmark opinion in *Gibbons v. Ogden*[43] defined commerce as "the power to regulate; that is, to prescribe the rule by which commerce is to be governed."[44] The Court also recognized the scope of congressional power: "If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government . . . ."[45] In *Gibbons*, Chief Justice Marshall established a very broad definition of commerce, one that encompassed "every species of commercial intercourse,"[46] and held that Congress' power was not limited to the interchange of goods across state lines but included navigation of waterways as well.[47] Although Chief Justice Marshall recognized that the states have some concurrent powers with the federal government in the area of commerce,[48] the state steamboat monopoly statute challenged in *Gibbons* was held unconstitutional under the supremacy clause.[49] The state law was held to conflict with a coastal trading license held by Gibbons under a valid federal statute.[50]

The issue of whether the commerce power was vested exclusively in Congress was not resolved until 1851 in the case of *Cooley v. Board of Wardens.*[51] The issue facing the *Cooley* Court was whether a state had the power to regulate the use of habor pilots by requiring arriving and departing ships to accept local pilots while in harbor waters.[52] The state statute was clearly a regulation of commerce. In upholding the law, the Court found that congressional power to regulate commerce was not exclusive in

40. G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 127 (9th ed. 1975).
41. U.S. CONST. art. 1, § 8, cl. 3.
42. G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 127 (9th ed. 1975).
43. 22 U.S. (9 Wheat.) 1 (1824).
44. *Id.* at 196.
45. *Id.* at 197.
46. *Id.* at 193.
47. *Id.* at 190.
48. *Id.* at 210.
49. *Id.* at 240.
50. *Id.* at 239-40.
51. 53 U.S. (12 How.) 299 (1851).
52. *Id.* at 320.

all cases.[53] The question as to whether the commerce clause required exclusive federal regulation depended upon the nature of the activity being regulated. If the activity required uniform national regulation, the power was vested exclusively in Congress. If diverse local circumstances demanded differing local regulations, the commerce power was shared concurrently with the states.[54]

The twentieth century has witnessed a great expansion in the scope of authority derived from the commerce clause.[55] The Supreme Court has held that the power of Congress to regulate commerce includes the power to regulate such local activities as agriculture, manufacturing, and mining.[56] The commerce clause has also been found to be a sufficient basis for upholding the Civil Rights Act of 1964.[57] While the Supreme Court has recognized that both the federal and state governments have legitimate concerns in the regulation of commerce, the precise parameters of their roles have not been defined. State power is limited, at least by implication, by the fact that the Constitution vests the power to regulate commerce in Congress so as to promote national uniformity. In assessing the state's role in the regulation of commerce, therefore, the courts have distinguished between the legitimate exercise of the state's police power to protect the health, safety, and welfare of its citizens, and an exercise of state power that would restrict or burden the flow of interstate commerce, often for local economic advantage. The Court has recognized that such a judicial inquiry may amount to a balancing of policy considerations. In *California v. Zook*,[58] for example, the Court stated that "the question is whether the state interest is outweighed by a national interest in the unhampered operation of interstate commerce."[59] Chief Justice Stone in *Southern Pacific v. Arizona*[60] also

53. *Id.* at 318-19.

54. *Id.* at 319.

55. *See generally* Campbell, *Chancellor Kent, Chief Justice Marshall and the Steamboat Cases*, 25 SYRACUSE L. REV. 497 (1974); Tarlock, *Oil Pollution on Lake Superior: The Uses of State Regulation*, 61 MINN. L. REV. 63 (1976); Note, *Environmental Law—Commerce Clause: Congress May Prohibit the Discharge of Oil Into Nonnavigable Tributary of Navigable Water Absent Showing That Oil Reached and Polluted Navigable Water*, 27 ALA. L. REV. 227 (1975); Note, *State Environmental Protection Legislation and The Commerce Clause*, 87 HARV. L. REV. 1762 (1974); Note, *Constitutional Law—Commerce Clause: Local Discrimination in Environmental Protection Regulation*, 55 N.C. L. REV. 461 (1977); Note, *Alaska's Regulation of King Crab on the Outer Continental Shelf*, 6 U.C.L.A. L. REV. 357 (1977); Note, *Waters of the United States: Does Federal Control Inundate the Wetland?*, 26 U. FLA. L. REV. 893 (1974).

56. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

57. Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

58. 336 U.S. 725 (1949).

59. *Id.* at 728.

60. 325 U.S. 761 (1945).

concluded that there must be "appraisal and accommodation of the competing demands of the state and national interests involved."[61]

In *Ray v. Atlantic Richfield Co.*,[62] a major oil company contended that the Washington Tanker Law violated the commerce clause because it would substantially impede the efficient flow of commerce in an area demanding uniform regulation.[63] Since the time of *Cooley*, the Court has recognized that the states have a concurrent, but limited, power to regulate commerce. In an attempt to balance the national interest in the freedom of interstate commerce with the state interest in matters of local concern, the Court has considered whether the state regulations discriminate against interstate commerce,[64] whether the state regulation places an unreasonable burden on interstate commerce,[65] and a closely related issue, whether the area of commerce being regulated demands national uniformity.[66]

The concepts of national uniformity and unreasonable burdens on interstate commerce were first recognized by the Supreme Court in *Southern Pacific Co. v. Arizona*.[67] Southern Pacific challenged the Arizona Train Limit Law, which prohibited the operation within the state of railroad trains having more than fourteen passenger or seventy freight cars.[68] The Court found that enforcement of the state law in Arizona, while train lengths were unregulated or regulated by varying standards in other states, would result in impairment of uniform and efficient operation of the railroads and would substantially increase operating costs.[69] The law was therefore held invalid as contravening the commerce clause. The Court recognized that, while states were allowed a great deal of latitude in the regulation of local matters that may in some way affect commerce, they could not materially restrict the free flow of commerce and thereby interfere with matters demanding national uniformity.[70] The decisive question for the Court was whether the total effect of the state safety regulation in reducing accidents was so slight as not to outweigh the national interest in keeping interstate commerce unimpeded and under uniform national regulation.[71] The Court concluded that examina-

61. *Id.* at 769.

62. 430 U.S. 905 (1977) (No. 76-930, 1977 Term), *noting prob. juris.*, Atantic Richfield Co. v. Evans, No. C 75-648 M (W.D. Wash., Sept. 25, 1976).

63. Brief for Appellees at 57.

64. *See, e.g.*, Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Minnesota v. Barber, 136 U.S. 313 (1890).

65. *See, e.g.*, Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); H. P. Hood & Sons v. DuMond, 336 U.S. 525 (1949); Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511 (1935).

66. Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).

67. *Id.*

68. *Id.* at 763.

69. *Id.* at 773.

70. *Id.* at 770. *See generally* Note, *Federal Regulation Under Federal Aviation Act and Noise Control Act Preempts the Field of Airport and Aircraft Noise Control Rendering Local Airport Curfews Invalid*, 22 U. KAN. L. REV. 319 (1974) [hereinafter cited as *Federal Aviation Noise Control*].

71. 325 U.S. at 775-76.

tion of the facts revealed slight, if any, safety advantages in regulated as opposed to unregulated train lengths.[72] The state interest was therefore outweighed by a national interest in a railway system regulated by one body with nationwide authority.[73]

In *Bibb v. Navajo Freight Lines, Inc.*,[74] the Court again considered the effect of a state regulation on the flow of interstate commerce. The issue in *Bibb* was whether the commerce clause was violated by a state statute requiring the use of curved rear fender mudguards on trucks operating on Illinois highways. Unlike Illinois, forty-five other states permitted the use of straight mudguards. The Court balanced the state and federal interests involved and held that, although the states have great latitude in the promulgation of safety regulations, the unreasonable burden that the state placed on interstate commerce exceeded the permissible limits.[75] The Illinois statute significantly burdened interstate truck transportation and there was insufficient evidence as to health or safety advantages in the state regulation.[76]

More recently the Court in *Pike v. Bruce Church, Inc.*,[77] struck down an Arizona regulation barring the shipment of local cantaloupes out of state unless the cantaloupes were crated in Arizona so as to reflect their initial origin.[78] The Court held this regulation was an undue burden on commerce since it would require a grower with adequate packing facilities in California to invest $200,000 for an unneeded Arizona packing shed to pack his annual $700,000 Arizona crop.[79] In the majority opinion, Justice Stewart stated that the extent of the burden that will be tolerated depends on the local interest involved and whether it can be achieved as well with a lesser impact on interstate activities.[80] The Court in *Great Atlantic & Pacific Tea Co. v. Cottrell*[81] upheld the balancing standard set out in *Pike* as proper and unanimously invalidated a Mississippi statute which provided that milk from another state could be sold in Mississippi only if the other state accepted

72. *Id.* at 779.
73. *Id.* at 781-82.
74. 359 U.S. 520 (1959).
75. *Id.* at 530.
76. *Id.* at 524. In an earlier case involving state regulation of the size and weight of trucks using the state highways, the Court in South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938), reached a contrary result, upholding the state regulation as a valid safety measure. The state statute limited the use of South Carolina highways to vehicles less than 90 inches wide and having a gross loaded weight of less than 20,000 pounds. While the facts in *Barnwell* showed that the regulation in effect excluded 85-90% of the trucks engaged in interstate commerce from using the South Carolina highways, the Court in considering the special conditions involved found the weight and width regulations were justified. *Id.* at 195-96.
77. 397 U.S. 137 (1970).
78. *Id.* at 146.
79. *Id.* at 145.
80. *Id.* at 142.
81. 424 U.S. 366 (1976).

Mississippi milk on a reciprocal basis.[82] In reversing the lower court, Justice Brennan stated: "The fallacy in the District Court's reasoning is that it attached insufficient significance to the interference . . . upon the national interest in freedom for the national commerce, and attached too great significance to the state interests purported to be served . . . ."[83]

While the Court has continued to invalidate state laws that burden interstate commerce, it also has upheld state regulations that are legitimate matters of local concern and that do not substantially impede free economic competition across state lines.[84] The Court is, in effect, weighing the national interest in uniformity of interstate commerce regulation against the state interest in protecting the health and safety of its citizens.

B. The Commerce Clause Issue in *Ray*

In the *Ray* case, the State of Washington's declared interest in the protection of local natural resources must be balanced against the federal interest in the uniform regulation of the free flow of commerce. The federal government has a very real concern in maintaining open and unimpeded channels for the flow of oil to and among United States ports. The American economy is dependent on adequate oil supplies to meet increasing fuel manufacturing and energy needs.[85] Forcing oil tankers to cope with different size prohibitions and design requirements in each port or harbor would substantially impair the efficient movement of commerce. The state, on the other hand, may argue that the regulation of tanker traffic does not require national uniformity, that tug escort and access limits are the types of limitations that must be tailored to diverse local conditions. However, as in *Southern Pacific* and *Bibb*, the State of Washington did not convince the district court that its design and navigation requirements are superior to those of the PWSA in preventing accidents or in protecting the marine and natural environment. Further, the danger inherent in ships over 125,000 DWT, the Washington size limitation, has not been proven to be demonstrably greater than that found in the increased number of smaller vessels that would be required to carry the same amount of oil. Since it has not been shown that enforcement of the Tanker Law, in addition to the PWSA, would serve an important health or safety function for the State of Washington, the national interest in the free and efficient flow of interstate commerce should require that the burdensome effects of enforcement of the Washington statute be prohibited.

With receipt of foreign and Alaskan oil steadily increasing in response to increased energy needs, the efficient movement of oil tankers becomes

82. *Id.* at 375-76.

83. *Id.* at 375.

84. *See, e.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

85. 1977 SENATE REPORT, *supra* note 2, at 9.

more important. Thus, the case for uniform federal regulations to avoid inconsistent state laws becomes more compelling. Should it decide to base its decision in *Ray* on commerce clause grounds, the Court must determine whether national uniformity in regulation of tanker design and operation is necessary to avoid the burdensome inconsistency of state laws or whether requirements such as tug escorts and access limits are amenable to local regulation designed to meet local needs and conditions. On the basis of its prior holdings in *Southern Pacific, Bibb, Pike*, and *Cottrell*, the Court would most likely find that the national interest in uniform tanker regulations outweighs the state interest in local controls.

III. The Preemption Issue

In deciding the preemption issue in *Ray*, the Court will first examine the federal statute and its legislative history to ascertain the scope and detail of the PWSA and the intent of Congress in enacting that law. The Court will then consider the provisions and effect of the Washington Tanker Law to determine if the state law has been preempted.

A. The Federal and State Legislation

1. The Ports and Waterways Safety Act

Enactment of the Ports and Waterways Safety Act of 1972[86] was aimed at protecting the marine environment by establishing a comprehensive scheme of federal regulations for the design and operation of tankers.[87] The two titles contained in the PWSA, Title I dealing with the establishment of regulations for vessel traffic controls[88] and Title II containing design and construction requirements for tankers,[89] represent a "systems approach,"[90] focusing on the prevention of oil pollution.[91] The PWSA provides the Coast Guard with broad authority to establish and operate vessel traffic systems for congested waters and to prescribe design and safety equipment standards for vessels subject to the Act.[92]

86. Tit. I, 33 U.S.C. §§ 1221-1227 and tit. II, 46 U.S.C. § 391a (Supp. V 1975).

87. S. REP. No. 92-724, 92d Cong., 2d Sess. 7 (1972) [hereinafter cited as 1972 SENATE REPORT].

88. Tit. I, § 101, 33 U.S.C. § 1221 (Supp. V 1975).

89. Tit. II, § 201, 46 U.S.C. § 391a (Supp. V 1975).

90. Although concurring in the need for vessel traffic services, systems and controls as contained in H.R. 8140, the committee believed that a comprehensive approach to the prevention of pollution from marine operations and casualties required, in addition, improvement of the vessels themselves: their design, construction, maintenance, and operation . . . .It is clear that a systems approach to prevention of damage to the marine environment requires not only better control of vessel traffic but an improvement in the vessels themselves.

1972 SENATE REPORT, *supra* note 87, at 13.

91. *Id.* at 13.

92. *Id.* at 7.

Specifically, Title I of the PWSA grants to the Coast Guard the power to:

1) establish and operate vessel traffic systems (VTS) for waters subject to vessel traffic;[93]

2) require compliance with a VTS, including the carrying of any electronic devices necessary to the systems;[94]

3) control vessel traffic in hazardous areas by

i) specifying times of movements through ports or other waters;

ii) establishing vessel traffic routing schemes;

iii) establishing vessel size and speed limitations and vessel operating conditions; and

iv) restricting vessel operation under hazardous conditions;[95]

4) direct the anchoring, mooring, or movement of vessels when necessary to prevent damage; and[96]

5) require pilots on vessels engaged in the foreign trade under circumstances where a pilot is not required by state law.[97]

The Act provides that the Coast Guard, in carrying out its authority, shall consult with other federal agencies and consider regulations issued by port or other state and local authorities.[98]

In exercising its authority under the PWSA, the Coast Guard must consider and balance a number of factors.[99] These factors include the scope and degree of the hazard involved, vessel traffic characteristics, port and waterway configurations, the differences in geographic, climatic, and other conditions and circumstances, environmental factors, economic impact and effects, existing vessel traffic control systems, and local practices and customs.[100] Title II of the Act provides that the Coast Guard "shall establish . . . such additional rules and regulations as may be necessary with respect to the design and construction, alteration, repair, and maintenance of . . . vessels."[101] In carrying out its duties under Title II, the Coast Guard is required to consider the need for such regulations, the extent to which they will contribute to safety and the protection of the marine environment, and the practicability of compliance therewith, including cost and technical feasibility.[102]

93. Tit. I, § 101, 33 U.S.C. § 1221(1) (Supp. V 1975).
94. *Id.* § 1221(2).
95. *Id.* § 1221(3).
96. *Id.* § 1221(4).
97. *Id.* § 1221(5).
98. Tit. I, § 102, 33 U.S.C. § 1222(c) (Supp. V 1975).
99. *Id.* § 1222(e).
100. *Id.*
101. Tit. II, § 201, 46 U.S.C. § 391a(3) (Supp. V 1975).
102. *Id.* § 391a(4).

In March of 1977, President Carter announced his intention to establish new regulatory measures to address the growing problem of oil pollution from tankers.[103] The proposed Amendments to the PWSA reflect the belief of the Senate Committee on Commerce, Science and Transportation that improvements in legislation were necessary if only to clarify Congressional policy and purposes.[104] Congress' intent to establish a comprehensive federal scheme for regulation of design, equipment and operation of tankers, and to encourage continued efforts to obtain international agreements concerning navigation and protection of the environment is reflected in the proposed amendments.[105] This intent to establish comprehensive regulations was also mentioned in the enactment of the PWSA in 1972: "Comprehensive legislation is needed to protect our coastal waters and resources including fish, shellfish, wildlife, marine and coastal ecosystems and recreational and scenic values. What is most urgently needed is legislation that will put the emphasis on *prevention*, and that is the thrust of [the PWSA] as amended."[106] The proposed amendments restate those provisions from the 1972 Act covering the powers and duties of the Coast Guard[107] and the factors that it must consider in the exercise of its authority.[108] They also reiterate that the Coast Guard shall establish procedures for consulting with state and local governments that are experienced in dealing with local traffic control problems.[109] But the proposed amendments also require any vessel over 20,000 DWT that carries, or is designed to carry, oil in bulk to meet

103. 1977 SENATE REPORT, *supra* note 2, at 10.

104. *Id.*

105. *Proposed Amendments* §§ 102(b)-102(c), *supra* note 15, at S8748-49. Sections 102(b)-102(c) of the *Proposed Amendments* are as follows:

> (b) Purposes—It is therefore the purposes of Congress in this Act—
>
> (1) to authorize a comprehensive inspection and enforcement program for increased navigation and vessel safety and enhanced protection of the marine environment;
>
> (2) to direct the Federal Government to establish stringent standards for the design, construction, equipment, maintenance, alteration, repair, operation, and manning of all vessels which (A) use any port of the United States or (B) operate in the navigable waters of the United States; and
>
> (3) to establish a program to prevent any substandard vessel from (A) using any port of the United States or (B) operating in the navigable waters of the United States.
>
> (c) Policy—It is further declared to be the policy of the Congress in this Act—
>
> (1) to authorize no impediment to, or interference with, the right of innocent passage or any recognized legitimate use of the high seas; and
>
> (2) to support and encourage continued active United States efforts to obtain international agreements concerning navigation and vessel safety and protection of the marine environment.

106. 1972 SENATE REPORT, *supra* note 87, at 9 (emphasis in original).

107. *Proposed Amendments* § 101, *supra* note 15, at S8749.

108. *Proposed Amendments* § 103, *supra* note 15, at S8749.

109. *Id.*

specific standards in addition to those promulgated by the Coast Guard.[110] These standards include: (1) segregated ballast systems to insure that the seawater taken on by empty tankers for ballast and discharged upon entering a loading port does not become polluted by being stored in the oil tanks; (2) double bottoms to prevent most oil spillage that results from limited intensity hull ruptures due to groundings such as those that have occurred within harbors and near shore areas; (3) and dual radar systems with collision avoidance capabilities.[111] Another effect of the proposed amendments would be a substantial expansion of the authority of the Coast Guard in the area of international negotiations. One of the important provisions that would be added to the PWSA provides that "[t]he Secretary [of the Department in which the Coast Guard operates] and the Secretary of State shall undertake international negotiations, utilizing the appropriate international bodies or forums, to achieve acceptance of regulations promulgated or required under this Act as international standards"[112] Thus, the PWSA and proposed amendments arguably establish a comprehensive scheme of federal regulation of the design and operation of oil tankers. This regulatory program gives the Coast Guard broad power to establish and operate vessel traffic systems and requires certain design standards in addition to those promulgated by the Coast Guard. In addition, the strong federal interest in international affairs is reflected in the proposed amendments that will grant authority to the Coast Guard to enter into international negotiations for the purpose of achieving acceptance of the federal regulations as international standards.

2. *The Washington Tanker Law*

As a result of a fear of oil spills by tankers in Puget Sound, the Washington Tanker Law was enacted.[113] The Washington Legislature incorporated its concerns for the environment and the citizenry in the statute. The legislators cited the "great potential hazard" to the state's natural resources and the jobs dependent on those resources.[114] The legislature also recognized Puget Sound as a relatively confined environment with irregular shorelines that was, as a result, more susceptible to long-term damage from oil spills.[115] Due to the limited space for maneuvering large tankers and the many natural navigational obstacles in Puget Sound, the legislature found that it was important that oil tankers be piloted by skilled persons familiar

110. *Proposed Amendments* § 104, *supra* note 15, at S8750.
111. 1977 SENATE REPORT, *supra* note 2, at 12-16.
112. *Proposed Amendments* § 303, *supra* note 15, at S8752.
113. WASH. REV. CODE ANN. §§ 88.16.170-88.16.190 (Supp. 1976).
114. *Id.* § 88.16.170.
115. *Id.*

with local waters and that such tankers be capable of rapid maneuvering responses.[116] The Tanker Law, the specific intent and purpose of which is "to decrease the likelihood of oil spills on Puget Sound, and its shorelines,"[117] contains three operative provisions: 1) the size limit prohibits any oil tanker over 125,000 DWT from entering Puget Sound;[118] 2) the design requirements and tug escort proviso prohibits any oil tanker between 40,000 and 125,000 DWT from entering Puget Sound unless it has minimum shaft horsepower of one horsepower for each two and one-half DWT, twin screws, double bottoms underneath all cargo compartments, two radar systems, one of which must be collision-avoidance radar, and such other navigational systems as may be prescribed by the State Board of Pilotage Commission; however, tankers not meeting the foregoing design requirements may still enter Puget Sound if escorted by tugboats with an aggregate horsepower of five per cent of the tanker's DWT;[119] and 3) the pilotage requirement provides that any oil tanker of 50,000 DWT or greater must employ a pilot licensed by the State of Washington while navigating Puget Sound.[120]

B. Parameters of the Preemption Doctrine

In the *Ray* case, Atlantic Richfield also challenged the Washington Tanker Law on grounds that the state statute was preempted by the federal PWSA. Traditional case law has recognized that when there is congressional silence[121] as to a subject being regulated, there may be implied permission for the states to regulate.[122] However, if Congress adopts federal legislation, then under the supremacy clause of the Constitution, the federal statute may supersede state regulation and preempt any further state control. The sole ground on which the three-judge federal district court in *Ray* rested its decision was that the PWSA preempted the Washington Tanker Law.[123] In

116. *Id.*

117. *Id.*

118. *Id.* § 88.16.190(1).

119. *Id.* § 88.16.190(2).

120. *Id.* § 88.16.180.

121. The "silence of Congress" doctrine is traceable to the Court's discussion of the concurrent federal-state regulation problem in Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851). The Court in *Cooley*, in discussing the act of 1789, stated that "the nature of this subject is such that until Congress should find it necessary to exert its power, [the regulation] should be left to the legislation of the States." *Id.* at 319.

122. In South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938), the Court acknowledged that a state may build and maintain its highways and that, in the absence of congressional action, regulation is within the state's competence even though interstate commerce is materially affected. *Id.* at 187.

123. Atlantic Richfield Co. v. Evans, No. C 75-648 M, slip op. at 6 (W.D. Wash., Sept. 24, 1976) *prob. juris. noted sub nom.* Ray v. Atlantic Richfield Co., 430 U.S. 905 (1977) (No. 76-930, 1977 Term).

so ruling, the court reflected a judicial trend toward reliance on the preemption doctrine without reaching the commerce clause issue.[124]

The preemption doctrine is based on the supremacy clause of the Constitution, which states that the Constitution and the laws of the United States made pursuant thereto are the supreme law of the land and that the states are bound by them.[125] Thus, a state statute that is enacted within the purview of state power and that is not in conflict with any constitutional prohibition may nevertheless be unenforceable if federal legislation has preempted state statutes. The preemption doctrine has been used by courts to invalidate state laws that are in direct conflict with a federal act[126] or that Congress has precluded explicitly or implicitly by enacting federal regulations with an intent to occupy the field.[127] With the enactment by Congress of regulations in an ever-increasing number of fields, the courts have been charged more frequently with the task of ascertaining the purpose and scope of federal acts.

Despite increasing reliance on preemption as a decisional ground, there has been relatively little agreement as to the appropriate standard for analysis.[128] This inconsistent application has been viewed by many critics as the most troublesome aspect of the doctrine.[129] As Justice Black indicated in *Hines v. Davidowitz*,[130] "none of [the Court's] expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula."[131] One rather acid comment on the Supreme Court's failure to develop a uniform approach to preemption is that its decisions take on an "unprincipled quality, seemingly bereft of any consistent doctrinal basis."[132]

Some factors that the Court has considered as important in finding preemption are the presence or absence of direct conflict between state and

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124. *See, e.g.*, Douglas v. Seacoast Prods., Inc., 431 U.S. 265 (1977); Jones v. Rath Packing Co., 430 U.S. 519 (1977); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).

125. U.S. CONST. art. VI., cl. 2.

126. *See, e.g.*, Perez v. Campbell, 402 U.S. 637 (1971).

127. *See, e.g.*, Douglas v. Seacoast Prods., Inc., 431 U.S. 265 (1977); Jones v. Rath Packing Co., 430 U.S. 519 (1977); City of Burbank v. Lockheed Air Terminal, Inc , 411 U.S. 624 (1973); Campbell v. Hussey, 368 U.S. 297 (1961); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); Hines v. Davidowitz, 312 U.S. 52 (1941).

128. *See* Note, *Federal Preemption of State Laws*, 50 IND. L.J. 848 (1975).

129. *See* Catz & Lenard, *The Demise of the Implied Federal Preemption Doctrine*, 4 HASTINGS CONST. L.Q. 295 (1977).

130. 312 U.S. 52 (1941).

131. *Id.* at 67.

132. Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and The Burger Court*, 75 COLUM. L. REV. 623, 624 (1975) [hereinafter cited as *Preemption Doctrine*].

federal regulation,[133] explicit congressional intent to occupy the field,[134] administrative incompatibility,[135] dominant federal interest[136] and local police power concerns.[137] In the absence of a consistent approach by the Court, it has been suggested that a case-by-case approach be openly adopted.[138] Under this approach, the factors cited above would be used to balance the federal and state interests in a manner reminiscent of commerce clause cases.[139]

The most obvious situation in which the issue of preemption arises is the case of a direct conflict between federal and state legislation. One of the rare cases of actual conflict between federal and state action occurred in *Perez v. Campbell*.[140] The Arizona Motor Vehicle Safety Responsibility Act provided for suspension of driver's licenses as a sanction for non-payment of automobile accident judgments, and applied to debtors who had received a discharge in bankruptcy.[141] The latter provision was held to be in direct conflict with the Federal Bankruptcy Act, which states that a discharge in bankruptcy fully discharges all but certain specified judgments. Here the fact that the state statute was concerned with highway safety, while the Bankruptcy Act was concerned with debtor rehabilitation was held to be an insufficient basis for finding no conflict. The state act was therefore held unconstitutional as violative of the supremacy clause.[142]

The effect of a direct conflict was also discussed by Justice Stewart in *Huron Portland Cement Co. v. City of Detroit*.[143] The majority in *Huron* upheld a Detroit smoke abatement ordinance as applied to ships using boilers that had been inspected and licensed by the federal government. The Court found no conflict between the municipal ordinance and federal boiler

133. Perez v. Campbell, 402 U.S. 637 (1971); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

134. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Campbell v. Hussey, 368 U.S. 297 (1961).

135. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973).

136. Pennsylvania v. Nelson, 350 U.S. 497 (1955); Hines v. Davidowitz, 312 U.S. 52 (1941).

137. Kelly v. Washington *ex rel.* Foss Co., 302 U.S. 1 (1937).

138. *Preemption Doctrine, supra* note 132, at 654.

139. It has been argued that the courts are using essentially the same reasoning process in a case based on preemption as had been used in past cases in which the issue was whether the state regulation unduly burdened interstate commerce. Note, *Preemption as a Preferential Ground*, 12 STAN. L. REV. 208, 219-20 (1959). Even with the rash of current criticism of the doctrine, reliance on preemption has escalated, shifting to Congress the responsibility for invalidating the state law in question. This shift results because the Court, in deciding a case on the basis of the preemption doctrine is, in effect, attempting to determine congressional intent in enacting the legislation and the extent of permissible state legislation in the same field. *Id.* at 224. One commentator has postulated that, by using the preemption doctrine, flexibility is gained because the decision invites congressional reconsideration and thus allows Congress a greater share in the process. *Id.* at 225.

140. 402 U.S. 637 (1971).

141. *Id.* at 641-42.

142. *Id.* at 656.

143. 362 U.S. 440 (1960).

inspection provisions because the main purpose of federal inspection was to insure safety while the Detroit ordinance was directed solely at air pollution.[144] Justice Stewart's opinion stated that intent to supersede the state's exercise of its police power in areas not covered by federal legislation is not to be inferred from the fact that Congress has occupied a limited field.[145] In other words, such intent is not to be inferred unless the act of Congress is in actual conflict with the law of the state.[146]

Even where there is no direct conflict between the federal and state laws, the Court may find preemption where Congress has indicated an intent to exclude supplementary state legislation. The Court found this element present in one of the first major preemption cases, *Rice v. Santa Fe Elevator Corp.*[147] *Rice* dealt with the effect of the 1931 amendments to the United States Warehouse Act. By these amendments, Congress terminated the dual system of state and federal regulation provided by the original act and substituted an exclusive system of federal regulation of federally licensed warehouses.[148] The Court therefore held that warehouses licensed under the federal act were not required to comply with state laws covering the same phases of warehouse business.[149] In attempting to establish a preemption standard, the Court in *Rice* held that, in areas in which the states have traditionally been allowed to exercise their police power in enacting regulations for the protection of the health, safety and welfare of the community, state action is not superseded by the federal act unless that is the "clear and manifest purpose of Congress."[150] Justice Douglas found that such a purpose may be shown in several ways. The scheme of federal regulation may be so pervasive as to reasonably imply that no room was left by Congress for the states to supplement;[151] the act of Congress may regulate a field in which the federal interest is dominant;[152] or finally, the state policy may produce a result inconsistent with the objectives of the federal scheme.[153]

The *Rice* analysis subsequently was used in *Campbell v. Hussey*[154] to find the Georgia Tobacco Identification Act preempted by the Federal

144. *Id.* at 444-46.

145. *Id.* at 443 (citing Savage v. Jones, 225 U.S. 501, 533 (1911)).

146. *Id.*

147. 331 U.S. 218 (1947).

148. *Id.* at 223-24.

149. *Id.* at 234-36.

150. *Id.* at 230. Atlantic Richfield contended that federal regulation of vessel design, equipment, and operation would not disrupt an area of traditional state authority. In so arguing, they pointed to a long history of exclusive federal regulation of vessel design and equipment and a great deal of federal legislation regarding the control of vessel operation. Brief of Appellees at 40-42. *See generally* Note, *Federal Regulation of Aircraft Noise Under Federal Aviation Act Precludes Local Police Power Noise Restrictions—City of Burbank v. Lockheed Air Terminal, Inc.*, 15 B.C. INDUS. & COM. L. REV. 848 (1974).

151. 331 U.S. at 230.

152. *Id.*

153. *Id.*

154. 368 U.S. 297 (1961).

Tobacco Inspection Act.[155] The Georgia law required that certain types of tobacco be marked with an identifying tag when received in warehouses for sale.[156] The Court rejected the argument that the Georgia act was permissible because it "merely supplement[ed] the federal regulation"[157] and went on to hold that "Congress, in legislating concerning the types of tobacco sold at auction, preempted the field and left no room for any supplementary state regulation."[158]

Campbell was distinguished in *Florida Lime & Avocado Growers, Inc. v. Paul*,[159] which involved a California statute prohibiting transportation or sale in California of avocados that did not meet the state's minimum-oil-content standard of maturity.[160] In a 5-4 decision, the Court upheld the statute excluding avocados that did not meet the California standard despite the fact that they had been certified as mature under federal regulations.[161] Justice Brennan, writing for the majority, stated that federal regulation of a field of commerce should not be deemed preemptive unless there are persuasive reasons for preemption, either because the nature of the subject matter permits no other conclusion or Congress had unmistakably so ordained.[162] The *Florida Lime* opinion concluded that "there is neither such actual conflict between the two schemes of regulation that both cannot stand in the same area, nor evidence of a congressional design to preempt the field."[163]

Again using the *Rice* standard, the Court in *Pennsylvania v. Nelson*[164] held that the federal Smith Act, which prohibited the knowing advocacy of the overthrow of the government of the United States by force or violence, superseded the Pennsylvania Sedition Act, which proscribed the same activity.[165] The Court found that the pervasiveness of the congressional plan made it reasonable to assume that no room was left for the states to supplement it.[166] "Therefore, a state sedition statute is superseded regardless of whether it purports to supplement the federal law."[167] The Court also found that the Pennsylvania statute touched a field in which the federal interest was so dominant that the federal regulatory system must preclude state law on the subject.[168] As the Court noted, "Congress having thus

155. *Id.* at 302.
156. *Id.* at 298.
157. *Id.* at 300.
158. *Id.* at 301.
159. 373 U.S. 132 (1963).
160. *Id.* at 133-34.
161. *Id.* at 152.
162. *Id.* at 142.
163. *Id.* at 141.
164. 350 U.S. 497 (1955).
165. *Id.* at 509.
166. *Id.* at 504.
167. *Id.*
168. *Id.* at 504-05.

treated seditious conduct as a matter of vital national concern, it is in no sense a local enforcement problem."[169] Finally, the majority held that the enforcement of a state sedition act would have created the danger of conflict with the administration of the federal scheme.[170]

The dominant federal interest theme has also appeared in the area of foreign affairs in several Supreme Court decisions on preemption. In *Hines v. Davidowitz*,[171] the Court held that enforcement of Pennsylvania's Alien Registration Act of 1939 was barred by the federal Alien Registration Act of 1940.[172] The Court stated that its primary function in determining the meaning and purpose of the act of Congress was to decide whether, under the circumstances of the particular case, the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[173] In determining that the Pennsylvania statute was an obstacle to the execution of Congress' objectives, the Court found it important that the legislation was in a field that affects foreign relations, the one area of government that has, from the beginning, demanded broad national authority.[174]

The principle of exclusive federal control over the field of international relations was reiterated in *Zschernig v. Miller*.[175] An Oregon statute dealing with certain inheritance rights of nonresident aliens was found unconstitutional by the *Zschernig* Court as "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."[176] Justice Douglas' majority opinion went on to hold that, even in the absence of a treaty, a state law may have a direct impact upon foreign relations, adversely affecting the power of the federal government to deal with the problems of international affairs and therefore must be held invalid.[177] Thus, in cases of pervasive Congressional legislation or areas of special federal concern, such as national security and foreign affairs, the Court generally finds that concurrent state legislation has been preempted by the federal scheme.

It could be inferred from the Supreme Court decision in *De Canas v. Bica*[178] that a clear and unequivocal statement of exclusive federal authority is required for a finding of preemption. The Court in *De Canas* held that a

169. *Id.* at 505.
170. *Id.*
171. 312 U.S. 52 (1941).
172. *Id.* at 74.
173. *Id.* at 67.
174. *Id.* at 67-68.
175. 389 U.S. 429 (1968).
176. *Id.* at 432.
177. *Id.* at 441.
178. 424 U.S. 351 (1976).

California statute prohibiting employers from knowingly employing illegal aliens was not preempted by either the United States Constitution or the federal immigration law.[179] Justice Brennan used the standard he had set out in *Florida Lime* as the basis for finding that a "clear and manifest purpose of Congress" to preempt state regulation had not been shown.[180] However, in two recent decisions, the Supreme Court has found preemption of state laws in the absence of explicit declarations of preemptive intent.

In *Jones v. Rath Packing Co.*,[181] the Court found that California weight labeling requirements on certain processed foods were preempted by federal law.[182] The California law required that the average net weight of food packages be no less than the net weight stated on the packages.[183] The only permissible variations were those caused by unavoidable deviations in the manufacturing process.[184] By contrast, the applicable federal statute permitted variations from the stated weight caused by unavoidable losses due to the distribution as well as the manufacturing process.[185] Therefore, packages complying with the federal act could nonetheless be found in violation of California's regulations. The Court stated that although the state law was not inconsistent with the federal regulations, it was required to determine whether the state law "stands as an obstacle to the purposes and objectives of Congress."[186] The Court found preemption even though it was possible to comply with both statutes. The *Jones* opinion stressed that in determining whether the state law is an obstacle to Congress' objectives, the Court must look to the relationship between state and federal laws as they are interpreted and applied, not only as they were written.[187] In another recent case, *Douglas v. Seacoast Products, Inc.*,[188] the Court held that two Virginia statutes limiting the right of nonresidents and aliens to catch fish in the state's waters were preempted by the federal Enrollment and Licensing Act.[189] The Court noted that in this case, as in *Jones*, it was dealing with federal legislation that arguably superseded state regulation in a field traditionally occupied by the states and that preemption therefore could be found only if " 'that was the clear and manifest purpose of Congress.' "[190] Justice

179. *Id.* at 365.
180. *Id.* at 357-58.
181. 430 U.S. 519 (1977).
182. *Id.* at 524.
183. *Id.* at 522-23 n.3.
184. *Id.* at 531.
185. *Id.* at 533.
186. *Id.* at 526 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
187. *Id.* at 526.
188. 431 U.S. 265 (1977).
189. *Id.* at 286-87.
190. *Id.* at 272 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

Marshall, writing for the majority, found nonetheless that " 'no state may completely exclude federally licensed commerce' "[191] and that any state law that purports to do so must fail under the supremacy clause.[192] Relying on *Gibbons*, the Court stressed that the federal license emphatically implied an authority to licensed vessels to carry on the activity for which they are licensed.[193] Interference with the operation of federal regulatory agencies has been another basis for finding that state regulation stands as an obstacle to the purposes and objectives of Congress. In *City of Burbank v. Lockheed Air Terminal, Inc.*, [194] the owner of the Burbank Airport sought an injunction against enforcement of a local ordinance[195] placing a curfew on all jet flights from the airport between 11 p.m. and 7 a.m.[196] The district court found the ordinance unconstitutional on both commerce clause and preemption grounds[197] and the court of appeals affirmed on the basis of preemption.[198] Using the *Rice* standard,[199] the Supreme Court held that, given the pervasive nature of the scheme of federal regulation of aircraft noise, the FAA has exclusive jurisdiction in the regulation of aircraft noise.[200] The Court made this finding after an exhaustive examination of congressional intent in passage of the Noise Control Act of 1972,[201] which amended the Federal Aviation Act of 1958,[202] including a detailed look at the language of the act, Senate and House reports, Senate and House hearings, and floor debates.[203] As the opinion stated, "[t]he 1972 Act, by amending § 611 of the Federal Aviation Act, also involves the Environmental Protection Agency (EPA) in the comprehensive scheme of federal control of the aircraft noise problem."[204] Further evidence of an intent that federal agencies fully regulate the field of airspace management was found in the fact that Congress did not leave the FAA to act at large, but rather provided comprehensive standards for it to follow.[205] These standards require that the FAA, in establishing regulations, consider relevant data on aircraft noise, consult

191. *Id.* at 283 (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963)).
192. *Id.*
193. *Id.* at 285-86.
194. 411 U.S. 624 (1973).
195. *Id.* at 625-26 & n.1 (citing BURBANK, CAL., MUN. CODE §§ 20-32.1 (1970)).
196. *Id.* at 625.
197. 318 F. Supp. 914, 921-30 (C.D. Cal. 1970).
198. 457 F.2d 667, 670-76 (9th Cir. 1972).
199. *See* notes 151-153 and accompanying text *supra*.
200. 411 U.S. at 633.
201. 42 U.S.C. § 4906 (Supp. V 1975); 14 C.F.R. §§ 71, 73, 75, 77, 91, 93, 95, 99 (1977).
202. 49 U.S.C. §§ 1301-55, 1505 (1970).
203. 411 U.S. at 626-38.
204. *Id.* at 628-29 (footnote omitted).
205. *Id.* at 632.

with federal, state, and local agencies, consider whether the regulations provide for safety in air commerce, determine whether the regulations are economically reasonable and technologically practicable, and evaluate the extent to which the regulations carry out the purposes of the Act.[206] Justice Douglas, speaking for the majority, concluded by stating that the Court was "not at liberty to diffuse the powers given by Congress to FAA and EPA by letting the States or municipalities in on the planning. If that charge is to be made, Congress alone must do it."[207]

The exclusive power of a federal regulatory agency was also recognized in *Northern States Power Co. v. Minnesota*.[208] In *Northern States*, the Eighth Circuit Court of Appeals held that standards for radioactive emissions were under the exclusive jurisidiction of the Atomic Energy Commission, thus precluding the state from setting additional standards.[209] The court found that the broad scope of the authority conferred on the Commission to set standards and prescribe rules and regulations was conclusive evidence of a legislative intent to occupy the field.[210]

One of the earliest preemption cases dealt with a fact situation similar to that found in the *Ray* case. In *Kelly v. Washington*,[211] a tug boat owner challenged the validity of a Washington law calling for the inspection and regulation of all motor-driven vessels not subject to inspection under the laws of the United States.[212] The challenge was based on the 1910 federal Motor Boat Act, which contained no provision for the inspection of motor-driven tugs.[213] The Court noted that the federal act was passed during the transition from steam powered vessels to vessels utilizing internal combustion engines.[214] The Court held that Congress had carefully considered the scope of existing laws and then decided to widen its area of regulation to include only a specified class of motor-driven vessels.[215] Since no provision of the federal act covered the same subject matter as the challenged state law, there was no direct conflict between federal and state laws. The Court found further that there was no need for national uniformity and thus the state's right to require inspection of motor-driven tugs was upheld.[216] The Court nonetheless suggested that if the state went further and attempted to

206. *Id.*
207. *Id.* at 640.
208. 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).
209. 447 F.2d at 1154.
210. *Id.* at 1152-53.
211. Kelly v. Washington *ex rel.* Foss Co., 302 U.S. 1 (1937).
212. *Id.* at 3-4.
213. *Id.* at 8.
214. *Id.* at 5-7.
215. *Id.* at 7.
216. *Id.* at 15.

impose structure, design, equipment, and operation standards beyond what was essential to safety, such regulations would be invalid because of the need for national uniformity.[217] The opinion stated,

> Congress may establish standards and designs for the structure and equipment of vessels, and may prescribe rules for their operation, which could not properly be left to the diverse action of the States. The State of Washington might prescribe standards, designs, equipment and rules of one sort, Oregon another, California another, and so on. . . .
>
> If . . . the State . . . attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of the authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule.[218]

Thus, the Court will find preemption where there is a direct conflict between state and federal law or where Congress prohibits state action by explicitly or implicitly expressing an intent to exclude supplementary state legislation.[219] In the absence of direct conflict, the Court will look for a showing of exclusionary intent on the part of Congress[220] in order to find preemption. In a succession of cases, the Court has utilized several factors from which inferences of Congressional intent may be drawn. In areas of traditional state control, state action may not be superseded by federal law. However, the existence of a comprehensive federal scheme, the presence of a dominant federal interest or the vesting of broad authority in a regulatory agency may lead the Court to infer that Congress intended the federal regulation to be exclusive. The possibility of inconsistent state regulation, the frustration or interference with Congressional objectives and the need for national uniformity of regulation are additional factors indicative of congressional intent to preempt.

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217. *Id.*

218. *Id.* at 14-15.

219. Incompatibility with the exclusionary intent of Congress is construed as a conflict under the preemption doctrine. Thus, whether the intent to prohibit state action is expressed or implied, the very existence of a state law that Congress intended to exclude may be held to be in conflict with federal law. As a result, even where the provisions of a state law are otherwise compatible with federal regulations, such a state law is considered as contrary to federal law as if actual conflict existed in their terms. *See, e.g.*, Teamsters Union, Local 20 v. Morton, 377 U.S. 252, 259-60 (1964); Garner v. Teamsters Union Local 776, 346 U.S. 485, 500 (1953).

220. The concept of Congressional intent is a complex and often elusive determination. While an examination of the statutory language and legislative history provides a useful starting point, it affords little doctrinal consistency. This has led the courts to the conclusion that preemption questions are resolved only on a case-by-case basis. *See* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638 (1973); California v. Zook, 336 U.S. 725, 731 (1949).

C. Analysis of the Preemption Issue

An examination of the PWSA and its proposed amendments and the Washington Tanker Law reveals no direct conflict in their respective provisions. Oil tankers could comply with both federal and Washington state regulations. Thus, the type of conflict the Supreme Court faced in *Perez v. Campbell*,[221] in which the provisions of the state law directly contradicted a federal statute, is avoided in the present case. In deciding the preemption issue in *Ray*, the Court must therefore ascertain congressional intent in enacting the PWSA and in proposing the pending amendments by looking for one or more of those factors described above as indicative of congressional intent.[222] *Rice v. Santa Fe Elevator Corp.*[223] laid the early groundwork for the Court in the area of preemption by setting out several factors that indicate a congressional intent to occupy the field. Justice Douglas, writing for the majority in *Rice*, found that a preemptive intent may be shown by pervasiveness of the federal scheme of regulation, dominant federal interest in the field, and a state policy that may produce results inconsistent with the objectives of the federal scheme.[224]

1. The State Interest

The Court in *Rice* held that in areas in which the states have traditional police powers, state action is not prohibited unless that is the "clear and manifest purpose of Congress."[225] That standard was reiterated in *Florida Lime & Avocado Growers, Inc. v. Paul*,[226] in which the Court went on to state that federal legislation should not be deemed preemptive unless Congress has "unmistakably . . . ordained"[227] that federal regulation is to be exclusive. Therefore, it may be argued that only a direct conflict or express declaration by Congress justifies a finding that state regulation of traditional state interests must yield to federal legislation.[228]

The State of Washington has extensive economic and ecological interests to protect in a very unique environment which, because of its geographical characteristics, has the potential for extensive oil spill damage. Washington has expressed concern for the potential impact of oil spills on the important natural resources of the state and on jobs and income dependent on those resources.[229] Puget Sound is a unique estuary in which the federal

221. 402 U.S. 637 (1971).

222. *See generally* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); Radin, *A Short Way With Statutes*, 56 HARV. L. REV. 388 (1942).

223. 331 U.S. 218 (1947).

224. *Id.* at 230.

225. *Id.*

226. 373 U.S. 132 (1963).

227. *Id.* at 142.

228. *See, e.g.*, De Canas v. Bica, 424 U.S. 351 (1976).

229. WASH. REV. CODE ANN. § 88.16.170 (Supp. 1976).

government maintains thirteen wildlife preserves and the state operates numerous fish hatcheries and two oyster preserves.[230] As the appellants in the *Ray* case pointed out, "Washington and its citizens have a substantial economic interest in the natural resources of Puget Sound. The value of the beds, tidelands and waterfront lands adjacent to Puget Sound are estimated to exceed $2,000,000,000 . . . . The Puget Sound fisheries industry, including commercial and sport fishing, packing and canning, contributes $170,000,000 annually to Washington's economy."[231] The Washington Tanker Law recognizes that Puget Sound is a confined environment with irregular shorelines and limited space for maneuvering, which increase the likelihood of long-term damage from oil spills.[232] Washington may claim that regulations such as tug escorts and access limits are the types of regulations that must be designed to meet diverse local conditions such as channel depths, width, tides and weather.

In this vein, the State of Washington has argued that the Tanker Law should be upheld on the basis of a congressional policy of federal-state cooperation in environmental planning.[233] The state urged that Congress had anticipated at least some state participation in virtually all of its water-related regulatory programs.[234] But the district court pointed out that in those statutes,[235] Congress had explicitly invited state participation in the formation of the regulatory scheme.[236] The district court in *Ray* found that the PWSA does not invite state participation and therefore concluded that Congress did not intend to share regulatory authority over tankers with the states.[237]

The district court in *Ray* went on to examine and distinguish two cases cited by Washington to support its position, *Askew v. American Waterways Operators, Inc.*,[238] and *Huron Portland Cement Co. v. City of Detroit*.[239] *Askew* held that a Florida statute imposing strict liability for any oil-spill damage to the state or to private persons did not conflict with federal

230. Morris, *Constitutional Preemption of State Laws Against Massive Oil Spills*, 1 U. PUGET SOUND L. REV. 73, 74 (1977).

231. Brief for Appellants at 12.

232. WASH. REV. CODE ANN. § 88.16.170 (Supp. 1976).

233. Atlantic Richfield Co. v. Evans, No. C 75-648 M, slip op. at 4 (W.D. Wash., Sept. 24, 1976), *prob. juris. noted sub nom.* Ray v. Atlantic Richfield Co., 430 U.S. 905 (1977) (No. 76-930, 1977 Term).

234. *Id.*

235. Estuarine Act of 1968, 16 U.S.C. §§ 1221-26 (1976); Federal Water Pollution Control Act, 33 U.S.C. §§ 1151-75 (1970) (current version at *id.* §§ 1251-1376 (Supp. V 1975)); Deepwater Ports Act of 1974, 33 U.S.C. §§ 1501-24 (Supp. V 1975); Clean Air Act, 42 U.S.C. § 1857 (1970 & Supp. V 1975).

236. Slip op. at 5. *See generally* Tripp, *Tensions and Conflicts in Federal Pollution Control and Water Resource Policy*, 14 HARV. J. LEGIS. 225 (1977).

237. Slip op. at 5.

238. 411 U.S. 325 (1973).

239. 362 U.S. 440 (1960).

regulation of oil tankers.[240] The court in *Ray* distinguished *Askew* on the ground that the federal act in question reflected a congressional policy of federal-state cooperation.[241] In the *Huron* case, the Court upheld Detroit's smoke abatement ordinance based on a finding that there was no overlap between the scope of the federal inspection statute and that of the Detroit ordinance.[242] The environmental aims of the Detroit ordinance were consequently not preempted by the federal inspection statutes, which were designed to insure the safety of vessels subject to inspection.[243] In contrast, the district court in *Ray* noted that "[s]ince the PWSA introduced environmental considerations into the federal tanker requlations, the state of Washington cannot say that there is 'no overlap' between the state and federal laws."[244]

However, Congressional awareness of the fact that each port contains unique environmental conditions and hazards is evidenced by the fact that the PWSA requires the Coast Guard to balance a number of such factors in prescribing regulations for individual ports.[245] Provisions in both the PWSA and proposed amendments require the balancing of such factors as port and waterway configurations, differences in geographic, climatic, and other conditions and circumstances, environmental factors, and local practices and customs.[246]

2. *Pervasiveness of the Federal Scheme*

The primary purpose of the PWSA and proposed amendments is "to authorize a comprehensive inspection and enforcement program for increased navigation and vessel safety and enhanced protection of the marine environment."[247] Where a federal statute deals with a subject extensively and in detail, the Court often infers that Congress intended to exclude supplementary state action. The federal scheme is said to be so comprehensive or pervasive that in effect, Congress has "left no room" for additional state regulation.[248] The comprehensiveness of the federal scheme, however, is not indicative of exclusionary congressional intent in every situation.[249]

The PWSA provisions give the Coast Guard broad authority to establish vessel traffic control systems for ports and harbors in order to "protect

240. 411 U.S. at 344. *See generally* Note, *Liability for Maritime Oil Pollution: A Comparison of the Maine Coastal Conveyance Act With Federal Liability Provisions*, 29 ME. L. REV. 47 (1977).

241. Slip op. at 5.

242. 362 U.S. at 446.

243. *Id.*

244. Slip op. at 5.

245. *See* note 102 and accompanying text *supra*.

246. *Id.*

247. *Proposed Amendments* § 102(b), *supra* note 15, at S8748.

248. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

249. *See, e.g.*, New York State Dep't of Social Servs. v. Dublino, 413 U.S. 405, 415 (1973).

the navigable waters and the resources therein from environmental harm resulting from vessel or structure damage . . . ."[250] The Washington Tanker Law seeks to "decrease the likelihood of oil spills on Puget Sound and its shorelines . . . ."[251] Thus, an argument could be made for upholding the Tanker Law on the basis that it complements the PWSA. The Court has frequently upheld state laws that further the goals of or are complementary to the federal act in question.[252] Since the *Cooley* decision in 1851, however, the Court has also recognized that some subjects require a comprehensive federal scheme of regulation without the benefit of state supplements. For example, the Court in *Campbell v. Hussey*[253] rejected the argument that the state statute was permissible because it merely supplemented federal regulations. The Court found that Congress, in prescribing the types of tobacco that could be sold at auction, had left no room for any supplementary state action.[254]

On the other hand, the Court in *Florida Lime* upheld a state statute regulating the maturity of avocados despite federal legislation in the field.[255] Justice Brennan stated, however, that the maturity of avocados seemed to be an inherently unlikely candidate for exclusive federal regulation.[256] By contrast, the subject matter of the *Ray* case, regulation of the design, contruction, and operation of oil tankers, is a far more likely subject for federal concern. Therefore, the Court in *Ray* may infer a congressional intent to occupy the field of tanker regulation from the pervasiveness of the federal scheme in an area of nationwide significance. If such an inference is made, supplementary state action such as the Tanker Law will be prohibited.

3. *Dominant Federal Interest*

The regulation of oil tankers is arguably a dominant federal interest, especially in light of the current national interest in the energy supply and dramatic rise in the amount of oil being transported by sea.[257] The regulation of oil tankers is also becoming a matter of increasing international importance to the United States.[258] Federal control over foreign affairs is exclusive and is not subject to interference by state laws that might frustrate foreign policy or create difficulties with foreign governments for which the nation as a whole would be held to answer.[259] Therefore, the Court has long recog-

250. 33 U.S.C. § 1221 (Supp. V 1975).

251. WASH. REV. CODE ANN. § 88.16.170 (Supp. 1976).

252. *See, e.g.*, Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

253. 368 U.S. 297 (1961).

254. *Id.* at 301.

255. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 135 (1963).

256. *Id.* at 143.

257. 1977 SENATE REPORT, *supra* note 2, at 8-9.

258. *Id.*

259. *See, e.g.*, United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301

nized foreign relations as an area of dominant federal interest demanding broad national authority.[260] The fact that the state legislation affected foreign relations was important to the Court in *Hines v. Davidowitz*,[261] in which case the Court found that the state legislation stood as an obstacle to the objectives of Congress.[262] And in *Zschernig v. Miller,*[263] an intrusion by state action into the area of international affairs was also held unconstitutional.[264]

The PWSA and proposed amendments strongly encourage the establishment of international standards for the regulation of tanker design, equipment, and operation.[265] The proposed amendments direct the Secretary of the Department in which the Coast Guard operates to undertake international negotiations to achieve acceptance of regulations promulgated under the PWSA as international standards.[266] Evidence of the importance which Congress places on the achievement of international standards is found in the policy statement of the proposed amendments[267] as well as in the Senate Report pursuant to passage of the Act. The Senate Report states that:

> [I]nternational solutions in this area are preferable since the problem of marine pollution is worldwide . . . . The Committee fully concurs that multilateral action with respect to comprehensive standards for the design, construction, maintenance and operation of tankers for the protection of the marine environment would be far preferable to unilateral imposition of standards.[268]

The Coast Guard, in carrying out its task of achieving international standards of regulation, has submitted a set of regulatory proposals to the Inter-Governmental Maritime Consultative Organization (IMCO), the maritime division of the United Nations, for consideration at a major international conference called by President Carter for February, 1978.[269]

Thus, the establishment of a worldwide scheme of regulations is a goal being actively sought by the President, Congress, and the Coast Guard. Enforcement of state legislation in the field may seriously impair the achievement of that goal. If the *Ray* Court finds that the state action at issue

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U.S. 324 (1937); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

260. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52 (1941); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

261. 312 U.S. 52 (1941).

262. *Id.* at 67-68.

263. 389 U.S. 429 (1968).

264. *Id.* at 432.

265. *Proposed Amendments* § 303, *supra*, note 15, at S8752.

266. *Id.*

267. *Id.* § 102(c), at S8749. "It is further declared to be the policy of the Congress in this Act . . . to support and encourage continued active United States efforts to obtain international agreements concerning navigation and vessel safety and protection of the marine environment." *Id.*

268. 1972 SENATE REPORT, *supra* note 87, at 23.

269. 123 CONG. REC. S8602 (daily ed. May 25, 1977).

is an obstacle to Congressional objectives in this area of dominant federal interest, such action will be held invalid.

4. The Regulatory Agency

The fact that Congress has granted the authority to administer a comprehensive federal program to the Coast Guard may be another ground for inferring a preemptive intent.[270] *City of Burbank v. Lockheed Air Terminal, Inc.*[271] established that where Congress has enacted a pervasive scheme of federal regulation involving a regulatory agency with broad discretionary power to prescribe and enforce regulations, state action in the area is forbidden, even though its effect on the federal program may be slight.[272] Given the pervasive nature of the federal scheme of regulation of aircraft noise, the Court in *Burbank* held that the Federal Aviation Administration (FAA) had exclusive jurisdiction, thus preempting state action in the field.[273] In reaching its decision, the Court found evidence of congressional intent to occupy the field in the broad grant of discretionary power to the FAA.[274] Under the Noise Control Act of 1972,[275] the FAA, in exercising its authority, is required to balance a number of factors.[276] The Court in *Burbank* held that the Act required a delicate balancing of these factors and went on to state that "[t]he interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the . . . . Act are to be fulfilled."[277]

In another regulatory agency case, *Northern States Power Co. v. Minnesota*,[278] congressional authority was given to the Atomic Energy Commission (AEC). The eighth circuit held that standards for radioactive emissions were exclusively under the jurisdiction of the AEC, thus precluding the state from setting additional standards.[279] The court found that the broad scope of the authority conferred on the Commission to set standards and prescribe rules and regulations was conclusive evidence of legislative intent to occupy the field.[280]

270. *See, e.g.*, San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959).

271. 411 U.S. 624 (1973).

272. This concept was not new to the Court. In reaching the conclusion that state safety equipment requirements for railroad trains were superseded by the Federal Boiler Inspection Act of 1911, the Court in Napier v. Atlantic Coast Line R.R., 272 U.S. 602 (1926), took into account the fact that the duty of the Interstate Commerce Commission was not merely to inspect, but also to prescribe rules and regulations. *Id.* at 612. The broad scope of authority granted to the ICC was found to be conclusive evidence of a legislative intent to occupy the field and therefore preclude state regulation. *Id.* at 613.

273. 411 U.S. at 633.

274. *Id.* at 626-27.

275. 42 U.S.C. §§ 4901-18 (Supp. V 1975).

276. 411 U.S. at 632.

277. *Id.* at 638-39.

278. 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).

279. *Id.* at 1154.

280. *Id.* at 1152-53.

In the *Ray* case, Congress has given the Coast Guard broad authority to carry out the provisions of the PWSA. For example, the PWSA and proposed amendments grant the Coast Guard broad discretionary power to establish size limitations, pilotage and tug escort requirements.[281] The Coast Guard also may prescribe and enforce vessel traffic systems and enter into negotiations for the purpose of achieving international standards of tanker regulation.[282] By contrast, the State of Washington prohibits entry of vessels of a certain size, and requires pilots and tug escorts in certain cases.[283]

The potential contrary application of state and federal laws is therefore an important consideration in *Ray*. The enactment by the State of Washington of additional and often more stringent regulations would appear to impair the discretionary power given to the Coast Guard to determine what standards should be imposed. This exercise of independent state discretion and resulting impairment of federal discretion may itself raise an inference that Congress intended to occupy the field and therefore preclude state regulation.[284]

5. Inconsistent State Regulation

The possibility of inconsistent state regulation may lead the Court to find that the state statute interferes with Congressional intent. The Court has consistently struck down state legislation that acts as an obstacle to congressional purposes.[285] In *Jones v. Rath Packing Co.*,[286] the Court noted that in determining whether a state law is an obstacle to the objectives of Congress, it must look to the relationship between state and federal laws not only as they are written but also as they are interpreted and applied.[287]

The Washington Tanker Law completely prohibits all vessels over 125,000 DWT from entering Puget Sound.[288] The PWSA gives the Coast Guard discretion in establishing size limitations.[289] The Tanker Law requires Washington state licensed pilots on all vessels over 50,000 DWT.[290] A tug escort is required by the Washington statute for all vessels of a certain size that do not meet stringent design criteria.[291] Again, Congress has given

281. *See* notes 93-97 and accompanying text *supra*.

282. *See* note 93 and accompanying text *supra*.

283. *See* notes 118-120 and accompanying text *supra*.

284. *See, e.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971); Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (1947); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942).

285. *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

286. 430 U.S. 519 (1977).

287. *Id.* at 526.

288. WASH. REV. CODE ANN. § 88.16.190 (Supp. 1976).

289. 33 U.S.C. § 1221 (Supp. V 1975).

290. WASH. REV. CODE ANN. § 88.16.180 (Supp. 1976).

291. *Id.* § 88.16.190.

the Coast Guard the authority to exercise its judgment as to the circumstances that would warrant requirement of a tug escort.[292] The design requirements of the Tanker Law and the PWSA with the proposed amendments are very similar. There is a great deal of overlap in the standards, with basic safety requirements such as double bottoms and collision avoidance radar included in both.[293] Examination of Coast Guard action under authority of the PWSA is therefore necessary to determine whether the state statute would interfere with the effectuation of Congressional goals.

The Coast Guard has created a mandatory vessel traffic control system (VTS) in Puget Sound[294] as authorized by the PWSA. The VTS establishes a network of one-way traffic lanes throughout Puget Sound, each 1000 yards wide and separated by zones 500 yards wide.[295] The Coast Guard has established a single traffic lane in Rosario Strait and has prohibited the passage of more than one tanker over 70,000 DWT in either direction at any given time, a size limitation which is reduced to 40,000 DWT in adverse weather.[296] The VTS also requires use of radio-telephone equipment to maintain continuous vessel contact with the Coast Guard's Vessel Traffic Center in Seattle, and requires regular reporting of the vessel's position, speed and other pertinent data.[297] The Coast Guard's Puget Sound Captain of the Port has exercised authority granted in the PWSA by imposing tug escort requirements in Rosario Strait.[298] In addition, Coast Guard adoption of generally applicable standards of tug assistance for tankers operating in confined waters is under consideration.[299] Regulations establishing tanker design standards under the PWSA are based largely on the provisions of the International Convention for the Prevention of Pollution from Ships, adopted in 1973 by the Inter-Governmental Maritime Consultative Organization (IMCO), the maritime division of the United Nations.[300] In short, the Coast Guard has made considerable use of the authority granted to it by the PWSA. In constructing and enforcing VTS and supplementary regulations tailored to meet the unique needs and conditions of Puget Sound as well as numerous other ports throughout the country,[301] the Coast Guard is carrying

292. 33 U.S.C. § 1221 (Supp. V 1975).

293. *See* notes 111 & 119 and accompanying text *supra*.

294. 39 Fed. Reg. 25,430 (1974); 33 C.F.R. § 161(B) (1976), *as amended by* 42 Fed. Reg. 29,480 (1977).

295. *Id.*

296. *Id.*

297. *Id.*

298. Brief for Appellees at 34-35.

299. 41 Fed. Reg. 18,770 (1976); 42 Fed. Reg. 5,956, 5,958 (1977).

300. 40 Fed. Reg. 48,280 (1975); 41 Fed. Reg. 1,479 (1976); 41 Fed. Reg. 54,177 (1976).

301. Vessel Traffic Systems have also been established in San Francisco, Houston/Galveston, Louisville and portions of the Gulf Intercoastal Waterways, and are under development in

out the purposes Congress set forth in the PWSA[302] and proposed amendments.[303]

Hearings before the House and Senate Committees at the time of passage of the PWSA demonstrated recognition of the detrimental effect that varying state regulations would have on the Coast Guard's ability to carry out its responsibilities.[304] During hearings on the bill in 1970, one representative expressed concern that "each of the coastal States [might impose] different types of regulations and requirements so that an incoming vessel would be in a state of confusion."[305] During the 1971 hearings, the Chairman of the National Transportation Safety Board urged adoption of a comprehensive program of federal regulation of vessels because state regulation "could result in a patchwork quilt approach which would lack standard frequencies and equipment and would place a greater burden upon ships than a federally-regulated program."[306] Inconsistent state legislation in the area of tanker regulation would therefore impair the broad discretionary power granted to the Coast Guard to establish international as well as national standards for the design and operation of tankers. This interference with the federal scheme set out in the PWSA may be seen by the *Ray* Court as an obstacle to the Congressional goal of establishing a comprehensive program of tanker regulation.

6. Need for Uniformity

The comprehensive scheme for oil tanker regulation set out in the PWSA also suggests that Congress intended to provide uniform standards governing ships operating in United States coastal waters. The district court found that the purpose of Title II of the PWSA was to provide such uniform regulations and went on to state that "Balkanization of regulatory authority over this most interstate, even international, of transportation systems is foreclosed by the national policy embodied in the PWSA."[307] In so ruling,

New York and New Orleans. *See Hearings on Vessel Traffic Control before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 94th Cong., 2d Sess., Ser. No. 94-39 (1976).

302. 33 U.S.C. § 1221 (Supp. V 1975).

303. *Proposed Amendments* § 102(b), *supra* note 15, at S8748.

304. *Hearings on Port and Harbor Safety Before the Subcomm. on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Comm. on Merchant Marine and Fisheries*, 91st Cong., 2d Sess., Ser. No. 91-34 (1970).

305. *Id.* at 27-28.

306. *Hearings on Port and Harbor Safety Before the Subcomm. on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 1st Sess., Ser. No. 92-12 (1971).

307. Atlantic Richfield Co. v. Evans, No. C 75-648 M, slip op. at 3 (W.D. Wash., Sept. 24, 1976), *prob. juris. noted sub nom.* Ray v. Atlantic Richfield Co., 430 U.S. 905 (1977) (No. 76-930, 1977 Term).

the district court followed a long line of decisions which recognized that some subjects demand uniform, exclusive regulation by the federal government to avoid the adverse cumulative effects of inconsistent local regulations.[308] For example, *Northern States Power Co. v. Minnesota*[309] dealt with state efforts to set standards for radioactive emissions.[310] In holding that the nature of the subject matter supported preemption, the court focused on the potential problems involved in allowing the states to establish their own regulations for matters of such nationwide concern.[311]

This fear of the cumulative effects of inconsistent state regulations was also voiced by Justice Douglas writing for the majority in *Burbank*. In confirming the exclusive power of the FAA to regulate noise pollution, Douglas stated that "[i]f we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of take-offs and landings would severely limit the flexibility of the FAA in controlling air traffic flow."[312]

The threat of inconsistent state regulations, the major concern of the Court in *Burbank*, has already materialized in the area of tanker regulation. The State of Alaska has enacted tanker design and operation legislation inconsistent with the Washington Tanker Law. The Alaska statute[313] requires payment of a "risk charge" and use of a tug escort unless tankers meet design requirements different from those of Washington.[314] In addition, the risk charge scheme encourages the use of large tankers and penalizes the use of small tankers.[315] Alaska's approach of attempting to reduce the number of accidents by reducing the number of tankers navigating its waters may rely on the same logic that prompted both Congress and the Coast Guard to reject setting across-the-board size limitations in their comprehensive program of regulation. In any event, the enactment of the Alaska statute establishes the fact, and not just the possibility, of inconsis-

308. *See, e.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945); Kelly v. Washington *ex rel.* Foss Co., 302 U.S. 1 (1937).

309. 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).

310. *Id.* at 1145.

311. *Id.* at 1153-54. *See generally* Note, *New Opportunities for State Participation in the Control of Radioactive Pollution*, 52 CHI.-KENT L. REV. 157 (1975); Note, *Preemption Under the Atomic Energy Act of 1954*, 11 TULSA L.J. 397 (1976); *Federal Aviation Noise Control, supra* note 70.

312. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 639 (1973).

313. ALASKA STAT. §§ 30.20.010-30.20.070 (1976).

314. Proposed regulations to implement the Alaska law indicate that calculation of risk charges will be based on a "vessel pollution coefficient" assigned to each tanker. The vessel pollution coefficient will be determined by the design features of the tanker. As a result, a 75,000 DWT tanker will be assessed twice the "risk charge" of a similarly equipped 150,000 DWT tanker. Brief for Appellees at 46-47 & n.42 (citing proposed 18 ALASKA ADMIN. CODE § 20.050 (1977)).

315. *Id.*

tent state regulations. Recognition of the potential detrimental effects of inconsistency recently prompted the Court in *Douglas* to state that "[s]uch proliferation . . . would create precisely the sort of Balkanization of interstate commercial activity which the Constitution was intended to prevent."[316] The national interest in maintaining the movement of oil to supply the country's energy needs while protecting the marine environment is reflected in the passage of the PWSA. Application of inconsistent state regulations in this area of multistate concern[317] would severely hinder the realization of Congress' objectives. Where uniformity in tanker regulation is vital to the national interest in energy supplies, a strong inference of preemption will arise. In addition, the subject matter itself, tanker design and regulation, appears to be one requiring national standards. In *Kelly v. Washington*[318] the Court found that there was no federal provision for the inspection of motor-driven tugs and no need for national uniformity; thus the state's right to require inspection of tugs was upheld.[319] The Court suggested, however, that if the state attempted to impose design, equipment and operation standards, such regulations would be invalid because of the need for national uniformity.[320] The PWSA establishes a comprehensive regulatory program calling for the Coast Guard to use its discretion to promulgate and enforce nationwide requirements and to achieve international standards for tanker regulation. In light of this federal legislation, the State of Washington enacted its Tanker Law imposing standards for the design, equipment and operation of tankers. Consequently, as the Court in *Kelly* warned, the Tanker Law may be forced to yield to the discretionary authority of the Coast Guard to achieve international uniformity of tanker regulation.

Conclusion

The enactment of the PWSA reflects a strong federal interest in establishing comprehensive regulations of tanker design, equipment and operation for safety and the protection of the marine environment. In addition, a congressional intent to exclude concurrent state legislation may be inferred from several factors discussed above. For example, the pervasiveness of the regulatory scheme implies that Congress intended to exclude even supplementary state regulation in the area. Any obstacles that state legislation would impose on Congress' objectives in an area of dominant federal

316. Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 286 (1977).

317. *See, e.g.*, Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 167 (1942). *See generally* Okidi, *Toward Regional Arrangements for Regulation of Marine Pollution*, 4 OCEAN DEV. & INT'L L. 1 (1977).

318. Kelly v. Washington *ex rel.* Foss Co., 302 U.S. 1 (1937).

319. *Id.* at 15.

320. *Id.*

interest, the conduct of foreign affairs, also points to a finding of preemption. A strong inference of preemptive intent may also be found in the fact that inconsistent state regulations would significantly interfere with the broad discretionary power granted to the Coast Guard to establish international standards of tanker regulation. Finally, the requirement of uniformity in tanker regulation to supply the nation's energy needs demands exclusive federal regulation of the field.

It is recognized that the State of Washington has a strong and valid interest in the protection of Puget Sound from damage due to oil spills. However, in light of the powerful federal interests involved and the fear of the cumulative effects of inconsistent state regulations, uniform regulation of tankers by the federal government through the PWSA should preempt enforcement of the Washington law.

POSTSCRIPT

On March 6, 1978 the United States Supreme Court handed down its decision in *Ray v. Atlantic Richfield Co.*[321] In an opinion written by Justice White and joined by Justices Stewart, Blackmun and Burger, the Court held the pilotage requirement as applied to enrolled vessels, as well as the size limitation and the design requirements of the Washington Tanker Law invalid under the supremacy clause of the Constitution. The tug escort provision of the Tanker law was upheld on the ground that the Coast Guard had not prescribed a tug escort rule for Puget Sound or decided against such a requirement. The Court stated, however, that regulations by the Coast Guard may be forthcoming that would preempt the state's present tug escort requirement.

Justice Marshall, joined by Justices Brennan and Rehnquist, concurred in the majority's finding that the pilotage requirement was invalid with respect to enrolled vessels and that the tug escort provision had not been preempted. Justice Marshall did not, however, agree with the Court's conclusion that the size limitation was invalid under the supremacy clause and saw no reason to reach the issue of whether the design requirements of the Tanker Law were preempted by the PWSA. Justice Stevens submitted a separate opinion, joined by Justice Powell, in which he stated that he was persuaded that the tug escort provision had been invalidated by the PWSA. Justice Stevens concurred with the remainder of the majority's opinion.

321. 46 U.S.L.W. 4200 (U.S. Mar. 7, 1978).