Challenges to Federalism: State Legislation Concerning Marine Oil Pollution

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The increasing concern for protection of the environment from marine oil pollution has resulted in international, federal, and state action on the subject. But in American Waterways, a Florida statute was held invalid due to the requirement of uniformity in maritime law. This Article criticizes that decision, arguing that the uniformity principle is not constitutionally mandated. Other challenges to the statute—that it violates the commerce clause, or is preempted by the Federal Water Quality Improvement Act—are also discussed. The author concludes that the preventive provisions of the statute should be upheld by the Supreme Court when it hears the case.

With an extensive coastline, a recent history of tanker oil spills and an increasingly ecology-conscious citizenry, it was not surprising that the Florida legislature moved to control oil pollution. The result was the Oil Spill Prevention and Pollution Control Act of 1970.\(^1\) Bold in conception and sweeping in coverage, the Act was certain to meet resistance both from federalists and from those parties subject to its regulation: oil terminal operators and tanker owners. The Act was challenged in the recent case of American Waterways Operators v. Askek.\(^2\) The three-judge federal court struck down the entire statute, primarily on the ground that it would interfere with what the court called the constitutional requirement that the federal admiralty law be uniform of content and application. Since Alaska,\(^3\) Maine,\(^4\) Massachusetts,\(^5\) New Jersey,\(^6\) Oregon,\(^7\) and Washington\(^8\) also have recently

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3. ALASKA STAT. §§ 46.03.740, .750 (1971).
enacted oil pollution statutes and Congress has passed the Water Quality Improvement Act of 1970 (WQIA), the concern of shipowners facing a multiplicity of statutes is quite understandable. The Florida Act and the American Waterways decision provide useful vehicles for consideration of the several legal doctrines brought into play by state attempts to legislate concerning oil pollution on navigable waters in the face of federal legislation in this area.

The Florida statute is designed to serve five basic purposes: to confer licensing authority; to regulate the deliverance and transferrence of hazardous materials, including oil and petroleum products; to establish a compensation-and-control expense fund; to make terminal operators and carriers strictly liable for pollution damage; and to make them responsible for removing escaped pollutants.

The statute's requirements are designed both to prevent pollution and to provide for clean-up after an accident has occurred. The eligibility of terminal operators for a license depends upon a "showing of satisfactory containment and cleanup capability." And vessels transporting pollutants within state waters must maintain containment gear on board. The financial responsibility requirement for vessels using any port in Florida is a before-the-fact provision although its purpose is to provide after-the-fact security. The strict liability and reimbursement clauses and the obligation to clean up only come into play after a spill has occurred, but they also tend to deter pollution in the first place. Thus, the statute could be fairly described as both preventive and remedial-compensatory in purpose.

The WQIA, in contrast, focuses primarily on relief or penalties

10. 33 U.S.C. §§ 1151-75 (1970), as amended by Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500 (Oct. 18, 1972), 1972 U.S. CODE CONG. & AD. NEWS 4825. WQIA provisions dealing with marine oil pollution were generally preserved by section 311 of the 1972 Amendments. The major changes made by section 311 were to (1) impose liability for discharge of hazardous substances other than oil [§ 311(b)(2)], (2) add penalties for failure to comply with the financial liability provisions [§ 311(p)(5)-(6)], and (3) provide for reimbursement for states which act to remove discharges [§ 311(c)(2)(H)].
12. Id. § 376.07.
13. Id. § 376.11.
14. Id. § 376.12.
15. Id. § 376.09.
16. Id. § 376.06(8).
17. Id. § 376.07(2)(a).
18. Id. § 376.14(1). The provision requires that the owner or operator of the vessel provide either evidence of insurance [id. § 376.14(1)(a)], surety bonds payable to the Governor of Florida [id. § 376.14(1)(b)], or proof of qualification as a self-insurer [id. § 376.14(1)(c)].
after the fact. Such regulatory activity as is mentioned in the WQIA is directed either toward insuring that financial responsibility exists for the obvious purpose of satisfying certain claims after an incident has caused damage—or is so non-specific as to be merely an authorization for undefined future Coast Guard action.

The plaintiffs in American Waterways argued, inter alia, that the Florida Act violated the commerce clause by imposing burdens upon foreign and interstate commerce, and violated the admiralty clause by seeking to "legislate substantive maritime law which . . . is exclusively within the federal domain." The latter argument became the sole constitutional basis of the court's opinion.

This Article will begin by critically exploring the two propositions inherent in the district court's opinion: that Congress derives power to legislate on maritime subjects from the admiralty clause, independent of any of the article I, section 8 grants of legislative power; and that Congress' power to legislate in this area is exclusive—it could not permit the states to exercise their legislative powers in this area, even if it wanted to. Following this analysis, the Article will attempt to articulate the rubrics and realities of preemption or supersession of state legislation by constitutionally empowered federal legislation. The elusive foreign affairs power will also be discussed and the more familiar prohibition of undue burden upon interstate commerce briefly examined.

Next, the analysis will focus on the Florida legislation and relevant federal law. Particularized consideration will be given to the conse-

19. See Water Quality Improvement Act of 1970 (WQIA), 33 U.S.C. § 1161(f) (1) (1970), making the shipowner liable for the Government's expenses in removing the spilled oil and taking action to mitigate its harmful effects. See also id. §§ 1161(b) (4) (fines for failure to report spill) and 1161(b)(5) (fines for "knowing discharge").

A bill prohibiting all non-negligible, willful discharges of oil is presently before Congress. H.R. 15627, 92d Cong., 2d Sess. (1972). The bill would place a maximum size on cargo tanks in tankers to be constructed in the future. This is an example of a "preventive" approach but insofar as willful discharges are involved, its effectiveness depends heavily on successful detection and prosecution of offenders. If passed, the bill would provide implementing domestic legislation for the 1969 and 1971 amendments to the International Convention for the Prevention of Pollution of the Sea by Oil, opened for signature May 12, 1954, [1961] 12 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3, as amended April 11, 1962, [1966] 17 U.S.T. 1523, T.I.A.S. No. 6109, 600 U.N.T.S. 332. The 1969 amendment may be found in 9 INT'L LEGAL MATS. 1 (1970); the 1971 amendment may be found in 11 INT'L LEGAL MATS. 267 (1972).


22. See text accompanying notes 115-22 infra.


24. Id. at 1245, 3 ERC at 1431-32.
quences of each major feature of the Florida statute. The non-pre-
emption clause found in the federal WQIA\textsuperscript{25} will be examined and
the district court’s conclusion that the clause was ineffective in preserving
the Florida Act will be challenged. Finally, the efficacy of the
severability clause in the Florida statute will be endorsed in light of
the author’s belief that substantial portions of the state statute are via-
ble.

I

SCENARIO FOR CONFUSION

The admiralty clause is addressed only to the jurisdiction of the
federal courts.\textsuperscript{26} It concerns the judicial power rather than legislative
power and speaks only to the capability of the federal courts to enter-
tain actions. The clause does not define possible constraints on deter-
mining the merits of the controversies so entertained, nor does it refer
to legislative power. The clause simply states:

The judicial Power shall extend to all Cases, in Law and Equity, aris-
ing under this Constitution, the Laws of the United States, and Treaties
made . . . under their Authority . . . [and] to all Cases of admir-
alty and maritime jurisdiction . . . .\textsuperscript{27}

A. Legislative Power Inferred from the Admiralty Clause

However, courts have achieved control over legislation by reading
independent clauses in conjunction with each other. The American
Waterways court stated that “changes in the corpus of maritime law
have been effected by a variety of congressional enactments . . . .”\textsuperscript{28}
It noted that the necessary and proper clause, when read in context
with the admiralty clause confers congressional power to enact legisla-
tion in the maritime field.\textsuperscript{29} Later in its opinion the court relied heav-
ily upon \textit{Southern Pacific Co. v. Jensen}\textsuperscript{30} for the proposition that
“state legislation is invalid where it is in contravention with \textit{sic} general admiral-
ty rules or congressional enactments . . . .” and that
“to permit the states severally to regulate [shipping and terminal] indus-
tries . . . would sound the death knell to the principle of uniform-
ity.”\textsuperscript{31}

\textsuperscript{26} See Swan, Uniformity in Admiralty: Constitutional Mandate or Historical
Shibboleth?, \textit{4 Lincoln L. Rev.} 175 (1969). See also D. Robertson, \textit{Admiralty and
Federalism} 185-201 (1970).
\textsuperscript{27} U.S. Const. art. III, § 2.
\textsuperscript{28} 335 F. Supp. at 1245, 3 ERC at 1432.
\textsuperscript{29} \textit{Id.} at 1245 n.10, 3 ERC at 1432 n.10; accord \textit{Stoffel v. W.J. McCahan
Sugar Refining & Molasses Co.}, 35 F.2d 602 (E.D. Pa. 1929).
\textsuperscript{30} 244 U.S. 205 (1917).
\textsuperscript{31} 335 F. Supp. at 1248, 3 ERC at 1434.
This is a curious symbiosis to say the least. A clause referring to supportive or enabling legislation is combined with a clause defining judicial jurisdiction to produce constitutional legitimacy for the concept of substantive federal legislative power. Then the power is adduced to be *exclusive* in that states are precluded from making laws concerning maritime matters even though Congress has not exercised its full powers.32 This legislative power theory has a familiar ring, having been used by the United States Supreme Court in a 1934 decision33 upholding the validity of the federal Ship Mortgage Act.34

Only a few judges have openly confronted this issue. One of the first to grapple with it was the noted admiralty jurist, Addison Brown. He offered the plausible argument that the exclusive power to legislate concerning maritime matters was conferred *by implication* in the Constitution:

Aside from the grant of power to regulate foreign and interstate commerce, the constitution, it must be remembered, contains no direct grant to congress of legislative power over the maritime law. Its authority upon that subject, over and above the power derived from the commercial clause, though no doubt now firmly established, rests upon implication only. The grounds of this implication briefly stated, are that the constitution, in extending the judicial power to all cases of maritime jurisdiction, presupposes a certain body of maritime law as its necessary attendant; that this law is not only a matter of interstate and international concern, but requires, also, harmony and consistency in its administration, and hence cannot be subject to defeat or impairment by liability to the diverse legislation of numerous states; and that it cannot be supposed that the states, in parting with all control over the judicial administration of maritime causes, intended to reserve to themselves a general legislative power over the same subject; and that Congress must, therefore, be the only body competent to make any needed changes in the general rules of the maritime law.35

The implicit power theory as articulated by Judge Brown seems to posit congressional authority founded in something other than the concerns with import duties, naval operations, commerce, piracy and war enumerated in article I, section 8. Good arguments can be made supporting federal maritime legislation under the article I, section 8 powers, especially the commerce clause, which historically focused on

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32. *See id.* at 1248-49, 3 ERC at 1434.
33. Detroit Trust Co. v. S.S. Thomas Barlum, 293 U.S. 21 (1934).
the largely waterborne trade of a young nation. Indeed, it has been urged, in support of applying state substantive law to pleasure boating, that federal law should not be applied if the activity in question does not involve interstate commerce. Attempts to justify the implicit legislative power assume uniformity in admiralty law to be constitutionally mandated, thus gaining the necessary foundation for the desired power. This is so even though it was held quite early that the Constitution's conferral of admiralty jurisdiction to the federal courts is independent of legislative power generally and the commerce clause in particular.

B. The Uniformity Doctrine in Maritime Law

The Supreme Court played a prominent role in "constitutionalizing" the felt need for uniformity in maritime law. If the power to legislate had been predicated upon the commerce clause, application of state law could have been tested by principles of preemption including the concept of undue burden on interstate commerce even in areas where Congress had not yet spoken. By choosing to imbue the salu-

38. See Detroit Trust Co. v. S.S. Thomas Barlum, 293 U.S. 21 (1934); cf. The Lottawanna, 88 U.S. (21 Wall.) 558 (1895); Occidental Indemnity Co. v. Industrial Accident Comm'n, 24 Cal. 2d 310, 149 P.2d 841 (1944).

Justice Bradley lent his prestige to the position that Congress was given substantive power independent of any of the enumerated powers simply by virtue of the Constitution's jurisdictional grant to the courts. In Butler v. Boston & So. S.S. Co., 130 U.S. 527, 557 (1889), he said:

[Als . . . [the jurisdictional grant] is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature and not in the state legislature.
And in In re Garnett, 141 U.S. 1 (1891), a case challenging Congress' power to extend the application of the Limitation of Liability Act to all vessels, including those not in commerce, he added:

It is unnecessary to invoke the power given to Congress to regulate commerce in order to find authority . . . [for the amendment] . . . the power to make such amendments . . . is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce

Id. at 12.

39. The admiralty jurisdiction of the United States is a part of its judicial power, and not its legislative. It extends "to all cases of admiralty and maritime jurisdiction." And while it does not authorize congress to create admiralty cases, yet, if in the exercise of its power derived from other clauses of the Constitution, it should do so, as the power to regulate commerce, the grant of judicial power would extend to them, because in their nature and constituents they would be cases of admiralty and maritime jurisdiction.

The City of Salem, 37 F. 846, 849 (D. Ore. 1889).
41. See part II infra.
tory policy of uniformity with a constitutional aura, however, the Court was committed to a seemingly inflexible mandate for federal law. In the much-criticized but distressingly tenacious Jensen opinion the Court emphasized the need to preserve the "characteristic features of the general maritime law" and to prevent states from interfering with the "proper harmony and uniformity of that law."

Because the saving clause in section 9 of the Judiciary Act of 1789 preserved concurrent jurisdiction in state courts for admiralty plaintiffs to pursue common law remedies, it might be argued that the states could similarly extrapolate from their jurisdictional powers to allow state courts to reach decisions departing from federal precedents in maritime cases. Although the courts have not permitted such results, no satisfactory constitutional reasons for the prohibition have been offered.

Within the federal court system, the Anglo-American commitment to stare decisis, coupled with the corrective review of the Supreme Court sitting as the highest federal court, assist in achieving uniformity. In actions originating in state courts, the Supreme Court has also labored to secure uniform results. Lacking a convincing constitutional argument, the Court has rather lamely offered variations on its uniformity-for-uniformity's-sake theme from the workmen's compensation cases.

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43. Jensen is the first of the unfortunate "workmen's compensation trilogy" [the other two cases are Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) and Washington v. Dawson & Co., 264 U.S. 219 (1924)] where the Court extrapolated from speculative dicta in an early opinion of Justice Bradley in The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1875), into a purported constitutional limitation on state legislative power. Another leading case adopting this rationale is Chelents v. Luckenbach S.S. Co., 247 U.S. 372 (1918).

44. 244 U.S. at 216. See generally D. Robertson, Admiralty and Federalism 273-74 (1970); Note, From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century, 67 Harv. L. Rev. 1214 (1954).


There are several substantial reasons for maintaining a body of maritime law as uniform as possible—throughout the world as well as among the several states. Since commercial vessels are often used between ports in differing jurisdictions, their owners and operators are benefited to the extent the governing regime of law can be unified. Planned transactions such as hiring a crew, chartering, ship repair, and carriage of goods can be entered into with maximal primary predictability; casualty losses can be insured against with a sound underwriting foundation; and operational procedures and equipment can be standardized for greater economy and minimal confusion of application. Absent a multilateral treaty on point the federal government is the largest governing unit through whose laws such uniformity can be insured. Thus, insofar as the well-being of the water carriers is concerned, the federal government would appear to have the predominant interest, and advancing uniformity should be a guiding choice of law principle. This is distinctly different, however, from enforcing it as a constitutional requirement. The Court has recognized this distinction and permitted application of state law when federal remedies were felt to be unavailable and when Congress had indicated a preference for state regulation. In cases not involving state statutes conflicting with federal statutes, the courts have often used the governmental-interest approach to resolve conflicts between state and federal precedents. As might be expected, this does not always result in the federal rule prevailing, although most of the time federal interests are more focused, more intense and more easily impaired, thus justifying resort to the federal solution.


53. See, e.g., Just v. Chambers, 312 U.S. 383 (1941); Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922); Rautbord v. Ehmann, 190 F.2d 533 (7th Cir. 1951). One could imagine a state private nuisance law that created a right of redress against willful and repeated noisemakers being invoked against a rowdy yachtsman on federal navigable waters within that state, who had blown a compressed air horn. Absent congressional legislation supportable by the commerce clause (which support is hard to imagine), the federal court might well have to apply the state law and recognize the tort even though no such cause of action existed under the general maritime law and disuniformity would thereby result.

54. See, e.g., Kossick v. United Fruit Co., 365 U.S. 731 (1961); Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959); Union Fish Co. v. Erick-
In fact, apart from the workmen's compensation cases, the federalization of maritime law has been accomplished through jurisdictional devices, preemption, choice-of-law analyses and straight-forward policy determinations without needing a constitutional rule of uniformity.\textsuperscript{55} When the growth of the law was felt to require it, the Court has borrowed state law without apparent qualms to augment the general maritime law.\textsuperscript{56}

Once the uniformity principle has been unfrocked of its constitutional mantle, it is apparent that Congress may offer reliable guidance to the courts as to when uniformity may be sacrificed to competing state interests. Congress can expressly preempt a field where maritime commerce is concerned; it can remain silent and leave it for the courts to decide how far the states can intrude; and it should be able to declare, without violating the Constitution, that the states may legislate exclusively or concurrently in a given area.\textsuperscript{57}

The \textit{American Waterways} court failed to analyze this critical congressional power. Although it appeared to recognize the dimensions of the preemption issue, the court never transcended the inflexible uniformity rules of the \textit{Jensen} decision.

\section*{II
THE PREEMPTION PROBLEM}

Insofar as oil pollution is concerned, it is apparent that most of the law to be applied will be found in statutes, or regulations promulgated pursuant to statutory authority. Here, at least, the Constitution offers guidance: it indicates under what circumstances Congress may act\textsuperscript{58} and states further that when it has acted, its laws are the supreme law of the land.\textsuperscript{59} Often this does not simplify the problem, for obtuse catchwords such as "preemption," "occupation of the field," "maritime but local," "interstitial and supplementary," and "non-conflicting" come into play as courts struggle to determine if state statutes can be valid in areas of mandated or assumed federal interest.\textsuperscript{60} Moreover federal

\begin{itemize}
  \item \textsuperscript{55} See \textit{Swan}, supra note 26, at 185-208.
  \item \textsuperscript{56} One commentator has noted that the Court's relaxation of the policy favoring uniformity has occurred (with just two exceptions) only when it has served to benefit plaintiffs. He concluded that the benefits to industry from uniformity are subordinated to the interests of allowing recovery and maximizing compensation. \textit{Currie}, supra note 50, at 219-20.
  \item \textsuperscript{57} \textit{See Willeburn Boat Co. v. Fireman's Fund Ins. Co.}, 348 U.S. 310, 321 n.29 (1955).
  \item \textsuperscript{58} U.S. CONST. art. I, §§ 8 & 9.
  \item \textsuperscript{59} Id. art. VI.
  \item \textsuperscript{60} [The Supreme Court, in considering the validity of state laws in the light.
statutes themselves sometimes add to the difficulty by containing saving clauses or shared-responsibility clauses purporting to allow some measure of parallel state action.\(^{61}\)

### A. General Approaches and Tests

The least difficult preemption cases are those in which the state statute is congruent in coverage with the federal statute and conflicting in one or more material aspects. Under these circumstances the state law is generally held preempted.\(^{62}\) The decision becomes more difficult when Congress has enacted legislation applying to a substantial part but not all of a "field" and a state has attempted to regulate or control a portion not specifically covered by the federal statutes. The court must then determine if the federal government has "occupied" the field. If the court so holds, the state legislation is invalid on the theory that Congress has decided that no further regulation is desirable or that it alone can determine the timing and content of further statutory control.\(^{63}\)

The arguments against holding for preemption are found in *Florida Lime & Avocado Growers, Inc. v. Paul.*\(^{64}\) There the Supreme Court cautioned that preemption was not to be lightly presumed and said:

> [F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.\(^{65}\)

The minority repeated the oft-quoted rubric that state legislation would be invalid if it stood "as an obstacle to the accomplishment and execu-

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61. See text accompanying notes 142, 160-66 infra.
62. See Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) where the Illinois Public Utilities Commission was enjoined from enforcing Illinois law against grain elevator operators licensed under U.S. Warehouse Act [7 U.S.C. § 241 (1970)] because eight facets of behavior allegedly violating state law were within the regulatory scope of the federal act.
64. 373 U.S. 132 (1963) (5-4 decision).
65. *Id.* at 142.
tion of the full purposes and objectives of Congress. The majority, although remanding for findings as to the burden on interstate commerce, found a state avocado-marketing restriction was not such an obstacle for preemption purposes.

Another test which is invoked in the absence of an explicit congressional directive is whether or not Congress has endeavored to create a "pervasive scheme" of federal regulation. Here legislative history often assists in determining the nature and magnitude of the problem that Congress sought to rectify and its design to accomplish this. On the other hand, mere breadth of congressional purpose is not necessarily determinative. For example, the checkered history of suppliers liens in maritime law and the accellerated growth of the American merchant marine led Congress to pass the Ship Mortgage Act. Notwithstanding Congress' deliberate response to the need for a uniform national scheme, there were gaps in the resulting statute. Questions of what constituted adequate consideration and notice have been left to state law on the theory that such interstitial supplementation was necessary and that no emasculation of the federal purpose would result.

Cases involving regulation of public utilities and common carriers, as opposed to products and commodities, reveal even more subtle distinctions in evaluating the need for exclusive federal control. Both industries typically operate across state lines and thus face the problem of not only stricter standards in one state but differing standards in

66. Id. at 165, citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941). The majority opinion in Avocado Growers utilized a distinction made in earlier regulation of commerce cases: that while a state may not control production of goods destined for interstate commerce already regulated in some measure by the federal government (see Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1941)), it may regulate the marketing within its boundaries of goods moving in interstate commerce to protect the safety and welfare of its residents. 373 U.S. at 145-46. The minority differed on the application of the conceded legal rule and contended that the state regulation, by choosing a criteria which the federal administrator had rejected, had raised an "obstacle". Id. at 166. Moreover, the minority felt the federal regulation was a restriction on marketing even though, botanically speaking, compliance depended on harvesting decisions. Id. at 171-72. Finally they argued that the state marketing restriction protected the growers' image and economic interest rather than the health and welfare of the consumer and thus was not within the state's police power in any event. Id. at 168-69. Avocado Growers, besides being a leading case, illustrates the difficulties which typify preemption cases.


70. See, e.g., Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 1 ERC 1016
several states.\textsuperscript{71} Here again the court is more inclined to uphold a state requirement if it is in an area where Congress has not yet specifically acted and if it qualifies as an attempt to protect the health and welfare of the state's residents.\textsuperscript{72}

\section*{B. Determining Congressional Intent}

The task of determining the intent of Congress can be difficult as the purpose of a federal statute is often susceptible of various interpretations, notwithstanding declarations of purpose within the statute itself. A narrowly construed purpose can support a holding of preemption on the theory that once so circumscribed, any interference with or supplementation of the federal scheme would be disruptive.\textsuperscript{73} On the other hand, a broadly defined purpose may be viewed as an attempt to sweep in all aspects of the problem. This is, in part, the rationale of \textit{Northern States Power Co. v. Minnesota},\textsuperscript{74} where more stringent state standards for power reactor design and construction were struck down in view of the utility's compliance with Atomic Energy Commission standards. The court reasoned that the congressional purpose was to federalize all aspects of the radioactivity hazard. On the other hand, a narrowly focused federal purpose may leave room for state laws with different purposes\textsuperscript{75} and broad objectives may help sustain state controls under the theory that they are different means to the same end.\textsuperscript{76}

At other times analysis of the avowed purposes of state and federal laws may not be so fruitful. Identical purposes have been found

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\item \textsuperscript{71} See, e.g., Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (mudguards required in Arkansas were illegal in Illinois).
\item \textsuperscript{73} See, e.g., Campbell v. Hussey, 368 U.S. 297 (1961) (grade labeling under \textit{Tobacco Identification Act}); Pennsylvania R.R. Co. v. Public Service Comm'n, 250 U.S. 566 (1919) (platforms on end cars controlled by caboose provision in \textit{Safety Appliance Act}).
\item \textsuperscript{74} 320 F. Supp. 172 (D. Minn. 1970), \textit{aff'd}, 447 F.2d 1143 (8th Cir. 1971), \textit{aff'd mem.}, 405 U.S. 1035, 3 ERC 1976 (1972).
\item \textsuperscript{75} See, e.g., Kelly v. Washington ex rel. Foss Co., 302 U.S. 1 (1937) (state safety inspections of small motor vessels permitted where Congress had regulated only equipment and hulls of steamships and large motor vessels).
\item \textsuperscript{76} See Chrysler Corp. v. Tofany, 419 F.2d 499 (2d Cir. 1969); \textit{Chrysler Corp. v. Rhodes}, 416 F.2d 319 (1st Cir. 1969). In \textit{Tofany} the court de-emphasized a policy of uniformity expressed in the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1425 (1970), and upheld Vermont's disapproval of a highbeam headlight, saying: "[U]niformity . . . is of course desirable, but in these cases, it is truly a secondary objective." 419 F.2d at 511. The court found a broader federal objective to reduce accidents on highways and held the Vermont standard an acceptable way of accomplishing that end.
\end{itemize}
in regulatory schemes felt to be compatible, and statutes that in fact conflicted have been preempted regardless of the fact that their declared objectives did not encroach on the federal purpose. Of course when compliance with state law inherently precludes compliance with federal law, the former will be preempted.

If the federal statute unambiguously states that contrary state legislation is invalid, and the federal legislation is otherwise valid, the question is easily resolved. In practice, few statutes are so worded and even those that are may not be phrased to cover unforeseen future conflicts.

C. Preemption in Maritime Pollution Cases

The maritime-but-local doctrine was formulated by the Supreme Court in the nineteenth century to combat commerce clause challenges to state pilotage, wharfage, and quarantine statutes. Its essential premise was that there were some aspects of ocean commerce where the activity was so geographically localized and where local expertise would be so clearly superior to centralized control that no prejudicial disruption of federal uniformity would result. On the other hand, local regulations which forced shipowners to alter operating procedures, change equipment, or be exposed to liabilities predicated on widely disparate standards of behavior as their vessels transited from one port to the next were felt to be unduly burdensome and to undercut the fundamental policy of governance by uniform maritime laws.

77. See, e.g., California v. Zook, 336 U.S. 725 (1949) ("ride bureau's" use of non-licensed carriers violation of both state and federal law).
78. See First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152 (1946) (state engineering requirements on interstate power dam related to water diversion held not binding on federal licensee). In Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1959), the Court said it did not matter that the "violent conduct [labor strife] was reached by a remedy having no parallel in, and not in conflict with" any federal remedy and "even though the ground of intervention [was] different than that on which federal supremacy has been exercised" the state injunction law was preempted by the National Labor Relations Act, 29 U.S.C. §§ 151 et seq. (1970). 348 U.S. at 480.
82. See The Steamship New York v. Rea, 59 U.S. (18 How.) 223 (1856). In Hess v. United States, 361 U.S. 314 (1960) the majority upheld the application of a stringent state liability law to a proceeding in admiralty but warned that there might be some state laws that, even though local in application, "might contain provisions so offensive to traditional principles of maritime law that admiralty would decline to enforce them." Id. at 320.
In *Huron Portland Cement Co. v. Detroit* a city air pollution ordinance made certain discharges of smoke a violation subject to penalties and authorized officials to "seal" offending equipment after three successive convictions. Plaintiff owned a fleet of ships powered with old fashioned boilers and in order to keep steam pressure to work winches while in port, it was necessary periodically to blow soot from the burners. The resulting discharges were in violation of the ordinance, so the shipowner sued to enjoin its enforcement on grounds that it constituted a burden on interstate commerce. The plaintiff also claimed the ordinance was preempted by federal law which provided for periodic boiler inspection and certification by the Coast Guard. The Supreme Court held that the federal inspection law focused only on shipboard safety and that the ordinance therefore was not conflicting. The ordinance was a valid exercise of the power to protect the health and welfare of the residents of Detroit and, the Court held, was supportive of the objective of clean air through local control declared in other federal legislation. No evidence of conflicting requirements in other port states was introduced, so the Court did not have to consider its earlier ruling in *Bibb v. Navajo Freight Lines, Inc.* that the impossibility of complying with differing state requirements constituted a burden on commerce.

Justice Douglas, author of the *Bibb* opinion, dissented in *Huron Cement*. Partially in anticipation of conflicting regulations of other states and partially from a feeling that compliance with one set of inspection standards should be enough, he declared:

> The variety of requirements for equipment which the States may provide in order to meet their air pollution needs [sic] underlines the importance of letting the Coast Guard license serve as authority for the vessel to use, in all our ports, the equipment which it certifies.

The difficulty with this position is that air pollution is in many respects a phenomenon dependent upon entirely local parameters such as meteorological patterns, the degree of industrialization, transportation systems, and population density. Thus neither the Coast Guard nor any other agency could define a single set of equipment standards that would apply with uniform effectiveness to Detroit, Michigan and Coos Bay, Oregon. Moreover, the Detroit ordinance focused on pollution

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84. *Id.* at 442 n.1, 1 ERC at 1017 n.1.
86. 362 U.S. at 445-46, 1 ERC at 1018.
88. 362 U.S. at 455, 1 ERC at 1018 (Douglas, J., dissenting).
89. In *Parker v. Brown*, 317 U.S. 341 (1943), the Supreme Court upheld a state raisin-marketing program alleged to be in violation of federal antitrust laws. Describing the market stabilization with regard to raisins as a matter of "local concern",...
emissions, not on equipment as such. Thus the shipowner was theoretically free to modify his boilers or to find substitute equipment for handling cargo, as he saw fit. Justice Douglas' remarks come closer to the mark in the oil pollution context, where a tanker calling at Florida ports or even merely transiting its waters would be required by the state law to carry on board specified "containment gear."90 Also, in the marine context, the Corps of Engineers has endeavored with fair success to prescribe vessel navigation regulations in restricted waters through requirements tailored to specific local conditions.91 This function could and should be greatly expanded to reduce strandings and collisions which frequently cause oil to escape.

The provisions of state laws that establish more stringent standards calling for additional equipment or further penalties for noncompliance have been held invalid where the federal statutes cover the same specifics. In considering such cases the Supreme Court has stated: "The States [can] not legislate so as to require greater or less or different equipment; nor [can] they punish by imposing greater or less or different penalties."92 The Court has added that

\[\text{compliance with the engineering requirements of the State . . . if additional to, or different from, the federal requirements, may well result in duplications of expenditure that would handicap the financial success of the project}^93\]

and thus such requirements would be invalid in view of overall national priorities. The Court has also repeatedly emphasized, however, that state legislation which protects the health and welfare should only be superseded "where the repugnance or conflict is so 'direct and positive' that the two acts cannot be 'fairly reconciled or consistently stand together.'"94

the Court said that "because of its local character and the practical difficulties involved, [it] may never be adequately dealt with by Congress." Id. at 362-63.

In recognition both of the geographical variations bearing on the problem of air pollution and the differing goals of the states in this area, the Clean Air Amendments of 1970, 42 U.S.C. §§ 1857-58a (1970), provide for the establishment by the Environmental Protection Agency (EPA) of minimum air quality standards. However, the states are explicitly authorized to adopt and enforce stricter standards than those imposed by EPA. Id. § 1857d-1.

90. See FLA. STAT. ANN. § 376.07(2) (Supp. 1972).
91. See 33 C.F.R. § 207 (1972).
93. When Congress has taken a particular subject matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go further than Congress has seen fit to go.
95. First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152, 167 (1946).
Unlike the Detroit ordinance in *Huron Cement* which was being applied only to United States-flag vessels,\(^9\) tankers of many flags carry oil through Florida waters. The importation and transportation of oil might fairly be said to be governed by

"that class of laws which concern the exterior relation of this whole nation with other nations" . . . . And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.\(^9\)

In cases involving a possible conflict of state laws with federal legislation affecting foreign-flag vessels, the courts cannot invoke a rigid formula to ascertain the intended coverage of the federal act, but must determine whether, under the circumstances of . . . [the] particular case . . . [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. And in that determination, it is of importance . . . [whether the] legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits.\(^9\)

The United States has ratified two multilateral treaties concerning freedoms and duties arising out of use of the sea by merchant vessels.\(^9\)

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\(^9\) Foss Co., 302 U.S. 1 (1937), the Court said: [Where the state law is but the exercise of a reserved [police] power, the repugnance or conflict should be direct and positive so that the two acts could not be reconciled or consistently stand together in order for the supremacy clause to preempt the state law. *Id.* at 11, *citing* Reid v. Colorado, 187 U.S. 137, 148 (1902).

*In Lockheed Air Terminal, Inc. v. City of Burbank, 457 F.2d 667, 3 ERC 1983 (9th Cir.), prob. juris. noted, 41 U.S.L.W. 3183 (U.S. Oct. 10, 1972) (No. 71-1637), the court held a municipal noise ordinance preempted by the Federal Aviation Act, 49 U.S.C. §§ 1101 et seq., notwithstanding a general clause saving "remedies now existing by common law or by statute". *Id.* § 1506. The court reached its decision even while recognizing the ordinance as an exercise of the municipality's power to protect the health and welfare of its residents.*

\(^9\) See 362 U.S. at 441, 1 ERC at 1016.


\(^9\) The need for a multilateral treaty to establish a fair balance between the conflicting pressures for freedom of navigation and for coastal state regulation was recognized in the early 1920's when the International Law Commission tried to develop an acceptable treaty draft. *See* M. McDougal & W. Burke, *The Public Order of the Oceans* 599 (1962). Nearly 35 years passed before the twin conventions [see notes 100 & 101 and accompanying text *infra*] were completed in 1958. Nearly three dozen nations have ratified or adhered to these treaties including the United States, the
Notably, article 24 of the Convention on the High Seas calls for each signatory nation to adopt regulations to prevent oil pollution. Similarly, the Convention on the Territorial Sea and Contiguous Zone recognizes the power of a coastal state to "punish the infringement ... of its ... sanitary regulations" and to "take the necessary steps ... to prevent passage which is not innocent." Although penalties may be levied under United States law against shipowners whose agents have willfully discharged oil and these penalties may have a deterrent effect there really has been little progress at the federal level in adopting preventive regulations. Such regulations might include restrictions on routes and approaches, vessel tank size and construction, standards of maneuverability, minimum ship-to-ship communications, requirements for on-board oil containment equipment, and confirmatory off-shore inspections. For most of these alternatives, considerations of the reciprocal burdens on United States-flag vessels using foreign waters, the relationship to existing treaty obligations, the impact on foreign trade and national oil import policy, and the general tenets of international law would suggest that

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United Kingdom, Russia, and The Netherlands. See 6A E. BENEDICT, ADMIRALTIES 57, 67 (1972).


100. Every State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil, taking account of existing treaty provisions on the subject. [1962] 13 U.S.T. 2313, 2319, T.I.A.S. No. 5200, 450 U.N.T.S. 82, 96.


102. Id. art. 24.

103. Id. art. 15.

104. See, e.g., 33 U.S.C. § 1161(b)(5) (1970). The impact of the penalties—up to $10,000 for each "knowing discharge"—as a deterrent are, of course, directly correlated to the ability to identify the discharger. Since most bilge pumping and tank flushing is done at night from moving ships, identification is difficult to say the least.

105. See note 137 and accompanying text infra.

106. E.g., rudder-area-to-displacement ratios, requirements for bow thrusters, number of propellers, stem anchors, horsepower-to-displacement ratios, maximum beam and laden draft.


preventive regulation would be most properly handled at the federal level.

III

COMPARISON OF THE FLORIDA ACT WITH FEDERAL STATUTES

A. Federal Statutes and the States' Role in Marine Pollution

The preventive provisions of federal law—other than the deterrent effect which may be achieved by the threat of after-the-fact penalties, obligations, and liabilities—appear to be non-specific and inoperative. For the most part, the Coast Guard, or its parent, the Department of Transportation (DOT), already have sufficient statutory authority to promulgate regulations designed to prevent casualties or the escape of oil following a casualty. Because of possible technological changes, specific regulations formulated by an expert agency under its statutory authority are probably preferable to imposing operational constraints directly through statutes. With regard to nonintentional oil pollution risks, however, the Coast Guard has been slow to act.

1. Federal Statutory Authority

The DOT can modify and further control inland navigation by promulgating amendments to the Inland Rules of Navigation, and Coast Guard delegates have the power to prescribe anchorage and discharge areas in order "to safeguard ports, harbors, territories or waters of the United States . . . ." This authority has been exercised in the past almost exclusively with regard to ships carrying flamables or munitions. Following a collision, stranding, fire, or explosion, oil-pollution considerations undoubtedly would enter into the Coast Guard's ad hoc decision as to where the vessel might next proceed. And environmentalists have received some indications that the Coast Guard might use this authority to establish sealanes in territorial waters. Similarly, the Coast Guard is empowered by statute to establish, maintain, and operate various types of aids to navigation.

109. See text accompanying notes 110-122 infra.
If more specific authority is needed, Congress has supplied it by passing the Ports and Waterways Safety Act of 1971. The Act authorizes the Secretary of Transportation, inter alia, to establish, operate, and compel compliance with vessel traffic control systems in congested waters; to control vessel movements in hazardous circumstances; to restrict traffic on the basis of size, speed, and operating characteristics of the vessel; and to require pilots. Regulations concerning design, construction, cargo handling and stowage, and preventive inspections are also authorized.

The Commandant of the Coast Guard is authorized to promulgate regulations pertaining to tanker inspection for the specific purpose of reducing the likelihood of discharges of oil. To implement these regulations the Coast Guard is also empowered to board and inspect domestic and foreign vessels within twelve miles offshore. It seems clear that such boarding may take place after an incident leading to the escape of oil has occurred, but neither the WQIA nor the Conference Committee Report indicate whether a purely preventive boarding is also authorized. The President or his delegate are also empowered to require that oil spill containment equipment be carried aboard each vessel, but implementing regulations have not yet been issued. Since Congress is obviously interested in staking a claim to this type of regulation, the Florida Act's provision requiring that containment gear be carried on board would seem to be preempted.
2. Recent Court Decisions

Two recent decisions have dealt with the problem of state restrictions on the discharge of vessel sewage. Authority to set standards for on-board toilet systems is vested in the Environmental Protection Agency, but there was a delay in the promulgation of such standards, so New York and Michigan developed strict standards of their own. In *New York State Waterways v. Diamond*, a challenge to New York's water craft sewage law, the court held that the federal WQIA "does not evidence congressional intent to preempt or exclude state action at this time" and went on to say that a state is not "powerless to act to protect the health and welfare of its residents during the period prior to the effectiveness of federal standards." Plaintiffs in *Diamond* also contended unsuccessfully that the New York requirements imposed an undue burden on interstate commerce, an argument that was raised (but not decided) in *American Waterways*. Thus, during an interim period, *Diamond* arguably supports the validity of the Florida requirements with regard to on-board containment equipment.

In *Lake Carriers' Ass'n v. MacMullan*, the challenge to the Michigan sewerage statute, plaintiffs conceded that the state requirements would be preempted once the federal regulations were issued. Plaintiffs contended, however, that interim compliance with the state statute would be costly and in possible conflict with the eventual federal standards. Because the state statute called for flexibility in its application to enable shipowners to "maintain maritime safety requirements and comply with federal marine and navigation laws and regulations," and since it had not yet been interpreted by the Michigan courts, the majority invoked the abstention doctrine. In affirming dismissal of the complaint the Court held that the Michigan legislation was "susceptible to a construction by the state courts that would avoid

130. 406 U.S. at 506-07, 4 ERC at 1131-32.
132. 406 U.S. at 512, 4 ERC at 1133.
or modify the [federal] constitutional question.'”'133 The dissent argued that the issues of congressional intent to preempt state law and the burden on interstate commerce were “in large measure, independent of the particular construction given the Michigan Act.”134

The Florida legislation evidences an intent for state clean-up activities to be compatible with the National Oil and Hazardous Materials Pollution Contingency Plan.135 However, while the full reach of the statute has not yet been interpreted by the Florida Supreme Court, the possible flexibility built into the state clean-up provisions does not seem broad enough to require federal courts to apply the abstention doctrine. More importantly, the sewerage provisions of the WQIA do not contain a non-preemption clause as do the oil pollution provisions.136

3. State Role Regarding Preventive Measures

General navigation and hull-structure requirements for commercial seagoing vessels are the province of the Coast Guard.137 State regulation of these areas might unduly burden interstate commerce as to domestic ships.138 It might also interfere with the foreign affairs powers of the federal government insofar as the regulations applied to foreign ships,139 even though Congress and the Executive branch have not fully occupied these fields through existing legislation or treaties. However, it is appropriate for state agencies to control ad hoc clearances for vessels to proceed, depending upon such factors as tides, channel depths, sea and weather conditions, and the utilization of local pilots.140 Insofar as the Florida statute permits the Department of Natural Resources to set “requirements for minimum weather and sea conditions

133. Id. at 510-11, 4 ERC at 1133.
134. Id. at 516, 4 ERC at 1135 (Powell, J., dissenting).
140. See text accompanying notes 80-82 supra.
for permitting a vessel to enter port,"141 it seems unobjectionable.

B. Permissible State Remedial Measures—Effect of the Non-Preemption Clause

1. The Non-Preemption Clause Generally

With regard to remedial provisions the WQIA contains a little-noticed but potentially important clause which disclaims preemption by the Act of a state's imposition of "any requirement or liability with respect to the discharge of oil" into state waters.142 The WQIA permits the federal government to recover the costs of removing the oil from the water and from public and private shorelines and of otherwise minimizing damage to the public.143 Private claimants and state and local governments are left to their rights under the general maritime law, which holds injury from oil pollution to be a maritime tort.144 This means that liability must be predicated on fault,145 and probably means that contribution between joint tortfeasors should be permitted.146 If the cause of the escape of oil is not within his "privity or knowledge," the shipowner may be able to limit his liability to the value of his ship following the casualty plus the pending freight.147

If the non-preemption clause of the WQIA is taken literally, it would seem to allow a state to permit private claimants, or the state itself, to recover under strict liability principles rather than under the usual fault concept of the maritime law. It is here that the courts must proceed with the most caution. In American Waterways the court reached a conclusion which, out of context, is unassailable:

The statement that Congress did not intend to preclude state imposed liability for oil pollution simply means that the states are free to enforce pollution control measures that are within their constitutional prerogative.148

141. FLA. STAT. ANN. § 376.07(f) (Supp. 1972).
143. Id. § 1161(f).
145. In American Waterways the court erroneously suggested that unseaworthiness might be a basis for recovery in oil spill cases. 335 F. Supp. at 1247, 3 ERC at 1433. Since the warranty of seaworthiness depends upon a special relationship between plaintiff and defendant, it is not usually available to parties injured by pollution from oil spills. See Swan, Internationaand National Approaches to Oil Pollution Responsibility: An Emerging Regime for a Global Problem, 50 ORE. L. REV. 504, 558-59 (1971).
148. 335 F. Supp. at 1249, 3 ERC at 1435 (emphasis added).
However the opinion prefaced this remark with an ode to the principle of uniformity of maritime law. Citing Moragne v. States Marine Lines, Inc.,\textsuperscript{149} the court reasoned that "admiralty cannot tolerate the inconsistency inherent in accommodating state remedial statutes to exclusively maritime substantive concepts."\textsuperscript{160}

2. The Uniformity Dogma

Moragne did, indeed, terminate the inconsistent application of state wrongful death statutes to longshoremen's shipboard deaths in state waters. Owing to earlier Supreme Court decisions, that problem had become acute and had led to uncertainty among practitioners and even to confusion among members of the Court.\textsuperscript{151} The solution, however, resulted from the determination that federal courts could offer a non-statutory death remedy that they had previously considered unavailable, and not from any constitutional invalidation of state law applied to such plaintiffs.\textsuperscript{152}

The American Waterways court relied upon The Lottawanna\textsuperscript{153} and Knickerbocker Ice Co. v. Stewart\textsuperscript{154} for its "constitutionalization" of the uniformity principle.\textsuperscript{155} As suggested earlier,\textsuperscript{156} the principle is certainly not expressly stated in the Constitution and there is no persuasive argument that it can be inferred.\textsuperscript{157} The district court may have felt its course dictated by the series of Supreme Court cases. However, those cases are all more than 48 years old and of dubious logic; it can be hoped that their precepts will not be perpetuated simply by the inertia of the rule of precedent.

Unquestionably, uniformity of substantive law in maritime cases would be convenient for maritime attorneys and might be desired by insurers of shipowners' liabilities. Insofar as maritime cases are brought in federal courts and do not involve state statutes, Supreme Court review and stare decisis will maintain de facto uniformity. When maritime suits are initiated in state courts there is wisdom in fol-

\textsuperscript{149} 398 U.S. 375 (1970).
\textsuperscript{150} 335 F. Supp. at 1249, 3 ERC at 1435.
\textsuperscript{152} 398 U.S. at 400.
\textsuperscript{153} 88 U.S. (21 Wall.) 558 (1875).
\textsuperscript{154} 253 U.S. 149 (1920).
\textsuperscript{155} 335 F. Supp. at 1249, 3 ERC at 1435.
\textsuperscript{156} See text accompanying notes 27-40 supra.
lowing precedents of federal maritime law, but the supremacy clause cannot be said to compel this result. On the other hand, Congress could be found to have preempted a substantive area by specific legislation, to have occupied the field and thus foreclosed state legislation even where the particular issue is not specifically covered by existing federal statutes, or to have conferred concurrent legislative jurisdiction so long as no conflicts arise.

3. Legislative History of the Clause

The non-preemption clause of the WQIA appeared in the Senate bill and was retained in reworded form by the Conference Committee. The Senate Report indicated that the Public Works Com-

158. Even though ad hoc judicial decisions in the Anglo-American legal tradition have precedential value, it is too strained to suggest they were intended to be included in "the Laws of the United States" referred to in the supremacy clause [U.S. Const. art. VI, § 2], except possibly insofar as they interpret federal statutes. Nowhere are judicial precedents referred to in the versions of the clause found in the drafts submitted to the Constitutional Convention by Edmund Randolph ("articles of union"), Charles Pinckney ("Articles of Confederation"), William Patterson ("Acts of the United States in Congress Assembled" and "legislative acts") or Alexander Hamilton ("Constitution or laws"). See Documents Illustrative of the Formation of the Union of the United States 953-88 (U.S. Gov't Printing Off. ed. 1927).

It is true that the Supreme Court, in Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962), held that the federal common law would override "incompatible doctrines of local law" when the subject "is peculiarly one that calls for uniform law." Id. at 102-03. However, the case involved a determination of whether a collective bargaining agreement had been breached. The Court relied heavily on Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), and did not mention the supremacy clause. Lincoln Mills held that "the power of Congress to regulate the enforceability of arbitration clauses in collective bargaining agreements affecting interstate commerce under the Commerce Clause is plain." Id. at 457. Lucas Flour impliedly considered the federal courts as Congress' delegates to decide labor contract cases "according to the precepts of federal labor policy" and to insure that "doctrines of federal labor law uniformly . . . prevail over inconsistent local rules." 369 U.S. at 103-04. Arguably, federal court decisions could be binding on state courts when the federal courts as surrogates are enunciating doctrines and policies in an area where Congress has power to legislate under a constitutional grant of authority. This argument is bolstered by the fact that section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1970), specifically conferred jurisdiction over collective bargaining contract disputes on federal courts, thus creating a new variety of federal question jurisdiction. The argument becomes far more tenuous, however, when the federal courts act in areas where Congress would be powerless to legislate and uniformity is needed only as a matter of judicial or administrative convenience. It is especially tenuous because the admiralty jurisdiction is not part of the federal question jurisdiction. Romero v. International Terminal Operating Co., 358 U.S. 354 (1959). See also the hypothetical situation discussed in note 53 supra.

159. The rule stated in the text is considerably narrowed when the police power is involved. See note 94 supra.


161. The all-inclusive wording "any State or local law" [S. 7, 91st Cong., 1st Sess. § 12(p) (1969)] was changed to "any requirement or liability with respect to the dis-
mittee did not intend, for example, to preclude states from enacting "absolute liability without limits on oil discharged from State-leased offshore oil facilities." Although the illustration it used refers to structures rather than ships and necessarily refers to oil originating in state waters, it is clear the notion of state-imposed strict liability for claimants other than the federal government was considered and found acceptable.

The Conference Report explained that under the present version of the preemption clause

any State would be free to provide requirements and penalties similar to those imposed by [the WQIA] or additional requirements and penalties. These, however, would be separate and independent from those imposed by [the Act] and would be enforced by the States through its [sic] courts.

While not shedding much light on the question of the temporal effect of the clause—i.e., whether it applies before or after the discharge of oil or both—it is evident that complementary and even overlapping legislation was contemplated so long as it was not directly conflicting. Finally, it must be remembered that determination of water quality standards for deliberate discharge permits or for penalization of inadvertent discharges from fixed-location facilities has historically been left to or shared with the states. State enforcement has not been particularly effective, however, because of funding deficiencies, lack of trained personnel, and political pressure.

The most recent water quality programs give power to the federal agencies to act concerning pollution of interstate waters but still con-
template some concurrent state responsibility. The Senate Public Works Committee envisioned an approach for state coastal water quality standards involving shared responsibility with federal approval. The regulations defining oily discharges in "harmful quantities" which were promulgated pursuant to the WQIA make reference to state standards. Taken together, this history offers clues that the intent of Congress was to reserve to itself the ultimate control over planned discharges into interstate waters while leaving some after-the-fact compensatory schemes, penalties, and requirements to the states so long as there was no direct conflict making compliance with both federal and state law impossible or unreasonably burdensome.

4. Liability Under the Florida Act and Preemption

It is in this light that the WQIA's non-preemption clause should be read. To illustrate the point, consider that the Florida statute, albeit in an ambiguously worded passage, provides that certain shipowners are liable—perhaps regardless of fault—for injuries to private claimants from the escape of oil. While it is true that the WQIA

168. See, e.g., 33 U.S.C. § 1171(b) (1970), which requires a party seeking a federal discharge permit to obtain a certification from the state water pollution agency indicating that his anticipated discharge will not violate the state water quality standards.


170. A discharge of "harmful quantities" is defined as a discharge which "violate[s] applicable water quality standards." 40 C.F.R. § 110.3(a) (1972). See id. §§ 110.1 (j), (k); 33 U.S.C. § 1160(c) (1970).


172. Section 11 states that the Department of Natural Resources shall recover "from the . . . persons causing the discharge" reimbursement to the Florida Coastal Protection Fund of money expended to abate oil pollution from the spill and to clean and rehabilitate wildlife. Id. § 376.11. The section 12 recovery in favor of the state is broader and includes "all costs of cleanup or other damage incurred by the state and for damages resulting from injury to others." Id. § 376.12 (emphasis added). It is unclear whether the emphasized phrase refers only to indemnification of the state with respect to third-party claims or if the section creates rights in the third parties against the shipowner directly. The strict liability sentence which follows says "it shall not be necessary for the state to plead or prove negligence" [id.], implying that the former interpretation is correct. On the other hand, section 14(3) states:

Any claim for costs of cleanup, civil penalties, or damages by the state, and any claims for damages by any injured person, may be brought directly against . . . the insurer . . . .

Id. § 376.14(3). This might suggest that both the state and private claimants can recover on a strict liability theory. Although section 14 requires "each owner . . . of a . . . vessel . . . using any port in Florida [to] establish and maintain . . . evidence of financial responsibility" [id. § 376.14], it does not attempt to limit or place a maximum on the recovery possible under the statute. For further discussion of this aspect see text accompanying notes 190-204 infra.

173. Section 12 purports to impose liability only as to those vessels "destined for or leaving a licensee's terminal facility." Fla. Stat. Ann. § 376.12 (Supp. 1972). This would arguably be a denial of equal protection if other vessels merely transiting
relegates private and state government claimants to non-statutory (i.e., fault-based) remedies.\textsuperscript{174} Congress has not precluded the states from making oil spills the subject of strict liability as to such claimants. Thus the Oregon\textsuperscript{175} and Washington\textsuperscript{176} statutes, which impose strict liability but confer limited defenses—war, sabotage, or negligence of state or federal governments\textsuperscript{177}—would not seem invalid insofar as the imposition of liability is concerned. The Maine\textsuperscript{178} and Florida statutes provide that the state agency charged with enforcing the WQIA may, in its discretion, waive its right to reimbursement for costs of abatement, cleanup, and waterfowl rehabilitation when the occurrence is found to be “the result of” acts of God, war, government, or third parties.\textsuperscript{179} Although this liability could be even more strict than that of the shipowner to the federal government, it should not be precluded, because the non-preemption clause seems to have contemplated just such liability patterns.

Varying forms of liability may prove cumbersome for underwriting purposes, but operating procedure on board tankers should not materially change. There are, or soon will be, almost universal pressures to avoid oil spills in coastal areas,\textsuperscript{180} so that navigation and cargo transfer should already be conducted under fairly safe procedures requiring little additional expenses for future operations. Perhaps design criteria will voluntarily change, leading to more expensive configurations. Moreover, to the extent that claimants' proof burdens are eased by not having to prove fault, insurance costs may increase. Thus, while the cost of delivered petroleum products may increase, 

\textsuperscript{174} See 33 U.S.C. § 1161(o)(1); 1970 Senate Hearings, supra note 21, at 10-13.
\textsuperscript{175} OR. REV. STAT. §§ 449.155-.175, .995 (1971).
\textsuperscript{176} WASH. REV. CODE ANN. §§ 90.48.315-65 (Supp. 1971).
\textsuperscript{177} Id. § 90.48.320(c); OR. REV. STAT. §§ 449.157, .159 (1971).
\textsuperscript{178} ME. REV. STAT. ANN. tit. 38, §§ 541-57 (Supp. 1972).
\textsuperscript{179} Id. § 551(7); FLA. STAT. ANN. § 376.11(6)(b) (Supp. 1972).
\textsuperscript{180} As to the Florida Act it also appears that the defenses may only be permissible with regard to section 11 reimbursement claims and not with regard to the broader claims of section 12 or the direct actions provided for in section 14. See note 172 supra. The language of the section 11 discretionary defenses—requiring only that the pollution be “the result of” one of the enumerated defenses—seems more lenient than the parallel defenses in the WQIA. To benefit from the latter, the shipowner must show the discharge was caused “solely” by one or more of the specified events. 33 U.S.C. § 1161(f)(1) (1970).
\textsuperscript{180} See, e.g., International Convention on Civil Liability for Oil Pollution Damage, opened for signature Nov. 29, 1969, reprinted at 9 INT'L LEGAL MATS. 45 (1970) which provides for strict liability toward all claimants, governmental and private alike. Id. arts. I(2), (7), III.
such increases would more accurately reflect the true costs to society, a judgment which, for the time being at least, Congress seems willing to share with state legislatures.\textsuperscript{181}

Similarly, states can require the party responsible for the spill to ensure that it is cleaned up and can exempt independent contractors working on the clean-up from negligence liability to third parties and the state.\textsuperscript{182} This would be a "requirement . . . with respect to a discharge"\textsuperscript{183} and would not be preempted by the WQIA even though it indirectly places a similar obligation on the shipowner.\textsuperscript{184}

Presumably, a state could also file a claim for the loss of natural resources since the federal government's claims under the WQIA do not encompass such losses.\textsuperscript{185} The difficulties here are not those of preemption, but rather the evidentiary problems of quantifying the loss, and the legal problem of proving state ownership. While the Submerged Lands Act of 1953\textsuperscript{186} may have conferred proprietary rights to bottom life and seabed minerals, it is far more doubtful a state could assert a claim for the loss of ocean fish known to live in state waters from time to time.

Terminal operators are also extensively regulated by the Florida Act. They are subject to the same liabilities as shipowners and in addition must be licensed, are subject to periodic inspections and are required to maintain or have access to containment and removal equipment.\textsuperscript{187} Terminal operators are also covered by the liability provi-

\begin{enumerate}
\item 181. The use of the word \textit{preempt} implies the supercession of one statute by another. There is nothing in the legislative history of the WQIA to suggest that the words "imposing any requirement or liability" [33 U.S.C. § 1161(o)(2) (1970)] were intended to include state court decisions.
\item 182. \textit{Cf. FLA. STAT. ANN. §§ 376.09(1), (4) (Supp. 1972).}
\item 184. The WQIA makes the non-excused shipowner liable to reimburse the Government for costs of removing the oil and restoring the coastline. \textit{Id.} § 1161(f). It also empowers the Government to remove the spilled oil "unless [the President] determines such removal will be done properly by the owner . . . ." \textit{Id.} § 1161(c).
\item 185. Since Florida claims sea-bed rights to twelve miles offshore the State might also construe its "state waters" to extend that far. Arguably, the clean-up requirement conflicts with the International Convention for the Prevention of Pollution of the Sea by Oil [\textit{opened for signature} May 12, 1954, [1961] 12 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3], and might therefore violate the supremacy clause. \textit{See United States v. Louisiana, 364 U.S. 502 (1960).}
\item The Convention does not impose clean-up responsibility but rather proscribes discharges except those with negligible polluting effects. It does exempt certain discharges from its proscription, including those resulting from damage to the ship. International Convention for the Prevention of Pollution of the Sea by Oil art. IV. Although such a discharge is within the exception and therefore is not deemed a treaty violation, it would not seem that the imposition of an obligation to remove the oil would necessarily vitiate the treaty or constitute a violation of the supremacy clause. \textit{See 33 U.S.C. §§ 1161(a)(8), (f)(1) (1970).}
\item 187. \textit{FLA. STAT. ANN. §§ 376.06, .09, .11-.12 (Supp. 1972).}
sions of the WQIA\textsuperscript{188} and the state's power to establish liability con-
sonant with that Act's non-preemption clause should be subject to
the same analysis as presented above with regard to shipowners.\textsuperscript{189}
The preventive aspects of Florida's law might fare better with respect
to terminal operators than with shipowners since the requirements do
not directly affect or hamper the import, processing or interstate trans-
portation of petroleum products. The precautions required are strictly
local in nature as is their impact except insofar as the costs involved
could be passed along to the eventual consumer of oil.

5. Financial Responsibility Regulations

The Florida statute requires Florida terminal operators and ship-
owners whose ships use Florida ports to “establish . . . evidence of
financial responsibility based on . . . [liabilities] to which the vessel
could be subjected under this chapter.”\textsuperscript{180} The amount required of
shipowners is $100 per gross ton or $5 million, whichever is less.\textsuperscript{191}
It is doubtful that such a requirement is within the ambit of the non-
preemption clause. Therefore it may be preempted by the financial
responsibility provisions of the WQIA,\textsuperscript{192} or it may be invalid as a bur-
den on interstate commerce or as an interference with the foreign af-
fairs powers of the federal government. The argument against pre-
emption would be that the financial security required by the federal
act is \textit{only} for liability incurred thereunder\textsuperscript{193} and therefore, under the
rules of suretyship, might not be applied to the liability of non-federal
claimants under Florida law.\textsuperscript{194} Challengers of the state financial re-
sponsibility requirement might counter that it was Congress' intent to
have a unitary obligation for shipowners and that although states might
create additional liabilities, they were to be precluded from burdening
shipowners with a proliferation of insurance requirements. However,
many of the tankers entering state waters will be foreign-flag vessels
owned by undercapitalized companies, and the state legislation does not

\textsuperscript{189} See text accompanying notes 161-86 \textit{supra}.
\textsuperscript{191} The implementing regulations under section 14 of the Florida statute are
quoted in a letter from the West of England P & I Club to its members, \textit{reprinted at
AM. PETROLEUM INST., PROCEEDINGS OF JOINT CONFERENCE ON
PREVENTION AND CONTROL OF OIL SPILLS} 48 (1971).
\textsuperscript{193} The security is required "to meet the liability to the United States [to] which such vessel could be subjected under [1161]." \textit{Id.} § 1161(p)(1).
\textsuperscript{194} The \textit{Florida Act applies to "pollutants" and specifies that "[p]ollutants" shall
include, but not be limited to, oil of any kind and in any form, gasoline, pesticides, am-
(Supp. 1972).
itself create maritime liens in favor of oil pollution claimants. Florida
officials would argue that since it is unlikely that Congress intended
for states to create rights that might be, for all practical purposes, un-
enforceable for want of financial responsibility of the shipowner, the
requirement should withstand challenge.\textsuperscript{195} Offsetting the burden-on-
commerce argument to some extent, it can be said that requiring a fund
for recovery and allowing direct actions provide for the health and wel-
fare of the state's residents.\textsuperscript{196}

6. Possible Limits on Liability

A possible defect in the Florida legislation that should not be over-
looked is its seemingly open-ended liability. Although the State's
power to spend for clean-up and mitigation activity appears to be limit-
et to $5 million\textsuperscript{197}—which also might represent the upper limit on
a reimbursement claim by the State—there is no aggregate limit to lia-
bility on claims by private parties.\textsuperscript{198} In any event, the non-preemption
clause in the WQIA says only that "nothing in this section"\textsuperscript{199} shall
preempt the states' powers. The federal Limitation of Liability
Act,\textsuperscript{200} separate and long-standing legislation, is not covered
by the clause. Thus, a shipowner would be entitled to limitation in accord-
ance with the latter Act\textsuperscript{201} and any attempt by the State to deprive him

\textsuperscript{195} However, the argument in text is weakened by the decision in Department of
Fish & Game v. S.S. Bournemouth, 307 F. Supp. 922 (C.D. Cal. 1969) where state
officials had sued the spilling vessel in rem to recover a penalty for violation of
CAL. HARB. & NAV. CODE §§ 151-52 (West Supp. 1971) prohibiting the deposit of oil
in state waters. Over the shipowner's objection, the court held the complaint alleged
injury "to the water itself" and concluded that maritime tort liens—necessary to support
the in rem proceeding—were not necessarily restricted to collision or personal injury
claims. The allegations were held to show the existence of a maritime lien, thus justi-
fying the court's in rem jurisdiction. The court said, tangentially, that "the mere fact
that Congress . . . provides a penalty creates no presumption of the nonexistence of
similar rights . . . in the general maritime law. . . ." 307 F. Supp. at 929. The opin-
ion did not discuss the propriety of the state as a plaintiff suing for damage to sea-
water and "marine life therein." See also Maryland v. Amerada Hess Corp., — F.

responsibility and direct action clauses are found in FLA. STAT. ANN. § 376.14
(Supp. 1972).

\textsuperscript{197} See FLA. STAT. ANN. § 376.11(1) (Supp. 1972).

\textsuperscript{198} See note 172 supra.


\textsuperscript{200} 46 U.S.C. §§ 181-89 (1970). The essential limits imposed by the Act are
noted at text accompanying note 147 supra.

\textsuperscript{201} In In re Harbor Towing Corp., 335 F. Supp. 1150, 3 ERC 1607 (D. Md. 1971),
the State of Maryland claimed against a shipowner under a state statute for its costs in
cleaning up the ship's oil spill. The court held that the shipowner was entitled to limit
its liability since the state's right was predicated on compensation for consequences of
the spill rather than on a post-incident personal obligation of the owner to clean up
of this right would be preempted.202

The Florida statute is less than clear as to whether the State could recover up to $5 million on its claim and whether private claimants both individually and cumulatively might expose the shipowner to unlimited liability.203 This ambiguity might well be resolved through an interpretation by the Florida courts. If it were interpreted to make such liability subject to an upper limit not greater than that defined by the Limitation of Liability Act, no preemption question would necessarily be presented on this issue. This might, therefore, be an instance in which the federal courts should abstain from exercising jurisdiction pending determination of the state-law issue by Florida courts.204

The 1970 Civil Liability Convention,205 if ratified by the United States and in force, would, of course, become the supreme law of the land.206 This convention does provide for private and local government claimants as well as for national government claimants. Its after-the-fact responsibility provisions would most certainly preempt the state laws insofar as they dealt with seagoing ships carrying oil as bulk cargo.207 When and if such ratification will occur is an open question.


202. In re Garnett, 141 U.S. 1 (1891), upheld the validity of the Limitation of Liability Act even as to vessels not in interstate commerce. In fact, the Act is thought to apply to all types of vessels on United States navigable waters. See Stolz, supra note 36, at 709. With the dramatically increasing number of injuries involving private pleasure craft, a number of states have passed legislation covering liability from pleasure craft operation. For example, California has a "permissive user" statute for boats and has linked this to a liability limit of $10,000 for the vicarious liability thus imposed. See CAL. HAR. & NAV. CODE § 661 (West Supp. 1971). Since the value of the boat will seldom approach $10,000, the limitation provision may be preempted by the federal law when the incident occurs on navigable waters.

Assuming the California limitation would be valid as to incidents occurring on a small landlocked lake located wholly within the state, two further questions are raised: Why should the result depend on the fortuity of where the boat was put into the water; and what does Congress' power to control navigation on actual or potential interstate waterways have to do with limiting the liability of owners of non-commercial boats? For cases where federal courts have applied state law concepts of vicarious liability for negligent entrustment to boat owners on a non-uniform, choice-of-law basis, see e.g., Rautbord v. Ehmann, 190 F.2d 533 (7th Cir. 1951); Strom v. Anderson, 114 F. Supp. 767 (W.D.N.Y. 1953) (no liability in either case since entrustments found not to be negligent).


204. See text accompanying notes 131-34 supra.


206. See U.S. CONST. art. VI.

207. For the relevant provisions see Civil Liability Convention, art. I(1), 9 INT'L LEGAL MATS. 45 (1970).
IV

SEVERABILITY

In American Waterways the court concluded its opinion with a holding that the limitations on the doctrine of severability enunciated by both the United States and Florida Supreme Courts required that the entire Florida statute be stricken\(^\text{208}\) in spite of its severability clause.\(^\text{209}\) The court stated the rule that a severability clause is not an "inexorable command" and cannot save a statute whose invalid provisions are inextricably interdependent and interwoven with the rest of the legislation.\(^\text{210}\) The district court recognized that when a federal court is construing a state statute, deference should be given to the highest state court's determination of the effect of severability clauses.\(^\text{211}\) The district court quoted from a decision of the Florida Supreme Court on the issue:

> When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other, and (4) an act complete in itself remains after the invalid provisions are stricken.\(^\text{212}\)

Applying this standard to the Florida statute, the district court concluded that there are no provisions which, though standing by themselves might be considered unobjectionable, are not so interwoven in purpose

\(^{208}\) 335 F. Supp. at 1250, 3 ERC at 1435-36. The doctrine of severability is based on the concept that if, after an invalid portion of a statute has been stricken, that which remains is self-sustaining and capable of separate enforcement without regard to the stricken portion, the remainder should be sustained. Rutenberg v. City of Philadelphia, 329 Pa. 26, 196 A. 73 (1938).


\(^{211}\) See Watson v. Buck, 313 U.S. 387 (1941) reviewing the constitutionality of a 21-section Florida statute concerning the legality of tax fixing by holders of musical copyrights. The district court had held the entire statute invalid after finding deficiencies in eight sections, notwithstanding a severability clause. The Supreme Court reversed, saying:

> Unless a controlling decision by Florida's court compels a different course, the federal courts are not justified in speculating that the state legislature meant exactly the opposite of what it declared "to have been the legislative intent."

Id. at 396.

\(^{212}\) 335 F. Supp. 1250, 3 ERC at 1435-36 quoting from Cramp v. Board of Public Instruction, 137 So. 2d 828, 830 (Fla. 1962).
and scheme with the invalid provisions . . . as to permit the operation of the severability clause.\textsuperscript{213}

CONCLUSION

\textit{American Waterways} held the Florida Act unconstitutional and therefore invalid because "the states [are without] authority to legislate within the admiralty jurisdiction" and "Congress is powerless to confer [such] authority" on the states.\textsuperscript{214} As this Article has argued,\textsuperscript{215} there is no convincing constitutional basis for this broad proposition. It is conceded that the provisions of the Florida Act dealing with preventive regulation of ships' structure, equipment, and operation probably are unconstitutional insofar as Congress has occupied the field and to the extent the provisions infringe upon the powers of the executive branch or burden interstate commerce. And where limitation of shipowners' liability is concerned, any attempt to create open-ended liability would be preempted by the federal Limitation Liability Act.\textsuperscript{216} But other important provisions of the state law, specifically the after-the-fact imposition of strict liability on state government and private claimants, the licensing of terminal operators, the fines for failure to promptly report and remove an oil spill, and the obligation to clean up the spilled oil should be valid.\textsuperscript{217} The financial responsibility requirement for shipowners presents a closer question, but it too should be sustained.

Under this view of the various features of the Florida Act, the test of severability will not necessarily produce the same result as was reached in \textit{American Waterways}. Indeed, it can be argued that the after-the-fact provisions can stand alone and the legislature would have enacted them independently had it realized the preventive features would be held invalid.

While it may be that divergent state standards will produce ad-

\textsuperscript{213} 335 F. Supp. at 1230, 3 ERC at 1436.
\textsuperscript{214} \textit{id.} at 1249, 3 ERC at 1435.
\textsuperscript{215} See part I \textit{supra}.
\textsuperscript{216} See note 200 and accompanying text \textit{supra}.
ministrative burdens and some general confusion, the soundest solution is to assure state governments of stronger preventive regulation at the national level and more effective forms of redress for private claimants and state agencies. The former objective can be accomplished through greater Coast Guard initiative and international control through IMCO.218 More effective redress can be insured by the swift ratification of the 1970 Civil Liability Convention.219 Until these steps occur, state remedies such as those enacted by Washington, Oregon, and Florida should be held valid and effective.

218. See, e.g., IMCO's proposed 1971 amendments to the Oil Pollution Convention, 11 INT'L LEGAL MATS. 267 (1972). See note 137 supra.

219. See note 180 supra.