Constitutional Preemption Of State Laws Against Massive Oil Spills

*Arval A. Morris**

INTRODUCTION

The awesome reality of an impending and severe energy crisis is closing in fast on the United States—so much so, that on his 91st day in office, President Jimmy Carter unveiled a controversial energy conversion and conservation program, the most comprehensive energy program any President has ever proposed. At the heart of America's energy dilemma is oil:[1] America's growing dependence on oil and the rapid depletion of world oil reserves.[2] Although the United States was self-sufficient in oil in 1950, by 1970 it had become a net oil importer. By 1976, the United States imported about 7.3 million barrels of oil each day (bpd) or 42 percent of its daily consumption requirements of 17.4 million bpd. Alaskan oil became available late in 1977, and, ultimately, it is expected to add 2 million bpd to the domestic supply. This amount, however, merely will replace the decline in domestic oil production of the lower 48 states between 1970 and 1977. During the winter months of 1977, for the first time in American history, oil imports reached 50 percent of oil consumption.

---

* Professor of Law, University of Washington; B.A., 1951, The Colorado College; M.A., 1952, J.D., 1955, University of Colorado; LL.M., 1958, Yale University; LL.D., 1972, The Colorado College. The author thanks Ms. Ann Carey for her aid in preparing parts of the initial manuscript.

1. The disparity between supply and demand is expected to produce a severe oil squeeze on the United States by 1985. The major variable in oil exports from members of the Organization of Petroleum Exporting Countries (OPEC) is Saudi Arabian production. By 1985, Saudi oil production could range from a low of 6.3 million barrels per day (which amount is sufficient to permit exportation equal to the 1973 embargo level) to a maximum of 15 million barrels per day if capacity is substantially increased. The industrialized nations, including the United States, would be in a "safe" position only if they adopted strong policies of conservation and accelerated development of new fuel sources such as solar energy.

It is believed the United States will face two oil "squeezes"—in 1978-79 before the full impact of Alaskan oil is felt and again in the mid-1980's, when domestic demand surpasses Alaskan production. Rustow, *U.S.-Saudi Relations and the Oil Crisis of the 1980's*, 55 FOREIGN AFFAIRS 494 (1977); Smart, *Oil, The Super-powers and The Middle East*, 53 INTERNATIONAL AFFAIRS 17 (Jan. 1977).

2. The facts in the remainder of this paragraph are taken from BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T OF STATE, GIST (*Oil and Energy*), May, 1977.

These importation figures show oil is more than an increasingly scarce, but vital, fuel. They show oil also to be an important instrument in world power politics,[3] a target for world strategies, and a possible source of national and global economic crisis. Furthermore, for purposes of this article, oil is also a threatening pollutant that can severely impair the quality of life in countless ways by altering natural balances and by destroying or contaminating usable waters, water life, and shorelines whenever it spills.[4] Oil spills, the Supreme Court has declared, are "an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which life of the ocean and the lives of the coastal people are greatly dependent."[5]

In light of this declaration, the purposes of this article are to assess the validity of the federal court's decision[6] preempting Washington's Tanker Pollution Law,[7] and to comment generally on whether, consistent with the evolved preemption doctrine, coastal states can protect themselves from deleterious oil spills by enacting preventive rather than deterrent measures.

THE PROBLEM

The Puget Sound estuary[8] in the State of Washington is the most productive inland waterway in the continental United States, having more than 2,000 species of life located on or in its waters.[9] The federal government operates thirteen wildlife preserves on its shores comprising some 2,300 acres, and the State of Washington operates numerous fish hatcheries and two oyster preserves which comprise 12,000 acres. More than 60 percent of the people of the State of Washington reside within twelve counties bordering on Puget Sound. Since 1956, more than 300 million dollars have been spent by private persons and by local, state,

3. *See, e.g.*, Tucker, *Oil and American Power—Three Years Later*, 63 COMMENTARY 29 (1977).

4. *See* U.S. DEP'T OF COMMERCE, NOAA SPECIAL REPORT, THE ARGO MERCHANT OIL SPILL—A PRELIMINARY SCIENTIFIC REPORT, March, 1977.

5. Askew v. American Waterways Operators, Inc., 411 U.S. 325, 328-29 (1973).

6. Atlantic Richfield Co. v. Evans, No. C75-648M (W.D. Wash. Sept. 24, 1976) [hereinafter *Arco*], *prob. juris. noted*, 45 U.S.L.W. 3582 (1977), *sub. nom.* Ray v. Atlantic Richfield Co.

7. WASH. REV. CODE §§ 88.16.170-.190 (1976).

8. The limits of Puget Sound are defined in WASH. REV. CODE § 88.16.050 (1962).

9. The facts in this paragraph are drawn from *Hearing on Effectiveness of the Ports and Waterways Safety Act of 1972 Before the Senate Comm. on Commerce*, 94th Cong., 2d Sess. 119 (1976) (Statement of Robert Lynette); and Pretrial Order at 42, Atlantic Richfield Co. v. Evans, No. C75-648M (W.D. Wash.).

and federal governments to preserve and enhance its water quality.

> 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 state has a substantial proprietary interest in these lands, owning nearly all of the beds and approximately 43% of the tideland frontage . . . . The Puget Sound fisheries industry, including commercial and sport fishing, packing and canning, contributes $170,000,000 annually to Washington's economy . . . Puget Sound also supports aquaculture programs, including commercial clam and oyster farming and salmon rearing.[10]

Puget Sound has many bays and inlets; its bottom is marked by channels; it has strong currents running up and down its many channels and straits; its shoreline is irregular, and it is subject to a variety of weather conditions including fog, strong winds, and heavy rains. Because of these facts, during the Senate's 1971 Commerce Committee hearings on the Ports and Waterways Safety Act of 1972,[11] Puget Sound was identified as an area of significant danger and one likely to cause groundings of vessels, including oil tankers. For example, oil tankers supplying the oil refineries at Cherry Point, Ferndale, and Anacortes do so by passing through the treacherous waters of Rosario Strait which extend for eighteen miles and are three-fourths to one mile wide at their narrowest points.

The oil industry in the State of Washington is a multimillion dollar-a-day business. There are five important refineries in Washington State: ARCO at Cherry Point, Mobil at Ferndale, Shell and Texaco at Anacortes, and U.S. Oil and Refining Company at Tacoma. These plants process about 350,000 barrels of crude oil daily (one barrel equals 42 U.S. gallons).[12] According to

---

10. Brief of Appellants at 12, Ray v. Atlantic Richfield Co., No. 76-930 (U.S. Sup. Ct.) (footnotes omitted).

11. *The Navigable Waters Safety and Environmental Quality Act, Hearings on S. 2074 Before the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 366 *passim* (1971) (Marine Transportation System—Valdez to West Coast Ports). S. 2074 subsequently became part of The Ports and Waterways Safety Act of 1972. *See* [1972] U.S. CODE CONG. & AD. NEWS 2768.

12. WASH. STATE DEP'T OF ECOLOGY, REPORT TO THE GOVERNOR, WASHINGTON STATEWIDE OIL POLLUTION ABATEMENT PROGRAM 4 (1976). In addition to the five major refineries, Washington's oil industry includes three asphalt refineries, processing about 5,000 barrels of crude per day, and the U.S. Oil and Refining Company, also producing asphalt. Four major bulk oil pipelines daily transfer nearly 500,000 barrels of oil throughout the state. Eighteen bulk terminals have daily throughput of over 410,000 barrels, and 800 handling

a January 1973 report, each passing day sees the waters, sea life, and coastlines of Washington being polluted by oil spills and uncontrolled waste oil disposal.[13] The primary reason is that the oil industry is steadily expanding in Washington. "Puget Sound is rapidly becoming the oil refining center of the Pacific Northwest," and "the days of producing petroleum products in the Northwest for the Washington market only are rapidly fading into the past."[14] Completion of the Aleyeska Pipeline will mean additional refineries, further increases in production, and unless strong corrective measures are taken, an increase in the number and volume of oil spills.[15] Furthermore, without reflecting any of the impact Puget Sound will soon experience when Alaskan oil starts to flow:

> Department of Ecology records show two oil spills per day occur in Washington State; each week oil spills occur that require localized cleanup and four oil spills per year occur that require extensive cleanup. Department records also show that 933 oil spills occurred in Washington State during the period extending from January 1, 1970 through June 30, 1972. The activity that caused 490 of these 933 oil spills was known while the cause of the remaining 443 oil spills was unknown. Of the 490 known-cause oil spills 82 percent (404) were caused by poor housekeeping practices, deliberate dumping, equipment failure or human error . . . .[16]

The problems generated by oil spills from oil tankers in distress in Puget Sound waters are expected to intensify dramatically.[17] Prior to the Arab oil embargo of 1973, ninety percent of the crude oil needs of Washington's four major refineries had been supplied by pipeline from Canada. But the Arab oil embargo

---

facilities distribute these products to consumers.

Five tugboat companies operate on Puget Sound. Approximately 10 ships service waterfront oil terminals weekly. "More than 15 ship-to-shore or shore-to-ship oil transfers greater than 1,000 barrels occur every day providing a total movement of about 200,000 barrels per day between ship and shore facilities." *Id.* at 4-5.

13. WATER RESOURCES CONSULTATION SECTION, TECHNICAL ASSISTANCE DIVISION, OFFICE OF TECHNICAL SERVICES, WASH. STATE DEP'T OF ECOLOGY, REPORT, OIL POLLUTION, PREVENTION AND CONTROL 14 (1973).

14. *Id.*

15. *Id.*

16. *Id.* at 16-17. The oil pollution control laws of Washington are found in WASH. REV. CODE §§ 90.48.315-.910 (1976).

17. Unless otherwise indicated the facts in this paragraph are drawn from *Hearings on Effectiveness of the Ports and Waterways Safety Act of 1972 Before the Senate Comm. on Commerce*, 94th Cong., 2d Sess. 3-5 (1976) (Statement of the Hon. Daniel J. Evans, Governor, State of Washington).

induced Canada to adopt a policy of stopping the exportation of her crude oil by 1980 with the result that Washington's refineries are now, or soon will be, supplied with more than 350,000 barrels of oil per day regularly transported through Puget Sound by oil tankers. Alaskan oil currently intended for Puget Sound refineries, Canada's change in oil export policy, and inland transhipments of Alaskan oil through Puget Sound will cause oil tanker traffic on Puget Sound to increase radically.[18] And, perhaps more threateningly, the oil may be transported over Puget Sound waters in supertankers, thereby drastically increasing total supertanker traffic in Puget Sound and the probability of a massive oil spill with its potentially severe damage. Moreover, the trend in oil tanker construction, especially during the past fifteen years since the closure of the Suez canal in 1967, has been toward larger size and deeper draft vessels.[19] By "January, 1971, more than one-fourth of the world tanker fleet consisted of ships of 175,000 deadweight tons (dwt) and over," and today, "shipbuilders and designers are considering 1,000,000 dwt tankers."[20]

Puget Sound has never suffered a massive oil spill but the probability of such an occurrence will increase significantly when Alaskan oil, carried by supertankers, begins to reach Washing-

---

18. Approximately 15% of the Alaskan crude oil is intended for Puget Sound. In 1974, imports by tanker to Puget Sound averaged 120,000 barrels per day. In 1977, the opening year of the Trans-Alaska Pipeline, 122,000 barrels per day of North Slope oil are scheduled for delivery to Puget Sound refineries; by 1978, that amount will increase to 213,000 barrels per day; and by 1981, it will reach more than 336,000 barrels per day. These, of course, are estimates, and may be low. Jurisdictional Statement of Appellants at 6 n.7, Evans v. Atlantic Richfield Co., No. 76-930 (U.S. Sup. Ct.).

19. The rise of the supertanker was largely precipitated by the closure of the Suez Canal during the Arab-Israeli conflict in 1967. This closure made supertankers economically feasible for the long haul around Africa's Cape of Good Hope from the Persian Gulf. The growth of oil-tanker size during the last 25 years has been dramatic as the following table shows.

Year	Length (avg.)	Cargo In Tons (avg.)	Cargo In Barrels (avg.)	Draft (avg.)	Relative Shipping Cost
1950	650	30,000	225,000	35	100%
1960	750	50,000	375,000	38	88%
1970	1150	250,000	1,875,000	65	45%
1975	1300	500,000	3,750,000	95	38%

Anderson, *National and International Efforts to Prevent Traumatic Vessel Source Oil Pollution*, 30 U. MIAMI L. REV. 985, 998 n.48 (1976). High profits which can exceed $4 million per voyage, generated by the relatively low shipping costs, are a powerful stimulus leading persons to ignore sound ecological principles. *Id.* n.50.

20. OCEANOGRAPHIC COMMISSION OF STATE OF WASHINGTON, REPORT TO THE LEGISLATURE, OFFSHORE PETROLEUM TRANSFER SYSTEMS FOR WASHINGTON STATE at I-29 (1975).

ton's waters. One massive oil spill in the wrong place during an incoming tide could destroy much, perhaps most, of Washington's shell and sea food industry and gravely impair the entire ecosystem of Puget Sound on which fish, oysters, crabs, shrimp, and other marine life depend.[21]

The state has recognized the gravity of this situation. A 1975 study done by the Oceanographic Commission of Washington produced the dire warning that the state can expect at least nineteen oil tanker wrecks in Washington waters during the next twenty-one years.[22] This projected future is obviously bleak and undesirable. It demands the state's full attention.[23] This study, however, is laced with "ifs." If, for example, radical changes are made in oil tankers or in laws governing the ways tankers supply oil to Washington's refineries, the study indicates the projected number of oil tanker wrecks on Puget Sound can be significantly reduced. Thus, the bleak and undesirable future projected by the

---

21. Regardless of its form, oil is, gallon for gallon, one of the most destructive environmental pollutants when found in large amounts. *See* R. Shinn, THE INTERNATIONAL POLITICS OF MARINE POLLUTION CONTROL 6 (1974); Schacter & Serwer, *Marine Pollution Problems and Remedies*, 65 AM. J. INT'L L. 84, 88-89 (1971). When spilled on the surface of water it disrupts the food chain with its oil slick, smothering or poisoning the food chain base of plankton, algae, or intertidal organisms, causing repercussions throughout the ecosystem. *See* COUNCIL ON ENVIRONMENTAL QUALITY, A REPORT TO THE PRESIDENT, OCEAN DUMPING: A NATIONAL POLICY 12-17 (1970). The surviving organisms that have ingested oil introduce it as a toxin into the food chain, and as these toxic pollutants are absorbed at higher levels in the food chain, they become more densely concentrated, until finally, they reach man. *See* Waldichuk, *Coastal Marine Pollution and Fish*, 2 OCEAN MANAGEMENT 1, 41 (1974). When it settles on the ocean bottom oil coats seaweed causing it to be more easily torn free by wave action, resulting in beach erosion. Simultaneously, some oil biodegrades, reducing the sea's oxygen available to living organisms. Moreover, oil slicks hamper phytoplankton photosynthesis, the food source of much of the world's protein and one of the sources of oxygen in the air, and cause much more damage. *See* COUNCIL ON ENVIRONMENTAL QUALITY, CANCER AND POLYCYCLIC AROMATIC HYDROCARBON COMPOUNDS, *Hearings on Interior and Insular Affairs and Public Works on S. 1751 and S. 2232 Before The Special Joint Subcomm. on Deepwater Port Legislation of the Senate Comm. on Commerce*, 93rd Cong., 1st Sess., at 115-17 *passim* (1974) (from a report prepared by the Mass. Institute of Technology); M. Schwartz & E. Rabin, THE POLLUTION CRISIS: OFFICIAL DOCUMENTS 124 (1972); Holcomb, *Oil In The Ecosystem*, 166 SCIENCE 204 (1969); and SECRETARIES OF THE INTERIOR AND TRANSPORTATION, A REPORT TO THE PRESIDENT ON POLLUTION OF THE NATION'S WATER BY OIL AND OTHER HAZARDOUS SUBSTANCES (1968).

22. OCEANOGRAPHIC COMMISSION OF THE STATE OF WASHINGTON, REPORT TO THE LEGISLATURE, OFFSHORE PETROLEUM TRANSFER SYSTEMS FOR WASHINGTON STATE, at II-19 to 37 (1975).

23. Relevant state legislation currently seeking to protect Puget Sound includes the Shoreline Management Act of 1971 (WASH. REV. CODE § 90.58 (1976)); the Water Resources Act of 1971 (WASH. REV. CODE § 90.54 (1976)); the State Water Pollution Control Act (WASH. REV. CODE § 90.48 (1976)); and the Coastal Waters Protection Act of 1971 (WASH. REV. CODE §§ 90.48.370-.410 (1976)).

report need not occur. The actual future is subject to human control, and it is the massive oil spill that must be prevented.[24]

THE STATE'S RESPONSE

The most useful approach to the problem of significantly reducing massive oil spillage and pollution caused by oil tankers in distress is to concentrate on the vessels themselves and on the prevention of oil spills. But curiously, reliance has been most widely placed on deterrence. Potential liability after the fact of oil spillage and pollution can have some deterrent effects so long as most violators are identified and the sanctions are severe enough and fully enforced. Deterrence has been subjected to exhaustive analysis,[25] to embodiment in many legislative enactments,[26] and to international cooperative efforts.[27] Deterrence can do little to further reduce tanker sources of oil pollution. One major problem with deterrence is that it operates after the fact. From an ecological point of view, it is better to prevent massive oil spills and their attendant pollution than to worry about them once they occur, as does deterrence, after the natural balances have been disrupted. Thus, the law's challenge is to identify con-

---

24. Senator Warren Magnuson has also recognized the gravity of the situation, saying:

> Let's take Whidbey Island to the mainland, 15 miles. A spill would start toward shore and nobody would know which way it was going until it hit down there. That is why we are so anxious to keep big ships out of Puget Sound . . . . Puget Sound is the cleanest inland sea in the United States. And the tides which come in there are often 15 feet. If one of those ships [oil supertankers] hit Puget Sound [and spilled oil] when the tide was going in, we would be two years shoveling out the area.

Hearings on Effectiveness of the Ports and Waterways Safety Act of 1972 Before The Senate Comm. on Commerce, 94th Cong., 2d Sess. 75 (1976).

25. *See, e.g.*, Bergman, *No Fault Liability for Oil Pollution Damage*, 5 J. MARITIME L. & COM. 1 (1973); Goldie, *Liability for Oil Pollution Disasters: International Law and the Delimitation of Competences in a Federal Policy*, 6 J. MARITIME L. & COM. 303 (1975); Comment, *Compensation for Oil Pollution at Sea: An Insurance Approach*, 12 SAN DIEGO L. REV. 717 (1975); Note, *Liability for Oil Pollution Clean-up and The Water Quality Improvement Act of 1970*, 55 CORNELL L. REV. 973 (1970); and Mendelsohn, *Maritime Liability for Oil Pollution—Domestic and International Law*, 38 GEO. WASH. L. REV. 1 (1969).

26. *See, e.g.*, The Water Pollution Prevention and Control Act, 33 U.S.C. §§ 1251-1376 (Supp. III 1973); Florida Oil Spill Prevention and Pollution Control Act of 1970, FLA. STAT. § 376 (1975); The Washington Water Pollution Control Act, WASH. REV. CODE §§ 90.48.315-.365 (1976); WASH. STATE DEP'T OF ECOLOGY, LAWS AND OIL SPILL EMERGENCY PROCEDURES (1970).

27. *See, e.g., Convention on Civil Liability for Oil Pollution Damage*, 9 INT'L LEG. MAT. 45 (1970); and *Convention on the Establishment of an International Fund for Oil Pollution Damage*, 11 INT'L LEG. MAT. 284 (1972).

trols to prevent oil spills as much as possible.[28]

Responding to the challenge and the gravity of the situation, Washington's legislature enacted the Washington Tanker Pollution Law,[29] a preventive measure, which Governor Evans signed into law May 29, 1975. In addition to relying on its police powers, Washington's legislature also relied on its proprietary powers as owner of the underlying beds and shores of Puget Sound as those powers are identified in Washington's constitution and confirmed by congressional enactment of the Submerged Land Act of 1953.[30] Washington's constitution provides for state ownership of "the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes."[31]

In its Tanker Pollution Law, Washington's legislature declared "that the transportation of crude oil and refined petroleum products by tankers on Puget Sound and adjacent waters creates a great potential hazard to important natural resources of the State and to jobs and incomes dependent on these resources" and that its intent was "to decrease the likelihood of oil spills on Puget Sound and its shorelines by requiring all oil tankers above a certain size to employ Washington state licensed pilots and, if lacking certain safety and maneuvering capability requirements, to be escorted by a tug or tugs while navigating on certain areas of Puget Sound and adjacent waters."[32] Thus, Washington's legislature sought to provide for vessel safety, for protection of the marine environment, and for Washington's economy by minimizing the risks of oil spills and pollution while simultaneously allowing oil to be transported on Puget Sound. To accomplish these ends, it required any oil tanker of fifty thousand dwt or greater, to take and pay a state licensed pilot while navigating Puget

28. Like deterrence, the control of oil pollution after it has occurred through cleanup techniques or through techniques seeking to minimize on-going spillage is of limited usefulness, doing little to prevent much of the ecological harm. This is a technical area left largely to engineers and scientists (*see generally* Dean, *The Chemistry of Crude Oils in Relation to Their Spillage on the Sea, in Hearings on H.R. 6495 Before House Comm. on Merchant Marine and Fisheries*, 91st Cong. 2d Sess., ser. 91, pt. 4, at 285 (1969)), except for an international agreement giving coastal nations pollution control jurisdiction over foreign vessels on the high seas in certain limited areas. *See The Convention Relating to Intervention on the High Seas In Cases of Oil Pollution Casualties*, 9 INT'L LEG. MAT. 25 (1970).

29. WASH. REV. CODE §§ 88.16.170-.190 (1976).

30. 43 U.S.C. § 1301 (1970).

31. WASH. CONST. art. XVII, § 1.

32. WASH. REV. CODE § 88.16.170 (1976).

Sound and adjacent waters.[33]

Washington's statute further provides that any oil tanker "greater than one hundred and twenty-five thousand deadweight tons shall be prohibited from proceeding beyond a point east of a line extending from Discovery Island light south to New Dungeness light" (this provision defines "Puget Sound" and limits supertankers in the treacherous waters of the straits of Rosario and Georgia); that oil tankers between 40,000 and 125,000 deadweight tons may proceed beyond the points enumerated if such tankers are equipped with certain safety features (relating to shaft horsepower, twin screws, double bottoms, and two radar systems), but if such tankers are not so equipped they may proceed beyond the points enumerated only so long as such tankers are under tug escort.[34]

The Washington legislation appears to have been drafted to accommodate two noncompeting transcendent interests. First, the statute seeks to realize the state interests in protecting its property, its economy, its sea life, and its environment from traumatic damages caused by massive oil spills and oil pollution by preventing or reducing their likelihood of occurrence. Secondly, the statute does not flatly prohibit all oil tankers on all parts of Puget Sound, but rather it seeks to realize compelling state interests while simultaneously vindicating state and national interests in the free flow of commerce under the commerce clause, including tanker transport of oil over the waters of Puget Sound, by requiring oil tankers to use adequate safeguards.

THE ARCO CASE

The day the Washington Tanker Pollution Law became effective, the Atlantic Richfield Co. (ARCO) and Seatrain Lines Inc. filed a complaint in federal court praying, *inter alia,* that the law be declared an unconstitutional state intrusion into areas either exclusively reserved to the national government under its unexercised foreign affairs powers[35] or its dormant commerce

33. WASH. REV. CODE § 88.16.180 (1976).

34. WASH. REV. CODE § 88.16.190 (1976). The laws of other states also provide vessel equipment and operation standards and for nonconforming vessel exclusion from state waters. *See, e.g.,* CONN. GEN. STAT. ANN. §§ 35-54; N.H. REV. STAT. ANN. § 145-a:11; ME. REV. STAT. ANN. § 560(3); and ALASKA STAT. §§ 30.20.010-.070 (Supp. 1976).

35. The *Arco* court did not discuss this contention, *but compare* DeCanas v. Bica, 424 U.S. 351 (1976), *with* Hines v. Davidowitz, 312 U.S. 52 (1941). For a discussion of international law indicating it precludes neither national nor state regulation, see Anderson, *National and International Efforts to Prevent Traumatic Vessel Source Oil Pollution,* 30 U. MIAMI L. REV. 985 (1976).

powers,[36] or preempted by Congress in the exercise of its commerce powers. Seatrain was completing construction of two gigantic oil supertankers, each of 225,000 deadweight tons, which it wanted to use to carry crude oil from Alaska to west coast ports, but at the time of suit, it had no sale or charter commitment for either of the vessels.[37] Seatrain's mere potential loss raises a standing issue the federal court ignored.[38] Arco had contracted with Mitsubishi Heavy Industries of Japan to construct three oil supertankers, two of 151,000 deadweight tons each and one of 120,000, which it wanted to use on Washington waters. Puget Sound is the only developed port area on the west coast with a controlling depth sufficient to accommodate fully loaded oil supertankers of a size in excess of 125,000 deadweight tons.

One of the last three-judge courts under the old rules[39] was convened and in September, 1976, ignoring any standing and abstention[40] questions that might be involved in the *Arco* case, the court delivered a cryptic but unanimous opinion,[41] holding "[w]e are persuaded that federal law has preempted the field" and "[b]ecause the Washington Tanker Law conflicts with Federal law preempting the same subject matter, the state law is void."[42] Although the *Arco* plaintiffs had asserted other grounds for declaring the statute void the court found it unnecessary to consider these other grounds.[43] In making its preemption ruling

---

36. The *Arco* court also did not discuss this contention, *but cf.* Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) (discussed *infra*), *and consider* Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973); Kelly v. Washington, 302 U.S. 1 (1937); The James Gray v. The John Fraser, 62 U.S. (21 How.) 184 (1858), in the context of Cooley v. Board of Wardens, 53 U.S. (12 How.) 298 (1851). *See also* text at notes 196-98 *infra*.

37. Pretrial Order at 19, 21-22, Atlantic Richfield Co. v. Evans, No. C75-648M (W.D. Wash.).

38. For an authoritative discussion of the requirements of standing, see Harrington v. Bush, 553 F.2d 190, 205 n.68 (D.C. Cir. 1977).

39. On August 12, 1976, Congress passed Public Law 94-381 repealing 28 U.S.C. §§ 2281 and 2282, and amending § 2284, abolishing three-judge district courts in most situations where the constitutionality of a state statute is challenged, except for reapportionment and other limited classes of cases; *see* 28 U.S.C.A. § 2284 (Supp. 1977).

40. The Supreme Court's most recent pronouncement on the abstention doctrine provides "Obviously it is for the [state] courts to decide the effect of [state] administrative regulations [and laws] . . . and thus to decide in the first instance whether and to what extent [state law] as construed would conflict with . . . federal laws or regulations." DeCanas v. Bica, 424 U.S. 351, 365 (1976). For a comprehensive discussion of the abstention doctrine, see Note, *Federal Courts, Injunctions, Declaratory Judgments, and State Law: The Supreme Court has finally Fashioned a Workable "Abstention Doctrine,"* 25 CLEV. ST. L. REV. 75 (1976).

41. *Arco, supra* note 6.

42. *Id.* at 3, 6.

43. *Id.* at 6.

the *Arco* court did not rely on any express congressional intent to preempt the area because the statute held to be preemptive, the Ports and Waterways Safety Act of 1972 (PWSA),[44] contains none. Instead, the *Arco* court inferred Congress's preemptive intent from the mere enactment of PWSA conferring discretionary regulatory authority, apparently on the belief that the federal statute, even in its semi-dormant state, was so comprehensive that Congress inferentially intended to preclude all state activity in the field.

The Preemption Doctrine

Preemption is a term without a precisely clear and agreed descriptive content, and courts and lawyers use it in different ways. The result can be confusing. Perhaps part of the responsibility lies with the Supreme Court itself. Clarity requires at least three separate notions be identified: (1) supersession because of conflict, (2) supersession because of preclusion (occupation of the field), and (3) joint regulation. Together, these three concepts can be viewed as making up the preemption doctrine. But, even so, no abstract formulation of the preemption doctrine can be relied upon to resolve all the problems of federalism implicit in preemption situations.[45]

A finding of preemption vindicates the Constitution's supremacy clause.[46] Preemption occurs whenever a court rules a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[47] and therefore fairly infers that Congress's purpose encompassed elimination of the state law. Preemption cases reaffirm Congress as the regulator of our federal system. The question in each case is what was Congress's purpose.[48] A state law stands as an obstacle to congressional purpose whenever (1) it actually conflicts with a federal law[49]; or (2) produces "a result inconsistent with the objec-

44. 33 U.S.C. §§ 1221-27 (Supp. V 1975); and 46 U.S.C. § 391a (Supp. V 1975).

45. For example, Mr. Justice Butler stated that "Our decisions provide no formula for discovering implied effect of federal statutes upon state measures." H. P. Welch Co. v. New Hampshire, 306 U.S. 79, 84 (1939). Although the Court uses various expressions, *e.g.*, conflicting, repugnance, irreconcilability, interference (Hines v. Davidowitz, 312 U.S. 52 (1941)), no test is sufficiently accurate because preemption decisions usually pivot on the exact wording and policies of the specific statutes in issue.

46. U.S. Const. art. VI, cl. 2.

47. Hines v. Davidowitz, 312 U.S. 52, 67 (1941). *See generally* Hirsch, *Toward a New View of Federal Preemption*, 1972 U. Ill. L.F. 515; Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and The Burger Court*, 75 Colum. L. Rev. 623 (1975).

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

49. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963).

tive of the federal statute";[50] (3) whenever "the scheme of federal regulation [is manifestly] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it";[51] or (4) whenever "the Act of Congress [regulates] a field in which the federal interest is so [clearly] dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[52] The latter two areas of preemption are known as the occupation-of-the-field ground, the former two as the conflict ground, although the two grounds are not mutually exclusive.[53]

The Conflict-Supersession Ground

The clearest and most defensible application of the conflict ground of preemption is found where courts strike state statutes only when they can "not be reconciled or consistently stand together with federal statutes."[54] Thus, if a conflict exists between the actual wording of provisions of state and federal laws such "that compliance with the one is defiance of the other,"[55] the appropriate course of judicial action is clear. Under the supremacy clause, federal law supersedes the state statute.

The justification for applying the conflict ground lessens dramatically when no clear conflict exists. As the amount of state curtailment or interference with a federal law progressively decreases there is less justification for preemption. A remotely possible, or even an actual but slight, interference or inconsistency with a federal purpose makes the justification for applying the conflict ground to a state statute more attenuated. Frequently the conflict is more subtle and far less susceptible to accurate detection. Moreover, even if a conflict exists, it may be so insignificant and the state interest sufficiently significant that courts will per-

50. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), citing Hill v. Florida, 325 U.S. 538 (1945).

51. *Id.* The bracketed term "manifestly" is inserted to express accurately current preemption principles, as this article establishes *infra*.

52. *Id.* The bracketed term "clearly" is inserted to express accurately current preemption principles, as this article establishes *infra*.

53. There is no absolute intellectual distinction between the "conflict" and "occupation-of-the-field" grounds. If Congress "occupies" the field, then, rather clearly, a state statute designed to operate in the same field may "conflict" with the federal statute, or with its operation and achievement of its goals, or with the intent of Congress. Although the Court frequently distinguishes the two grounds, it does not invariably do so. *See, e.g.*, Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958).

54. Sinnot v. Davenport, 63 U.S. (22 How.) 227, 243 (1859).

55. Cloverleaf Butter Co. v. Patterson, 116 F.2d 227, 232 (5th Cir. 1940). Such a conflict would exist, for example, where a state statute requires 350 cubic inch engines in all tractors, and a federal statute prohibits 350 cubic inch engines in all tractors.

mit the conflict to continue, and not preempt the state law. The result is that as the subject and scope of state and federal laws move farther apart, that is, they are tangential at only one point and otherwise operative in completely different fields, they produce the most difficult cases for justifying an application of the conflict ground.[56] Obviously, if state and federal laws are not tangent at any point but operate in completely different areas, there can be no conflict, and hence, no supersession.

Recognizing states as well as the federal government have legitimate interests, a finding of conflict is not favored. For this reason, the Supreme Court is prone to reconcile state and federal statutes wherever possible and even to permit minor state impairments of federal statutes when founded on important state interests. For example, the conflict ground of preemption was vigorously argued to the Court in *Huron Portland Cement Co. v. Detroit*,[57] yet the Court held Detroit constitutionally could prosecute a violator of the city's Smoke Abatement Code (1) even though the polluting vessel's boilers and engine had to be fired up and cleaned out before it could physically load or unload its cargo; (2) even though the ship was fully licensed to carry on interstate coastal trade under federal laws requiring federal inspection and approval of the vessel's boilers and engine, and (3) even though there was no way the federally licensed boilers and engine of this unique vessel could be operated in compliance with Detroit's Smoke Abatement Code, although the overwhelming majority of other vessels could. The necessary result was that under the Detroit Code this particular vessel was functionally prohibited from loading or unloading its cargo at Detroit's ports and, to that extent, was prohibited from carrying on coastal trade. Nevertheless, the Court found no constitutionally significant conflict between state and federal law. During the course of his opinion for the Court, Mr. Justice Stewart commented on prior opinions in the area. Using language pertinent to Puget Sound's *Arco* case, he observed:

> The scope of the privilege granted by the federal licensing scheme has been well delineated. A state may not exclude from its waters a ship operating under a federal license.
>
> . . . .

56. *See, e.g.*, Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) (no conflict between local pollution law and federal maritime safety statute). *But compare* Perez v. Campbell, 402 U.S. 637 (1971) (finding a conflict between federal bankruptcy law and state limitations on automobile negligence judgment debtors).

57. 362 U.S. 440 (1960).

> . . . The mere possession of a federal license, however, does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce. Thus, a federally licensed vessel is not, as such, exempt from local pilotage laws, or local quarantine laws, or local safety inspections, or the local regulation of wharves and docks.[58]

Occupation Of The Field: The Preclusion-Supersession Ground

Occupation of the field results in preemption decisions much more comprehensive in scope than decisions based on the conflict-supersession ground. When a federal statute is held to occupy a field, the supremacy clause precludes all state regulation in that field, even though it may in no way conflict with operation of the federal statute.[59] The clearest and most defensible application of the occupation-of-the-field ground occurs when Congress has expressly stated it is occupying the field.[60] This state of affairs constitutes the paradigm situation of preclusion; that is, under the supremacy clause congressional will must prevail and a state is precluded from legislating in a field because Congress expressly has fully occupied it and there is no remaining room for state legislation; hence, supersession by preclusion.

The justifications for applying the occupation-of-the-field ground diminish dramatically when there is no clear congressional declaration of intent to preempt an area. When Congress has not expressed an intent to preempt, courts must rely on inferences drawn from statutes, their histories, and other factors to preclude state regulation in a given area. Applying the occupation-of-the-field ground is most difficult when state law vindicates an obviously important state interest in a field in which Congress has legislated without expressly declaring its desire to preempt state law. In such situations, some of the criteria courts use to infer congressional intent are:

> The scheme of federal regulation may be so [clearly] pervasive as to make [manifestly] reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act

---

58. *Id.* at 447 (citations omitted).

59. *See* Hines v. Davidowitz, 312 U.S. 52 (1941), in which the state statute could have passed muster under the conflict test but did not under the occupation-of-the-field test.

60. For example, because state laws were frustrating Congress's purpose of creating easily negotiated warehouse receipts, the Federal Warehouse Act was amended in 1931 to make federal regulation of grain warehouses "exclusive with respect to all persons securing a license hereunder." 7 U.S.C. § 269 (1970). The consequence was preemption of all state regulations previously applicable. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 223 n.4 (1947). *See also* Railway Labor Act, § 2 Eleventh, 45 U.S.C. § 152 Eleventh (1970).

> . . . may touch a field in which the federal interest is so [clearly] dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . [T]he object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.[61]

An especially difficult situation is one in which federal law only partially regulates a field. In these situations, when Congress has not expressly declared an intent to preempt, courts are really valuing the desirability of allowing states to burden federal law in a partially regulated field. Put another way, the problem for courts under the occupation-of-the-field ground when Congress has not expressed preemptive intent is one of balancing state interferences with federal regulation against the evils and harm to state interests if its attempt to regulate is preempted and some part of an industry is left unregulated.[62] Recognizing the nature of Supreme Court decisions in this area of preemption, Thomas Reed Powell characterized its wisdom as depending more "upon judgment about practical matters and not upon a knowledge of the Constitution."[63]

1. The Changing Presumption: Concern for State Interests—The 1930's

The occupation-of-the-field ground raises two questions: (1) What is the field, and (2) How pervasive and important are the interests underlying the federal and state regulations? Justice Stone stated in this regard:

> Little aid can be derived from the vague and illusory but often repeated formula that Congress "by occupying the field" has excluded from it all state legislation. Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution.[64]

He thus posed a most difficult problem because the quest for the intended scope of congressional enactments is most frequently

---

61. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (citations omitted) (the bracketed terms are added to reflect current preemption principles, as discussed *infra*). The Court considered factors neither mutually exclusive nor necessarily concurrent. *See* Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515, 531-33.

62. *See* Powell, *Current Conflicts Between the Commerce Clause and State Police Power, 1922-1927*, 12 MINN. L. REV. 607 (1928).

63. Powell, *Supreme Court Decisions on the Commerce Clause and State Police Power, 1910-1914 II*, 22 COLUM. L. REV. 28, 48 (1922).

64. Hines v. Davidowitz, 312 U.S. 52, 78-79 (1941) (dissenting opinion).

vague, fruitless, and illusory.[65] Faced with this situation the Court has fallen back on presumptions. In doing so, the Court has not always kept these two questions separated, nor will the present article.

Prior to the 1930's the Supreme Court applied a local-national criterion to define the scope of the field,[66] although it preferred a clear congressional declaration on the subject. This criterion was quite similar to that which it was applying to define the scope of state power to regulate commerce under the *Cooley* doctrine[67] in situations where Congress had not acted at all. During this era the Court took a rather broad view of the field Congress occupied whenever federal law regulated a subject national in character. Indeed, in many instances the presumption favoring federal occupation of the field was so strong that the sole issue was whether a federal law dealt with a subject state law also reached. The very exercise of federal power was held necessarily to preclude state statutes even though their operation was fully consistent with the federal regulation.[68] On the other hand, if the subject matter was of local character traditionally regulated by the states, the Court was willing to take a more restricted view of the field and the scope of federal preemption.[69]

During the 1930's, the Supreme Court showed greater solicitude for state interests and retreated from its expansive presumption favoring preemption whenever a federal law dealt with a

---

65. *See, e.g.*, Note, *"Occupation of the Field" in Commerce Clause Cases, 1936-1946: Ten Years of Federalism*, 60 HARV. L. REV. 262, 266-67 (1946) [hereinafter *Ten Years of Federalism*]. Part of the difficulty in ascertaining the precise boundaries of a "field" results because boundaries must be inferred from a statute's purpose and much of "federal law is generally interstitial in nature. It rarely occupies a legal field completely . . . . Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives . . . ." Hart & Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 470-71 (2d ed. 1973).

66. *See, e.g., Ten Years of Federalism, supra* note 65, at 267-68; Note, 43 COLUM. L. REV. 98, 102 (1943); Note, *Federal Supremacy and the Davidowitz Case*, 29 GEO. L.J. 755, 764-66 (1941).

67. The Court recognized some concurrent state power to regulate commerce "local" in nature or admitting of "diversity." Cooley v. Board of Wardens, 53 U.S. (12 How.) 298 (1851). *See also* California v. Zook, 336 U.S. 725 (1949); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).

68. *See, e.g.*, Charleston & W. C. Ry. Co. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915); Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51, 52-55 (1973).

69. *See, e.g.*, Kelly v. Washington, 302 U.S. 1 (1937); Sligh v. Kirkwood, 237 U.S. 52 (1915). *See also* Grant, *The Scope and Nature of Concurrent Power*, 34 COLUM. L. REV. 995 (1934); Comment, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 219-21 (1959).

subject also reached by state law.[70] Abandonment of this presumption placed the responsibility directly on Congress, rather than the Court, to preempt state laws only by express declaration. Congress, the Court reasoned, was the appropriate governor of the federal system. The Court developed the clear intent standard to govern judicial decision on whether Congress had occupied a field. If neither an express declaration of congressional preemptive intent nor an actual conflict was present, the Court would refuse to rule preemption had occurred unless congressional intent to occupy the field was otherwise definitely and clearly demonstrated.[71] Moreover, the Court was especially loathe to infer a congressional intent to occupy a field when public safety and health were in issue.[72] In effect, the clear intent standard created a new presumption favoring state laws to the extent that, absent definite and clear congressional intent to the contrary, state and federal statutes would be deemed capable of standing together and regulating concurrently.

2. *The Changing Presumption: Absolute Federal Supremacy—The 1940's, 50's, and 60's*

The Court took a different path beginning with World War II and continuing through the aftermaths of the cold war, Korea, and Vietnam. *Hines v. Davidowitz*[73] marked the turning point and invalidated much long standing state legislation. The Court held the Alien Registration Act of 1940, requiring aliens to register and carry identification cards, occupied the field and preempted Pennsylvania's law requiring alien registration and imposing more severe criminal sanctions than federal law. There was neither an actual conflict between state and federal laws nor

---

70. For further discussion of the historical changes and development of the preemption doctrine, see Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and The Burger Court*, 75 COLUM. L. REV. 623 (1975); Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51 (1973); Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L. F. 515; Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959); *Ten Years of Federalism*, *supra* note 65.

71. Mintz v. Baldwin, 289 U.S. 346 (1933). *See also*, Maurer v. Hamilton, 309 U.S. 598, 614 (1940) ("clearly indicated"); H. P. Welch Co. v. New Hampshire, 306 U.S. 79, 85 (1939) ("definitely expressed"). An earlier parallel development occurred with the "actual conflict" ground of supersession. *See, e.g.*, Savage v. Jones, 225 U.S. 501 (1912).

72. Maurer v. Hamilton, 309 U.S. 598 (1940).

73. 312 U.S. 52 (1941). Although *Hines* dealt with registration of aliens and the federal foreign affairs power, the Court has extended its reasoning to commerce clause cases and others. *See, e.g.*, Goldstein v. California, 412 U.S. 546 (1973) (copyright clause); Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (commerce clause).

a definite and clear expression of congressional intent to occupy the field. Nevertheless, the Court looked to the federal statute's constitutional foundation, the foreign affairs power, and, impressed by its importance, created a presumption in favor of absolute federal preemption because the federal law belonged "to that class of laws which concern the exterior relation of this whole nation with other nations."[74] Moreover, it was "so intimately blended and intertwined with the responsibilities of the national government"[75] that the federal statute, on its face, presented a complete scheme of regulation necessarily precluding all state laws in the field.[76]

In *Hines* the Court redefined the judicial function in preemption cases holding the question to be decided is whether the state statute "stands as an obstacle to [achieving] the *full* purposes and objectives of Congress."[77] When deciding the question courts were to consider the "nature of the power exerted by Congress, the object sought to be obtained, and the character of the obligations imposed by law."[78] This last requirement obliged courts to judge how the goals of various federal statutory provisions could best be achieved; that is, the Court returned to the view that judges are competent to infer preemptive congressional intent even in the absence of a definite and clear congressional declaration. This approach harkened back to that of the pre-1930's by permitting courts again to develop and assert a presumption of preemptive congressional intent whenever Congress has legislated in a field. This view was confirmed in *Cloverleaf Butter Co. v. Patterson,*[79] where the Court preempted a state statute regulating part of a field untouched by the preempting federal statute, and was further elaborated in *Rice v. Santa Fe Elevator Corp.*[80] Thus, from the 1940's until the rise of the Burger Court, the Supreme Court was actively involved in regulating the federal system in preemption cases and expanding absolute federal authority. It greatly relaxed its "definite and clear" requirement of

74. 312 U.S. 52, 66 (1941).

75. *Id.*

76. *Id.* at 66-67.

77. *Id.* at 67 (emphasis added).

78. *Id.* at 70.

79. 315 U.S. 148 (1942).

80. 331 U.S. 218 (1947). *See also* Carleson v. Remillard, 406 U.S. 598 (1972); Townsend v. Swank, 404 U.S. 282 (1971); Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971); Ham v. Rock Hill, 379 U.S. 306 (1964); Free v. Bland, 369 U.S. 663 (1962); Farmer Educ. & Coop. Union of Amer. v. WDAY, 360 U.S. 525 (1959).

preemptive congressional intent, and it found federal occupation of the field on the basis of its view of congressional policy embodied in federal statutes,[81] or its view of congressional design,[82] or even its judgment of the chances of a potential conflict between state and federal laws.[83] Decisions of this era essentially marked a return to the presumption of preemptive congressional intent and absolute federal supremacy[84] which lasted until the rise of the Burger Court.

3. The Changing Presumption: "Normalcy" and A Return to Strong Concern for State Interests—The 1970's

The Court changed directions in a series of decisions beginning in 1973, and once again showed great judicial solicitude for joint regulation and a strong concern for state interests.[85] In *Goldstein v. California,*[86] the Court held state law could regulate the copyright field concurrently with federal law by prohibiting reproductions of misappropriated phonograph records. *Goldstein* heralded the Court's return to its presumption of joint state and federal power prevalent in the 1930's.

Court reembracement of the doctrine favoring states' presumptive authority was confirmed in *New York State Department of Social Services v. Dublino.*[87] New York work rules,[88] im-

81. In San Diego Building Trade Council v. Garmon, 359 U.S. 236 (1959), the Court stated both federal and state courts must defer to the NLRB whenever "an activity is arguably subject to § 7 or § 8 of the [N.L.R.A.]" in order to "avoid" conflict with national policy. Mr. Justice Frankfurter was worried lest danger of federal-state conflict would create a "potential frustration of national purposes." *Id.* at 244.

82. Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424, 430 (1963).

83. Pennsylvania v. Nelson, 350 U.S. 497 (1956).

84. For example, in Free v. Bland, 369 U.S. 663 (1962), the Court announced the absolute supremacy standard: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Id.* at 666. In Perez v. Campbell, 402 U.S. 637 (1971), the Court applied its presumption of federal preemption and rejected the "aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration" of the federal law. *Id.* at 651-52. *Compare* DeCanas v. Bica, 424 U.S. 351 (1976).

85. *See* Goldstein v. California, 412 U.S. 546 (1973); New York State Dep't of Social Servs. v. Dublino, 413 U.S. 405 (1973); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973); Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974). *Contra,* Jones v. Rath Packing Co., 97 S. Ct. 1305 (1977); Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973).

86. 412 U.S. 546 (1973). *See also,* Comment, *Goldstein v. California, Breaking Up Federal Copyright Preemption,* 74 COLUM. L. REV. 960 (1974).

87. 413 U.S. 405 (1973).

88. N.Y. Soc. Serv. Law § 131(5) (McKinney Supp. 1974).

plementing the Federal Work Incentive Program (WIN), require employable persons who receive aid under that part of the Social Security Act providing Aid To Families With Dependent Children[89] to accept available employment. New York's work rules are inconsistent with the WIN guidelines because they require earlier termination of benefits for employable welfare recipients who violate the rules, and use a more summary procedure.[90] The question in *Dublino* was whether the more stringent work rules of New York were precluded because Congress had occupied the field. The Court ruled the Federal WIN program had not fully occupied the field.[91] It further held New York had independent and legitimate state interests in promoting self-sufficiency among welfare recipients and in assuring "that limited state welfare funds be spent on behalf of those genuinely incapacitated and most in need."[92] Moreover, the Court came down squarely against any presumption favoring federal preemption.[93] Indeed, it set forth a strictly construed clear intent standard and re-created a strong presumption in favor of state laws and joint state and federal regulation:

> If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.[94]

This test of congressional intent is stricter than the clear intent standard the Court created in the 1930's, and, in effect, it amounts to a specific intent requirement. The Court is simply saying if Congress had desired to preempt work rules like New

---

89. 42 U.S.C. §§ 630-44 (1970).

90. New York's work rules required employable recipients to certify their unavailability for employment, to pick up their checks in person, and to report for job interviews, public works employment, or any employment that might thereby be generated. Failure to comply with any of these requirements was deemed a refusal to accept employment, and termination of benefits ensued. N.Y. Soc. Serv. Law § 131(5) (McKinney Supp. 1974). The Federal WIN program's requirements of periodic certification are less strict than New York's (42 U.S.C. § 602(a)(8) (1970)); they contain no termination penalty and contrary to New York law, the Federal WIN program provides many procedural safeguards. *See* 42 U.S.C. §§ 602(a)(4), 602(a)(19)(F), and 633(g) (1970).

91. 413 U.S. 405 (1973).

92. *Id.* at 413.

93. "Where co-ordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal preemption becomes a less persuasive one." *Id.* at 421.

94. *Id.* at 413 (quoting Schwartz v. Texas, 344 U.S. 199, 202-03 (1952), a case at odds with preemption principles of its period).

York's with its WIN program, it could explicitly have done so. "*Dublino* is therefore a completely state-directed occupation-of-the-field case, coupling a protective treatment of state interests and a state presumption with a doctrinal formulation echoing the pre-*Hines-Rice* cases."[95] Today joint state and federal regulation of a field is the preferred solution to preemption problems.

The Joint Regulation Ground: No Supersession

Decisions relying on joint regulation result from situations in which Congress permits both state and federal regulatory laws to coexist in a field. No supersession of state law occurs, and thus, no evils affect state interests which might otherwise if federal law were held to preempt all state law. This is especially important when federal law does not fully regulate all aspects of potentially dangerous industries, leaving part unregulated to threaten state interests.

The current requirement that Congress must clearly manifest its intent to preempt state laws obviously will result in decisions favoring joint regulation. This rule breathes new life into old cases significant to a proper resolution of the *Arco* case. In *Parker v. Brown,*[96] the Court upheld California's scheme for pooling and eliminating competition among its raisin producers because, although Congress had authorized the Secretary of Agriculture to establish an identical program, he had only partially done so.[97] In *H. P. Welch Co. v. New Hampshire*[98] the Court ruled the state's law regulating maximum hours worked by truck drivers was a permissible coordinate regulation resting on important state interests, even though the Interstate Commerce Commission had issued a somewhat conflicting regulation on the subject, but had postponed the effective date of its order. Once the ICC order became effective it would, of course, supersede conflicting provi-

95. Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and The Burger Court,* 75 COLUM. L. REV. 623, 646 (1975). A similar development has taken place with respect to the conflict ground of supersession. *Id.* at 646-49; Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974). *See also* Goldstein v. California, 412 U.S. 546, 554 (1973), where the Court said even with respect to "necessarily national" matters, permissible situations where conflicts between federal and state laws "may possibly arise" must be distinguished from other situations where such conflicts "will necessarily arise."

96. 317 U.S. 341 (1943).

97. "As we have seen, the Agricultural Marketing Agreement Act is applicable to raisins only on the direction of the Secretary of Agriculture who, instead of establishing a federal program has, as the statute authorizes, cooperated in promoting the state program and aided it by substantial federal loans." *Id.* at 368.

98. 306 U.S. 79 (1939).

sions of the state law. The Court refused, however, to rule that Congress had occupied the field and thereby precluded all state laws whether conflicting or not. These older cases rest on a holding of coordinate purpose of state and federal law, and are fully consistent with the Burger Court's holding in *Dublino,* discussed earlier. Putting these cases together shows that the joint regulation ground of decision is preferred. The current rule appears to require the actual establishment of a comprehensive plan of federal regulation coupled with a very clearly manifested congressional intent to preempt a field before the Court will apply the occupation-of-the-field ground and invoke the supremacy clause to preclude all state law in the same field. Moreover, recent cases, discussed below, indicate this rule applies irrespective of whether the state and federal laws share a close harmony of coordinate purposes or are within identical fields.

Unless strict requirements for preemption are met, the Court will apply its favored joint regulation ground. Because Congress has ample power to modify a situation whenever it chooses, the Court will allow state statutes to stand, emphasizing joint regulation as the practical method of maximizing all underlying governmental interests, state and federal. This is because preemption necessarily involves the "sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties" thereby making the proper judicial approach one of reconciling "the operation of both statutory schemes with one another rather than holding one completely ousted."[99]

The recent decision in *DeCanas v. Bica*[100] corroborates joint regulation as the preferred ground of decision under the current preemption doctrine. California's Labor Code provides "no employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers" and that each violation is punishable by a fine of up to $500.[101] Because the power to regulate immigration is unquestionably an exclusive

---

99. Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973) (quoting Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963)).

100. 424 U.S. 351 (1976); Note, *Presumption in the Field of Immigration: DeCanas v. Bica,* 14 SAN DIEGO L. REV. 282 (1976); Note, *Regulation of Illegal Aliens: Sanctions Against Employers Who Knowingly Hire Undocumented Workers,* 4 WEST. ST. L. REV. 41 (1976).

101. Cal. Lab. Code § 2805(a) and (b) (West Supp. 1971).

federal power[102] and because the Court in *Hines v. Davidowitz*[103] had relied on the importance and exclusivity of the power over foreign affairs and on the pervasiveness of the Immigration and Naturalization Act (INA) to preempt state laws requiring alien registration, the question was whether Congress had fully occupied the field when it enacted the INA, also superseding California's law. The Court, unanimously invoking the clear intent standard and treating *DeCanas* as a joint regulation case, upheld California's law, stating:

> [W]e will not presume that Congress, in enacting the INA, intended to oust state authority to regulate the employment relationship covered by [California's Labor Code] in a manner consistent with the pertinent federal laws. *Only a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal laws—was "'the clear and manifest purpose of Congress'" would justify that conclusion. Florida & Avocado Growers v. Paul* . . . . Respondents have not made that demonstration. They fail to point out, and an independent review does not reveal, any specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular.[104]

The Court distinguished *Hines* primarily on grounds that, unlike the California legislature, Congress in the INA had not specifically regulated the employment relationship of illegal aliens and there was no indication Congress intended to preempt state law in the field of employment regulation.[105] The state and federal laws had different purposes and were not in actual or necessary conflict. The Court was unable to derive any preemptive intent from the scope and detail of the INA.[106] Furthermore, and of significance to the *Arco* case, the Court found evidence in a law enacted subsequent to the INA, the 1974 Amendments to the Farm Labor Contractor Registration Act,[107] "that Congress intends that States may, to the extent consistent with federal law, regulate the employment of illegal aliens."[108] Finally, in the

---

102. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698 (1893); Chy Lung v. Freeman, 92 U.S. 275 (1876); Henderson v. New York, 92 U.S. 259 (1876); Passenger Cases, 48 U.S. (7 How.) 283 (1849).

103. *See* note 73 *supra*.

104. DeCanas v. Bica, 424 U.S. 351, 357-58 (1976) (emphasis added).

105. *Id.* at 362.

106. *Id.* at 359.

107. 7 U.S.C. § 2041-55 (Supp. IV 1974). *See* text discussion *infra*, at notes 133-35.

108. DeCanas v. Bica, 424 U.S. 351, 361 (1976).

course of its unanimous opinion, after quoting approvingly from *Florida Lime & Avocado Growers v. Paul,*[109] the Court gave the *coup de grâce* to any presumption favoring federal preemption, ruling "we cannot conclude that preemption is required either because 'the nature of the subject matter [regulation of employment of illegal aliens] permits no other conclusion' or because 'Congress has unmistakably . . . ordained' that result."[110]

In *Florida Lime & Avocado Growers,*[111] relied on in *DeCanas,* the challenged California law prohibited state entrance to all avocados not meeting its minimum-oil content standard of maturity. Federal marketing orders issued pursuant to the Agricultural Adjustment Act[112] judged the maturity of avocados by standards other than oil content. The Court held federal law had not superseded California's law excluding avocados certified as mature under federal regulations but containing less than California's required minimum oil content. The Court concluded "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."[113] The Court relied on the finding of no physical impossibility[114] of complying with both state and federal law and on the view that "federal regulation by means of minimum standards of the picking, processing, and transportation . . . however comprehensive *for those purposes* . . . does not of itself import displacement of state control over the distribution and retail sale of those commodities in the interests of *consumers* of the commodities within the State."[115] These cases amply evidence the disfavor in which the Court holds occupation-of-the-field preemption based upon the comprehensiveness of federal statutes.

Unquestionably, the Burger Court has firmly established the principle of joint regulation, irrespective of common state and federal purposes in a given field, as the preferred ground of decision in preemption cases. A heavy burden is on the party arguing in favor of federal supersession to show it was the clear and manifest purpose of Congress to occupy the field. Preemption involves

---

109. "[F]ederal regulation . . . 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 Congress has unmistakably so ordained." *Id.* at 356 (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1960)).

110. DeCanas v. Bica, 424 U.S. 351, 356 (1976).

111. 373 U.S. 132 (1963).

112. 7 U.S.C. § 608c (1970).

113. 373 U.S. 132, 141 (1963).

114. *Id.* at 143.

115. *Id.* at 145.

"the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties . . . [and] the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'"[116]

PREEMPTION AND THE ARCO CASE

The *Arco* court rushed to decision without showing any awareness of recent developments in the preemption doctrine and, as will be shown, without adequate analysis of the laws involved. Comprehensive analysis of the preemption issue requires in-depth examination of both the Ports and Waterways Safety Act of 1972 and Washington's Tanker Pollution Law.

The Ports and Waterways Safety Act of 1972 (PWSA)

"The purpose of the [PWSA] is to promote the safety and to protect the environmental quality of ports, waterfront areas, and the navigable waters of the United States."[117] Dealing with the United States' energy crisis was not within the Act's purpose. The Act contains no express statement concerning preemption. The legislation contains two titles, each of which follows the same general scheme of authorizing the secretary of the department in which the Coast Guard operates to promulgate rules and regulations on certain subjects. This scheme confers discretionary authority, and is founded upon congressional recognition that individual coastal ports and waterways significantly differ; that the problems they generate are highly local and diverse in character; and that the Secretary's regulations governing oil tanker and other vessel traffic for one port are not necessarily proper for all other ports.[118] Thus, Congress recognized that diverseness inheres in the subject areas. This recognition directly contradicts the *Arco* court's view of this area as one requiring national uniformity and a ruling of preemption.[119]

---

116. Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973) (quoting Silver v. New York Stock Exch., 373 U.S. 341, 357 (1973)).

117. S. REP. No. 92-724, 92d Cong., 2d Sess. 7 (1972), *reprinted in* [1972] U. S. CODE CONG. & AD. NEWS 2766.

118. 33 U.S.C. § 1222e (Supp. V 1975). *See also* S. REP. No. 92-724, 92d Cong., 2d Sess. 7, 32 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2766, 2791-92.

119. This view is one of long standing. *See* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851). Thus, the Supreme Court in Packet Co. v. Catlettsburgh, 105 U.S. 559 (1881), upheld local harbor regulations setting fees and locations for landing vessels stating this type of rule belongs "to that class of rules which, like pilotage and certain others,

Title I,[120] entitled Ports and Waterways Safety and Environmental Quality, authorizes the Secretary, in his discretion, "to establish, operate and maintain vessel traffic services and systems for ports, harbors, and other waters subject to congested vessel traffic, and to require vessels [including oil tankers] which operate in the area of a vessel traffic system or service to utilize or comply with it" and to require "such vessels carry or install electronic or other devices necessary for the use of the service or system."[121] Thus, Title I is most closely related to provisions of Washington's law (a) requiring pilots for oil supertankers on Puget Sound and (b) prohibiting all oil supertankers of more than 125,000 deadweight tons, which pose a threat of massive oil spill, from proceeding beyond a point east of a line extending from Discovery Island light south to the New Dungeness light. In a discussion occupying only two short paragraphs,[122] and without identifying any express intent of Congress to preempt, the *Arco* court held the PWSA preempted all the above-mentioned provisions of Washington's law.

Title II,[123] entitled Vessels Carrying Certain Cargoes in Bulk, is, as the *Arco* court recognized, an amendment to and reenactment of the Tank Vessel Act of 1936.[124] Title II confers discretionary authority upon "the Secretary to promulgate regulations for vessel safety and for protection of the marine environment with respect to design, construction, alteration, repair and maintenance of . . . vessels," including oil tankers.[125] This Title describes by way of illustration a broad category of subjects over

---

can be most wisely exercised by local authorities, and in regard to which no general rules, applicable alike to all ports and landing places, can be properly made." *Id.* at 563.

120. 33 U.S.C. §§ 1221-27 (Supp. V 1975).

121. S. REP. No. 92-724, 92d Cong., 2d Sess. 32 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2791.

122. Arco and Seatrain contend that the state's restrictions are preempted by federal regulation in the field, are violative of the commerce clause, and invade the foreign affairs powers of the United States.

We are persuaded that federal law has preempted the field. Title I of the Ports and Waterways Safety Act of 1972 (the PWSA), 33 U.S.C. §§ 1221 *et seq.*, establishes a comprehensive federal scheme for regulating the operations, traffic routes, pilotage, and safety design specifications of tankers. Under the PWSA, the Coast Guard can create traffic-control systems for Puget Sound, and it has done so. 33 C.F.R. Part 161, Subpart B. The PWSA gives the Coast Guard authority to restrict and even exclude tankers from Puget Sound under adverse or hazardous conditions. 33 U.S.C. § 1221 (3) (iv).

Arco, supra note 6, at 2-3.

123. 46 U.S.C. § 391a (Supp. V 1975).

124. *Arco, supra* note 6, at 3.

125. 1972 U.S. CODE CONG. & AD. NEWS 2786.

which regulations may be prescribed and its enumeration differs only slightly from the Vessel Tank Act of 1936, except that authority is expressly granted to prescribe standards for protection of the marine environment.[126] Title II is most directly related to provisions of Washington's law prescribing design and equipment for oil supertankers between 40,000 and 125,000 deadweight tons (shaft horsepower, twin screws, double bottoms, and two radar systems). This size oil supertanker, designed and equipped in accordance with Washington's law, is permitted to traffic the entire body of Puget Sound. Oil supertankers between 40,000 and 125,000 deadweight tons not so designed and equipped may also use the entire body of Puget Sound, but they must be in the company of a tug escort. In a discussion occupying only three short paragraphs,[127] and without identifying any express congressional preemptive intent, the *Arco* court held the PWSA preempted all the above-mentioned provisions of Washington's law.

The PWSA Inferentially Authorizes Joint State and Federal Regulation

The *Arco* court identified Congress's general approach in this area when it declared "Congress has invoked 'cooperative federalism'—or at least some state involvement—in virtually all its

126. *Id.*

127. The purpose of the original Tank Vessel Act, and of Title II of PWSA, was 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. Balkanization of regulatory authority over this most interstate, even international, of transportation systems is foreclosed by the national policy embodied in the PWSA. The PWSA has preempted § 3(2) of Washington's Tanker Law.

Washington asserts that the minimum design specifications required by § 3(2) of the Tanker Law were not preempted, because they can be avoided if the tanker has a tugboat escort. Congress has given the Coast Guard authority to require tugboat escorts in Puget Sound under hazardous conditions. 33 U.S.C. § 1221 (3) (iv). And the Coast Guard has considered doing this. Department of Transportation, Coast Guard, Final Environmental Impact Statement [on the] Regulations for Tank Vessels Engaged in the Carriage of Oil in Domestic Trade 71 (August 15, 1975). We believe that the tugboat-escort provision of the Tanker Law has also been preempted by the federal law.

Arco and Seatrain also argue that § 2 of Washington's Tanker Law (requiring a local pilot on all tankers larger than 50,000 dwt) has been preempted. Insofar as the Tanker Law prohibits a tanker "enrolled in the coastwise trade" from navigating Puget Sound unless it has a local pilot, the statute is void; it conflicts with clear federal law on that subject. 46 U.S.C. §§ 215, 364 (1970).

Arco, supra note 6, at 3-4.

water-related regulatory programs."[128] Inexplicably, the court then stood the current preemption doctrine on its head, precluding Washington's law by applying the discredited presumption of absolute federal preemption, presumably by invoking the hoary reasoning that if Congress had also wanted to permit cooperative federalism in the PWSA it would have expressly done so. In so ruling, the court regrettably failed to consider some of the most relevant provisions of the PWSA, discussed below. These provisions seem to show the opposite; namely, that Congress's approach in the PWSA is consistent with its approach in other water-related programs and authorizes cooperative federalism, including Washington's Tanker Pollution Law. For example, Title I, §102(c), provides: "In the exercise of his authority under this Title, the Secretary . . . may also consider, utilize, and incorporate regulations or similar directory materials issued by port or other State and local authorities."[129]

Obviously, the Secretary cannot consider, utilize, or incorporate state or local regulations on the items subject to his rule making powers under the PWSA if mere enactment of the PWSA has precluded all such regulations. It would appear, therefore, that the *Arco* court drew the wrong inference. The appropriate inference to be drawn from §102(c) is, like Congress's approach elsewhere in water-related legislation, that the PWSA authorizes joint state and federal regulation of the entire subject matter until the Secretary actually establishes conflicting rules either expressly or necessarily ousting state jurisdiction. Then, and then only, would a state's rules be superseded, but then only because of an actual or necessary conflict with federal law and not because Congress has precluded all state regulation by exclusively occupying the field with the PWSA. Consequently, the *Arco* court's ruling in favor of pervasive federal preemption on the sole ground that Congress occupied the field by enacting the PWSA is erroneous.

Title I, §102(b), illustrating the vast amount of state power Congress has granted in another area, further corroborates the correctness of this inference: "Nothing contained in this title prevents a State or political subdivision thereof from prescribing for structures only higher safety equipment requirements or safety

128. *Id.* at 4. *See, e.g.*, The Federal Water Pollution Act, 33 U.S.C. §§ 1151-75 (1970); The Air Quality Act of 1961, 42 U.S.C. § 1857 (1970); The Estuarine Areas Act, 16 U.S.C. §§ 1221-26 (1970); The Deepwater Ports Act of 1974, 33 U.S.C. §§ 1501-24 (Supp. IV 1974).

129. 33 U.S.C. § 1222(c) (Supp. IV 1974).

standards than those which may be prescribed pursuant to this title."[130]

Although inelegantly stated, §102(b) singles out shoreline structures only, and expressly authorizes states to impose more stringent safety requirements than the Secretary might prescribe—a kind of reverse preemption. The inferences are (1) the Secretary's rules in the sole area of shoreline structures are to be viewed as non-exclusionary of conflicting state regulations (a kind of reverse preemption); (2) in the other areas regulated by the PWSA, such as rules applying to vessels, states have joint authority to create rules not actually conflicting with the Secretary's, but (3) in these other areas states have no power to enforce state rules conflicting with or more stringent than regulations of the Secretary as they do in the area of shoreline structures, suggesting that the federal regulations for these other areas are minimum regulations that may be supplemented. This section expressly authorizes states to go beyond federal regulations with respect to structures only. There is nothing in this section, however, directly or by inference, precluding all state regulation of vessels when the state regulation is neither more stringent than the Secretary's rules, nor in actual or necessary conflict with them.[131] Thus viewed, the two sections are fully harmonious; one (§102(c)) authorizes non-conflicting state regulation of vessels and structures, and the other (§102(b)) expressly authorizes more stringent and conflicting state regulation, but solely for shoreline structures.

A final statutory provision further corroborates Congress's intent to permit joint state and federal regulation in the PWSA. Section 102(e) of Title I provides: "In determining the need for, and the substance of, any rule or regulation or the exercise of other authority hereunder the Secretary shall . . . consider—. . . (c) existing vessel traffic control systems, services and schemes."[132] Again, the Secretary obviously cannot consider existing traffic control systems of the states or independent port

130. 33 U.S.C. § 1222(b) (Supp. IV 1974).

131. Although stated confusingly, the House Report on H.R. 8140 explained that the word "only" was added to Title I in order to make it clear that states had power to go beyond the Secretary's regulations "only" in cases involving the safety of shoreline structures and not with respect to vessels. It was not the intent of Congress by adding "only" to preempt all state power to regulate vessels generally, thereby contradicting section 102(c), discussed *supra*. The Secretary's actual regulations directly conflicting with state regulations of vessels would preempt, but there is no general preemptive intent to preclude all state regulation of vessels. *See* H.R. REP. No. 92-563, 92d Cong., 1st Sess. 15 (1971).

132. 33 U.S.C. § 1222(e) (Supp. IV 1974).

authorities if such systems cannot exist because they have been superseded under the preemption doctrine. The appropriate inferences to be drawn from §102(e) are (1) state traffic control systems have not been superseded because of preclusion; (2) states have been authorized to institute traffic control systems, services, and schemes; and (3) they shall remain in force until superseded by actual or necessary conflict with federal regulations promulgated by the Secretary.

This view of the PWSA harmonizes it with congressional policy the *Arco* court identified in other water-related federal statutes seeking to protect the marine and coastal environment by invoking cooperative federalism.[133] Moreover, this view is consistent with the Supreme Court's pronouncement in *Dublino,* discussed above,[134] that "it would be incongruous for Congress on the one hand to promote [a policy objective] and on the other to prevent states from undertaking supplementary efforts toward this very same end."[135] Although Washington's Tanker Pollution Law also seeks to protect that part of the state's economy based on fish and shellfish, it shares two objectives with the PWSA: vessel safety and protection of the marine environment.

Moreover, on June 1, 1976, the Secretary of Commerce approved Washington's Coastal Zone Management Program under the Coastal Zone Management Act of 1972.[136] A vital part of

133. The fundamental nature of national policy is stated in the Federal Water Pollution Control Act Amendments of 1972: "to recognize, preserve and protect the primary responsibilities and rights of states to prevent, reduce and eliminate pollution." 33 U.S.C. § 1251(b) (Supp. IV 1974). The Estuarine Areas Act of 1968, 16 U.S.C. §§ 1221-26 (1970), provides "it is declared to be the policy of Congress to recognize, preserve and protect the responsibilities of the States in protecting, conserving, and restoring the estuaries of the United States." *Id.* at § 1221. The Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-64 (Supp. IV 1974), establishes a program of federal grants to coastal states for developing coastal zone management programs, and is partially based on the following finding: "The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the land and waters in the coastal zone . . . ." *Id.* at § 1451(h). The Deepwater Port Act of 1974, 33 U.S.C. §§ 1501-24 (Supp. V 1975), provides for federal licensing of offshore ports for supertankers and declares its purpose is, *inter alia,* to "protect the interests of the United States and those adjacent coastal states in the location, construction and operation of deepwater ports." 33 U.S.C. § 1501(a)(3) (Supp. V 1975); and to "protect the rights and responsibilities of states and communities to regulate growth, determine land use, and otherwise protect the environment in accordance with law." 33 U.S.C. § 1501(4) (Supp. V 1975). It seems obvious the PWSA must be interpreted consistently with this mass of recently enacted legislation and allow for "cooperative federalism."

134. *See* text at note 87 *supra.*

135. N.Y. State Dep't of Pub. Serv. v. Dublino, 413 U.S. 405, 419 (1973).

136. Jurisdictional Statement of Appellants at 20, Evans v. Atlantic Richfield Co., No. 76-930 (U.S. Sup. Ct.).

Washington's program consists of the identical policy incorporated in Washington's Tanker Pollution Law; namely, protection of the marine environment by controlling oil supertanker access to the environmentally sensitive waters of Puget Sound:

> The State of Washington, as a matter of overriding policy, positively supports the concept of a single, major crude petroleum receiving and transfer facility at or west of Port Angeles. This policy shall be the fundamental, underlying principle for state actions on the North Puget Sound and straits oil transportation issues . . . .[137]

In the absence of a clearly manifested congressional intent to the contrary in the PWSA, the Secretary of Commerce's approval of the policy embedded in Washington's Tanker Pollution Law under the Coastal Zone Management Act shows Washington's law is in harmony with other water-related federal laws and this federal approval is also evidence of its consistency with the PWSA.[138]

The legislative history of the PWSA further corroborates a contemplated sharing of regulatory authority with the states on several of *Arco's* questions: oil supertanker access to Puget Sound's hazardous waters and oil tanker design, operation, and safety requirements, at least until the Secretary promulgates conflicting regulations actually superseding Washington's law. The authors of the PWSA never intended to preempt state and local authority over vessel movement or design. Pursuant to a 1970 message on oil pollution by President Nixon, the Department of Transportation transmitted to Congress what later became Title I of PWSA. When doing so, then Secretary of Transportation Volpe stated:

> [W]e would expect to continue to encourage greater involvement and allocation of resources by state and local port authorities. Though the regulatory authority of our proposal will assure appropriate federal coordination and general uniformity, the scope of the port safety task as well as unique local conditions and problems virtually compels local as well as federal effort.[139]

Title II was added by the Senate which did not believe it was displacing state and local governments' authority to legislate in

---

137. *Id.* at 20 n.21.

138. *See* text discussion at note 101 *supra.*

139. *The Ports and Waterways Safety Act of 1972: Hearings on H.R. 8140 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. 4 (1971).

the field. For example, during the Senate hearings on the PWSA, it was stated:

> THE CHAIRMAN [Warren Magnuson]. In some of these places, like Puget Sound and probably Chesapeake Bay, San Francisco Bay, the State could pass any kind of a tough law on people coming in.
> MR. NICKUM. That is right.
> THE CHAIRMAN. I think in the Chesapeake Bay they have a tristate commission involving Virginia, Delaware, and all the people involved. The State may want to do that, but then only could say that no ship could come in their inland waters unless it complied with some of their guidelines. But this is something we have got to work out.[140]

The *Arco* court regrettably rendered its decision without commenting on Title I §102(b), (c), and (e) of the PWSA or its legislative history. These provisions appear to authorize cooperative federalism in the PWSA and to require a result directly opposite that reached by the *Arco* court. Indeed, they vindicate the Supreme Court's general rule of preemption that "historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[141]

Supersession of State Law Because of Preclusion Under the PWSA: Occupation of the Field

The *Arco* court was persuaded federal law had preempted the field because Title I of the PWSA "establishes a comprehensive federal scheme for regulating the operations, traffic routes, pilotage, and safety design specifications of tankers" and because under "the PWSA, the Coast Guard can create traffic-control systems for Puget Sound, and it has done so."[142] Moreover, the "PWSA gives the Coast Guard authority to restrict and even exclude tankers from Puget Sound under adverse or hazardous conditions."[143] The court made no inquiry into whether the Coast

---

140. *See* note 11 *supra*, at 146.

141. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Again, during the last Term of Court, the Supreme Court, although holding the challenged state statute preempted, stressed the same point saying the assumption in favor of the validity of a state law "provides assurance that 'the federal-state balance,' United States v. Bass, 404 U.S. 336, 349 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the courts." Jones v. Rath Packing Co., 97 S. Ct. 1305, 1309 (1977).

142. *Arco, supra* note 6, at 3.

143. *Id.*

Guard had actually restricted access of oil tankers, or whether there was an actual conflict between state and federal law; *i.e.*, a physical impossibility[144] of complying with both, or whether the subject matter permits no other conclusion than federal preemption,[145] or whether "Congress has unmistakably . . . ordained"[146] federal preemption. To the extent the court relied on the pervasive nature of the PWSA, which merely grants discretionary power to the Secretary, without considering whether the state law might consistently coexist, the court erroneously applied the discredited preemption doctrine favoring absolute federal preclusion. The extent to which the court relied on other factors, or failed to consider them, is discussed below.

1. The Legislative History of the PWSA is Devoid of Preemptive Intent.

The PWSA, on its face, does not express a clear and manifest congressional purpose[147] to preclude all state regulation of oil tankers. On the contrary, as explained above, it authorizes state regulation of oil tankers. Moreover, a search of the legislative history fails to reveal any general preemptive intent of Congress. The one instance in which the word "preempt" appears is in the context of an amendment. It cannot be characterized as showing an unequivocally clear and manifest congressional purpose to preclude all state regulation of oil tankers.[148] Neither the *Arco* court nor the *Arco* plaintiffs identified any legislative history showing express preemptive intent.

2. Is the Face of the PWSA Sufficiently Pervasive Generally to Preclude State Regulation?

Not finding preemption clearly prescribed by either the text or the legislative history of the PWSA, the *Arco* court found preemption by determining that the face of the statute created a comprehensive federal scheme for regulating oil tankers, an area requiring national uniformity, thereby precluding states from sharing any regulatory authority.[149] Thus, if one ignores the inferences drawn from §102(b), (c), and (e) and the legislative history

144. *See* text at note 114 *supra.*

145. *See* text at note 110 *supra.*

146. *Id.*

147. *See* DeCanas v. Bica, 424 U.S. 351, 357 (1976) (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-47 (1973)).

148. *See* text at notes 130 and 131 *supra.*

149. *Arco, supra* note 6, at 3.

of the PWSA, discussed above, the question is whether the PWSA, on its face, clearly manifests congressional intent to preclude even harmonious state regulations.[150] Washington's interest in preventing massive oil spills on Puget Sound is obvious. It cannot be persuasively maintained the PWSA involves an area solely of such great national interest that the state's obviously significant interests can easily be ignored or overridden. Given the current test of preemption and Washington's important state interests, general preclusion should be found on the ground of "pervasiveness" only if the evidence is strong and manifestly clear.

A. Title I and Occupation of the Field

Regrettably, the *Arco* court based most of its view of preemption due to the comprehensiveness of the federal legislative scheme solely on a grant of authority to the secretary of the department in which the Coast Guard operates. But without more, the grant of authority, although comprehensive, is dormant, and may remain so. Title I of the PWSA is permissive only, stating the secretary of the department in which the Coast Guard is operating "*may*"[151] create a comprehensive set of rules establishing vessel traffic control systems for such ports and waterways as he deems appropriate. The grant of authority is discretionary, and the Secretary is not obliged to create any vessel control rules whatsoever.[152] Thus, irrespective of the comprehensiveness of the authority the PWSA delegated to the Secretary, upon which the *Arco* court relied, it is impossible for Title I of the PWSA, in its dormant state, to be equated with a clear and manifest congressional purpose to preclude all state regulations in the area. "Only a demonstration that complete ouster of state power to promulgate laws not in conflict with federal laws—was the 'clear and manifest purpose of Congress' would justify that conclusion."[153]

The Secretary is not obliged to create a vessel control system for each and every port and waterway in the United States, including Puget Sound, nor if he acts is he obliged to create a comprehensive set of rules including all aspects of vessel control. Thus, the set of rules controlling vessels the Secretary may ulti-

150. DeCanas v. Bica, 424 U.S. 351 (1976).

151. 33 U.S.C. § 1221 (Supp. V 1975) (emphasis added).

152. Indeed, on Nov. 16, 1973, Congress directed the Secretary "to establish a vessel traffic control system for Prince William Sound and Valdez, Alaska." 33 U.S.C. § 1221 (Supp. IV 1974).

153. DeCanas v. Bica, 424 U.S. 351, 357 (1976).

mately establish for Puget Sound might be fragmentary and certainly need not be comprehensive and exclusive of room for state supplementation. Consequently, it appears the ruling of preclusion because of the comprehensiveness of the PWSA is in error. But, more importantly, until the PWSA's federal control system has been finally established, it is premature for the *Arco* court, under *H. P. Welch Co., Dublino, Florida Lime & Avocado Growers,* and *DeCanas,*[154] to determine there is such a degree of comprehensiveness as to yield the clear judgment that Congress has manifested its purpose to preclude all consistent state regulation.

As the *Arco* court noted, the Secretary has exercised his authority under the PWSA to create some rules applicable to Puget Sound. He has created a rudimentary traffic control and reporting system for vessels on Puget Sound.[155] But this set of rules is not comprehensive. It fails to address certain oil-tanker problems such as sudden losses of power and lack of tanker maneuverability in hazardous waters—the very concerns of the pilot, tug-escort,[156] and oil-tanker design features of Washington's Tanker Pollution Law. Moreover, the Washington law's tug-escort, alternative-design, and pilotage provisions can have no impact on the vessel control system the Secretary established for Puget Sound, and the *Arco* court found none. The Secretary's system simply consists of separated traffic lanes, partial radar tracking, and periodic reporting requirements,[157] all of which are unaffected by Washington's tug-escort, alternative-design, and pilotage provisions. Finally, the Secretary has created no rules limiting or regulating access of the more gigantic oil supertankers to Puget Sound's treacherous Straits of Rosario or Georgia which, again, is one of the crucial subjects of the Washington law.[158] It is noteworthy, but ignored by the *Arco* court, that Congress in the Deep Water Port Act,[159] enacted after the PWSA, expressly gave coastal

154. *See* text at notes 87, 95, 98, 100, and 111 *supra.*

155. *See* 33 C.F.R. §§ 161.101-.189 (1976).

156. The Coast Guard has published the required Advance Notice of Proposed Rulemaking, 41 Fed. Reg. 18770 (1976), stating that it may consider rules requiring tug escorts. To date, there are no regulations, and, of course, none existed at the time of the *Arco* decision.

157. *See* 33 C.F.R. §§ 161.101-.189 (1976).

158. The PWSA authorizes the Secretary to create rules controlling and restricting vessel operation "in a hazardous area or under hazardous conditions." 33 U.S.C. § 1221(3)(iv) (Supp. IV 1974). Except for those noted immediately above, however, no federal regulations have been promulgated regarding the hazardous waters of Puget Sound.

159. 33 U.S.C. §§ 1501-24 (Supp. IV 1974). Reliance on a subsequently enacted

states an absolute veto power on construction of deep water ports[160] and therefore on whether oil supertankers might be allowed to enter and to service deep water ports located beyond three miles from state shores.[161] It is logically inconsistent that Congress intended the State of Washington might absolutely control access of all oil supertankers whatever their characteristics to deepwater ports located more than three miles out in the Pacific Ocean, and at the same time, as the *Arco* court ruled, to preclude the State of Washington from regulating access of oil supertankers to its inland waters of Puget Sound where the dangers of oil supertanker transportation are severe and Washington's state interests are far greater.

Contrary to the holding of the *Arco* court, Title I of the PWSA is not so comprehensive in its dormant state as to preclude all consistent state legislation.

B. Title II and Occupation of the Field

Unlike Title I, Title II of the PWSA falls somewhere between mandatory and permissive. In section 4417a(3), on the one hand, Title II directs that the Secretary "shall" establish "*additional rules and regulations as may be necessary* with respect to the design and construction, alteration, repair and maintenance of such vessels,"[162] including oil tankers.[163] On the other hand, in its important section 4417a(7), Title II directs the Secretary to begin "publication *as soon as practicable* of, proposed rules and regulations setting forth *minimum standards* of design, construction, alteration and repair of the vessels [including oil tankers] to which this section applies for the purpose of protecting the marine environment."[164] In any event, the Coast Guard, at the time of the *Arco* suit, had recognized the federal regulations under Title II of the PWSA as "not a complete and comprehensive answer" to the oil tanker pollution problem.[165]

Two points emerge. First, under Title II the Secretary is

---

statute is consistent with the Court's search for preemptive intent in *DeCanas*. *See* text discussion at note 107 *supra*.

160. 33 U.S.C. § 1508(b) (Supp. V 1975).

161. 33 U.S.C. § 1503(c)(9) (Supp. V 1975). The state's veto power is only over the construction of such a port, but obviously, if such a port cannot be constructed because of a state's veto, it cannot be serviced.

162. 46 U.S.C. § 391a(3) (Supp. V 1975) (emphasis added).

163. *Id.* at § 391a(2)(B).

164. *Id.* at § 391a(7) (emphasis added).

165. U.S. COAST GUARD, FINAL ENVIRONMENTAL IMPACT STATEMENT ON REGULATION FOR TANK VESSELS ENGAGED IN THE CARRIAGE OF OIL IN DOMESTIC TRADE 1 (1975).

permitted considerable discretion in determining what additional rules and regulations of oil tanker design and equipment, if any, may be necessary, and in determining when it is practicable to publish his new rules. To this extent Title II appears to be more permissive than strictly mandatory.[166] Second, Congress has expressly characterized any new rules the Secretary may promulgate as minimum standards, not maximum or uniform standards. Thus, Congress's purpose in Title II is to establish a set of minimum regulations governing the design and equipment of oil tankers and other transport vessels. That Congress, itself, viewed Title II as creating *minimum* standards that might be supplemented with consistent state law serves to negate the *Arco* court's reasoning and conclusion that the subject areas of the PWSA require either uniform or exclusively federal treatment. This minimum-standards view yields an important inference harmonizing Title I and Title II along the lines of cooperative federalism, specifically, that states might supplement the Secretary's minimum standard rules at least until there is either a direct or necessary conflict with a federal regulation such that compliance with both becomes a physical impossibility, at which time the conflicting state regulation would be superseded. This inference is founded in the express congressional wording of Title II, in reason, and in case authority currently setting forth the preemption doctrine.[167]

The *Arco* court simply erred by failing to recognize Congress's own characterization of the Secretary's rules under Title II, and by substituting its own unwarranted characterization of them, stating that Congress's purpose under "Title II of the PWSA, was 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."[168] To the contrary, Title II characterizes the stan-

166. *See* the concern of Governor Evans in the text at note 199 *infra*.

167. *See* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963), where the Court upheld California's statute prohibiting entry of avocados not meeting the state's minimum-oil-content standard of maturity although the avocados had been certified for interstate commerce by the Secretary of Agriculture under federal regulations. The Court characterized the federal standards regulating avocados (oil tankers?) as "minimum standards" rather than "uniform standards" (compare a contrary holding predicated upon "uniform" federal regulations in Campbell v. Hussey, 368 U.S. 297 (1961)), and upheld California's law, finding no "physical impossibility" of complying with both state and federal standards. *See also* note 95 *supra*.

168. *Arco, supra* note 6, at 3. The court continued by saying "Balkanization of regulatory authority over this most interstate, even international, of transport systems is foreclosed by the national policy embodied in the PWSA. The PWSA has preempted § 3(2)

dards as minimum which means, of course, they are not to be considered as exclusive of complementary state law.

Because "federal regulation . . . 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 Congress has unmistakably so ordained,"[169] neither Title I nor Title II, solely on its face, preempts all consistent state regulation of the areas subject to federal regulation under the PWSA simply because Congress has delegated comprehensive authority to the Secretary to promulgate rules and regulations. It cannot be concluded that preemption is required because Congress's treatment of the subject matter in Title I or II permits no other conclusion or because "Congress has unmistakably so ordained" that result.[170] Indeed, as discussed above, Titles I and II, by their most reasonable inferences, affirmatively authorize consistent state regulation by providing for cooperative federalism: joint state and federal regulation in water-related areas subject to the PWSA.

Is There Supersession of Washington's Law Because of a Direct Conflict with the PWSA?

There has been no general preclusion of state law simply because of congressional passage of the PWSA. Nevertheless, it is possible that the Secretary, in the exercise of his authority, has promulgated a federal regulation either actually or necessarily conflicting with state law such that it is a physical impossibility[171] to comply with both. And the possibility of preemption by another federal statute has not been considered. Thus, it is useful to inquire whether Washington's Tanker Pollution Law actually or necessarily conflicts with any other federal statute or with any federal regulation issued by the Secretary and in force at the time of the *Arco* decision.

A. Pilots

Washington's law requires all oil tankers[172] of 50,000 or more

---

[governing supertanker design and equipment] of Washington's Tanker Law." To the contrary, as discussed above, cooperative federalism is the national policy embodied in the PWSA.

169. DeCanas v. Bica, 424 U.S. 351, 356 (1976) (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963)).

170. *Id.*

171. *See* text at note 114 *supra.*

172. Although Washington's law makes exception for enrolled vessels and vessels

deadweight tons to "take [and pay] a Washington state licensed pilot while navigating Puget Sound."[173] The *Arco* court held this provision void because "it conflicts with clear federal law on that subject."[174]

The only possible source the *Arco* court cites for this clear federal law is two sections of the United States Code.[175] These sections, however, are limited and apply only to all vessels engaged in the *coastwise trade,* indicating these vessels shall, when under way, except on the high seas, be under the control and direction of Coast Guard-licensed pilots. Coastwise seagoing vessels covered by the two Code sections consist solely of American vessels engaged in domestic trade or plying between port and port in the same country, as distinguished from American vessels in foreign trade. Moreover, the sections do not apply to foreign trade or to foreign flag ships.[176] Thus, the *Arco* court is, perhaps, half correct. If the *Arco* case involved American vessels engaged in the coastwise trade, Washington could not require them to take on state pilots. In such circumstances the two cited sections have the potentiality of conflicting with state law, but only if the vessel involved is licensed under the United States flag and only if engaged in the coastwise trade, such as transporting Alaskan oil to west coast ports. As to foreign flag oil tankers, or American flag oil tankers not engaged in the coastwise trade, there can be no conflict between state and federal law—Washington's law can apply. Of course, at the time of the *Arco* decision, no vessels were actually engaged in the coasting trade by transporting Alaskan crude oil to Puget Sound because Alaskan oil had not yet started to flow. The cited sections of the United States Code may conflict and supersede Washington's law requiring pilots on certain vessels in Puget Sound waters, but only if those vessels are American and only if they also are engaged in the coastwise trade; otherwise, there would be neither conflict nor supersession.[177]

---

exclusively engaged in the coasting trade (WASH. REV. CODE § 88.16.070 (1976)), the exception is inapplicable to the pilotage requirement for oil tankers in excess of 50,000 dwt. *See* WASH. REV. CODE § 88.16.180 (1976).

173. WASH. REV. CODE § 88.16.180 (1976).

174. *Arco, supra* note 6, at 4.

175. 46 U.S.C. §§ 215 and 364 (1970).

176. *See, e.g., In re* Canadian Pac. Ry. Co., 278 F. 180 (W.D. Wash. 1921). State pilotage laws applied to a British vessel coming from a foreign port do not conflict with a treaty provision that "no higher or other duties or charges shall be imposed in any ports of the United States on British vessels than those payable in the same ports by vessels of the United States" because of the exemption from state pilotage laws of coastwise vessels of the United States. Olsen v. Smith, 195 U.S. 332, 344 (1904). *See* note 95 *supra.*

177. Only state pilotage provisions conflicting with federal law are thereby su-

B. Oil Supertanker Design and Equipment

Before permitting unescorted access to the entire body of Puget Sound, Washington's law requires oil tankers between 40,000 and 125,000 deadweight tons to have double bottoms beneath all oil and liquid cargo compartments;[178] two radar systems, one of which must be collision avoidance radar;[179] twin screws, and shaft horsepower in the ratio of one horsepower to each two and one-half deadweight tons, plus such other navigational position location systems as may be prescribed.[180] An oil supertanker between 40,000 and 125,000 tons can easily escape all of Washington's design and equipment standards by simply using a tug escort when traversing Puget Sound's waters. In other words, Washington did not mandate that supertankers of this class must necessarily be of state-specified design and carry state-specified equipment before they would be permitted to use Puget Sound. What Washington mandated is that supertankers of this class must comply with Washington design and equipment standards if and only if the supertankers wanted to cross Puget Sound's waters solely under their own power. Thus, the design and equipment standards found in Washington's Tanker Law cannot possibly conflict with any federal law or regulation for the simple reason Washington has not exclusively imposed them as a matter of state law.[181]

On December 13, 1976, acting under the PWSA, the Secretary promulgated several new rules regulating oil tanker design and equipment.[182] These regulations were deemed "necessary to

---

perseded. The state law, as a whole, is not void, and the remaining parts of a state's pilotage law can be applied. State v. Ring, 122 Or. 644, 259 P. 780 (1927), *aff'd per curiam*, 276 U.S. 607 (1928). Although regulations of commerce, state pilotage laws are within states' constitutional power until Congress abrogates such power. Robins Dry Dock & Repair Co. v. Navigazone Libera Triestina S.A., 279 N.Y.S. 257, 154 Misc. 788 (Sup. Ct. 1931), *aff'd* 261 N.Y. 455, 185 N.E. 698 (1931), *cert. denied, sub nom.* Moran Towing & Trans. Co. v. Robins Dry Dock & Repair Co., 290 U.S. 657 (1933).

178. Recently proposed federal regulations will, if adopted, require supertankers in excess of 20,000 dwt constructed under a contract awarded after Dec. 31, 1979, or delivered after Dec. 31, 1981, to provide for segregated ballast and double bottoms. 42 Fed. Reg. 24868 (1977).

179. Recently proposed federal regulations will, if adopted, require oil tankers in excess of 10,000 gross tons to equip with "a second radar system and collision avoidance equipment." 42 Fed. Reg. 24871 (1977).

180. There is no doubt oil supertankers of this class meeting Washington's design and equipment standards also meet all PWSA standards. *See* 42 Fed. Reg. 5955 (1977) (to be codified in 33 C.F.R. § 164) (navigational safety rules); 42 Fed. Reg. 24868, 24869, 24871, 24874 (1977) (proposed new design and equipment rules).

181. WASH. REV. CODE § 88.16.190 (1976).

182. 41 Fed. Reg. 54177 (1976).

bring the vessels to which they apply into compliance with requirements already applicable to United States tank vessels in domestic trade."[183] The new regulations, which set minimum standards, do not deal with the same items as Washington's law and are not in direct conflict with it; thus, Washington's law is supplemental. The *Arco* court did not refer to, or rely on, the new regulations.[184] It is possible, however, at some future time new federal rules will be promulgated pertaining to the same subjects as Washington's law. If so, and if an oil tanker qualified under new federal regulations but not under Washington's and the vessel was also federally certified to engage in the coastwise trade, *e.g.*, a vessel federally certified to transport Alaskan crude oil, but prohibited from doing so on Puget Sound by Washington's law, there would be a conflict. Such a conflict, however, is in the future; the *Arco* court found none. Its proper resolution is not fully clear.[185]

C. *Tug Escort*

In the event an oil supertanker between 40,000 and 125,000 deadweight tons fails to meet Washington's design and equipment standards, Washington's law still permits it to use Puget Sound so long as it has a tug escort.[186] This provision is the heart

---

183. *Id.* at 54179.

184. Federal regulations adopted at time of suit in *Arco*, promulgated under Title II of the PWSA, have been characterized by the Coast Guard as "not a complete and comprehensive answer" to the problem of oil tanker pollution; in short, they are "minimum" and incomplete regulations. U.S. COAST GUARD, FINAL ENVIRONMENTAL IMPACT STATEMENT ON REGULATIONS FOR TANK VESSELS ENGAGED IN THE CARRIAGE OF OIL IN DOMESTIC TRADE at 1 (1975). The aim of these regulations is primarily to reduce the risks of operational pollution. *Id.* at 1, 2, 6, 6a, 60e, and 60f. The primary aim of the oil supertanker design and equipment provisions of Washington's law, however, is to reduce the risks of accidental pollution. President Carter's initiatives announced March 18, 1977, go well beyond existing regulations regarding new design, equipment, construction, and manning requirements for vessels, but they, too, leave room for state supplementation. *See Hearings on S. 682 Before Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 1st Sess., 835 (1977) (statement of Brock Adams). President Carter's initiatives do not address access limitations to hazardous or sensitive waters, the use of pilots, or the need for tugboat aid—all of great concern in Washington's Tanker Law. *See* the proposed new regulations in 42 Fed. Reg. 24868, 24869, 24871, and 24874 (1977).

185. *Contra*, Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960).

186. WASH. REV. CODE § 88.16.190 (1976). Admiral Siler, in his testimony before the Senate Commerce Committee in 1976, acknowledged the necessity of a tugboat provision:

> Notwithstanding the great desire for improvement in vessel stopping and turning capability we see no prospect of altering the physical fact of the tremendous mass momentum of a ship underway by any practical mechanical means. The same initial factor which makes a ship an economical method of transportation precludes quickly stopping its motion. The only feasible way of accomplishing this is through controlling its speed in certain critical locations.

of Washington's law. It is severable,[187] even though Washington's law regulating oil tanker design and equipment was striken as violative of the PWSA.[188] The possibility of requiring tug escorts is left open on the face of the PWSA, and its legislative history is silent on the subject. No federal legislation requires tug escorts, nor has the Secretary of Transportation mandated them under the PWSA.

The *Arco* court noted the PWSA authorizes the Secretary to require a tug escort in Puget Sound[189] and, although it has not, "the Coast Guard has considered doing this," citing an environmental impact statement.[190] Astoundingly, and without further discussion prior to or thereafter, the court concluded: "We believe that the tugboat-escort provision of [Washington's] Tanker law has also been preempted by the federal laws."[191]

To the extent the *Arco* court relied upon preemption due to preclusion because of an unexercised congressional grant of authority to the Secretary to require tug escorts on Puget Sound, its decision is in error as discussed above. To the extent the court may have correctly relied on the environmental impact statement for authority that the Coast Guard had considered tug escorts, it is still in error as discussed above. Congress has characterized the PWSA as setting minimal, not uniform or maximum, standards; when safeguarding its interest a state may supplement the PWSA with consistent law. To the extent the *Arco* court relied on the conflict-supersession ground and on the environmental impact statement to determine that federal law conflicts with Washington's tugboat-escort provision, the court announced a novel preemption doctrine without any foundation in precedent and

---

> We are therefore considering regulatory proposals which would require tug assistance for particular vessels.

Hearings on the Ports and Waterways Safety Act of 1972 Before the Senate Comm. on Commerce, 94th Cong., 2d Sess. 76-77 (1976).

187. The statute appears severable according to the severability tests advanced in State v. Anderson, 81 Wash. 2d 234, 501 P.2d 184 (1972). Under Washington law a severability clause is deemed conclusive unless, by facts that are proper subjects of judicial notice, it fairly can be said the legislative declaration of intent, on its face, is obviously false. In the absence of a severability clause the test is whether the legislature would have passed the remaining provisions without the unconstitutional portion. *Id. See also* United States v. Johnson, 390 U.S. 563 (1968) (accord, applying federal standards); Washington's severability clause, WASH. REV. CODE § 88.16.160 (1976).

188. *Arco, supra* note 6, at 6.

189. 33 U.S.C. § 1221(3)(iv) (Supp. IV 1974).

190. COAST GUARD, DEP'T OF TRANSPORTATION, FINAL ENVIRONMENTAL IMPACT STATEMENT [ON THE] REGULATIONS FOR TANK VESSELS ENGAGED IN THE CARRIAGE OF OIL IN DOMESTIC TRADE 71 (1975).

191. *Arco, supra* note 6, at 4.

without presenting any reasoned supporting discussion.[192] Because the Coast Guard's environmental impact statement is not part of federal law, and because the Secretary has not promulgated any regulations regarding tugboat escorts on Puget Sound, any claimed preemptive conflict between the environmental impact statement and Washington's tug-escort provision is unfounded.

"Since September 8, 1975, the effective date of Chapter 125 [Washington's Tanker Law] all tankers between 40,000 and 125,000 DWT have used tug escorts."[193] Thus, beyond any doubt, Washington's Tanker Law can simultaneously stand and be reconciled with Congress's PWSA and its federal regulations without any conflict because, in fact, it has. There has been no conflict with the rudimentary Vessel Traffic System the Coast Guard established for Puget Sound. That system only establishes separate lanes, partial radar tracking, and some periodic reporting requirements, but it does not create a comprehensive traffic control system on Puget Sound.[194] Moreover, the two laws have operated complementally, side by side, without complaints about their detrimental effects by members of Washington's oil industry, including the Atlantic Richfield Company. Because the Supreme Court has long held repugnance or conflict should be found only where it is "direct and positive, so that the two acts could not be reconciled or consistently stand together,"[195] the PWSA does not preempt, either by preclusion or by conflict-supersession, Washington's provision requiring tugboat escort on Puget Sound for oil supertankers; the *Arco* court erred when it held the state and federal laws could not stand together.

D. Prohibition of Supertankers in Excess of 125,000 Deadweight Tons

Washington's law prohibits any oil tanker of greater than

192. Neither tug-escort requirements nor access limits were considered at the time the rudimentary Vessel Traffic System for Puget Sound was established. *See generally* Notice of Proposed Rulemaking, Puget Sound Vessel Traffic System, 38 Fed. Reg. 21227-35 (1973); Final Rule and Regulations for Vessel Traffic Systems in Puget Sound, 33 C.F.R. § 161 (1976). Moreover, no person testified or submitted comments on whether tug-escort or vessel access limits should be established. The subjects were outside the scope of the rule-making. *See generally* Public Docket, CGD 73-158PH (1973).

193. Brief of Appellants at 7, Ray v. Atlantic Richfield Co., No. 76-930 (U.S. Sup. Ct.).

194. *See* 33 C.F.R. §§ 161.101-.189 (1976). Certain amendments not relevant to the subject matter under discussion have been proposed. *See* 42 Fed. Reg. 3182 (1977).

195. Reid v. Colorado, 187 U.S. 137, 148 (1902) (citing Sinnot v. Davenport, 63 U.S. 227, 243 (1859)).

125,000 deadweight tons "from proceeding beyond a point east of a line extending from Discovery Island light south to New Dungeness light."[196] This section excludes these tankers only from Puget Sound, not from all navigable waters lying within or adjacent to Washington. Moreover, it affects only that part of interstate and foreign trade carried on by oil supertankers of 125,000 deadweight tons or more. This provision is valid and without preemptive infirmity because the Secretary's regulations promulgated under the PWSA do not speak to the issue and are unaffected by the absence from Puget Sound of oil supertankers in excess of 125,000 deadweight tons.[197]

CONCLUSION

The first trickle of Alaskan oil is arriving in Washington ports. In 1978, that trickle will grow to a flood and bring combined potentialities of providing for all Washington's oil needs and destroying Puget Sound. Clearly, a comprehensive vessel traffic system for Washington's waters is a minimally needed mechanism, and the rudimentary one the Coast Guard recently established for several parts of Puget Sound is to be applauded. It is inadequate, however, and should be expanded to control the complete and exact route all oil tankers follow in all parts of Washington waters. Most importantly, a fully radar-controlled vessel traffic system, beginning with oil tanker entrance at the Straits of Juan de Fuca, is sorely needed.

Even if the Secretary of Transportation establishes these improvements through the Coast Guard, no matter how sophisticated the vessel transport system might become, it could not prevent oil spills due to supertanker groundings, explosions,[198] or collisions caused by human error or mechanical failure. The needed improvements have not been established. Indeed, according to Governor Daniel J. Evans, "The Coast Guard has steadily retreated from its 1973 position, and has now turned into an advocate for 'economic' considerations" on behalf of shipowners, so much so that during the years since 1972 the Coast Guard

196. WASH. REV. CODE § 88.16.190(1) (1976).

197. It is possible, of course, like California's law in Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963), this provision of Washington's law might pass muster under the preemption doctrine but fail to do so under the negative implications doctrine. *See* J.R. Brooks & Son v. Reagan, No. C71-1311 (N.D. Cal. Sept. 18, 1973); Deutsch, *Precedent and Adjudication*, 83 YALE L.J. 1553 (1974).

198. Recently proposed regulations will require, if adopted, safer inert gas systems to reduce the risks of in-tank explosions aboard supertankers. 42 Fed. Reg. 24874 (1977).

appears to have intended to use "those years to 'buy time' for the industry it should be regulating, for example, in getting minimum-cost vessels 'grandfathered' into the Alaskan oil trade."[199] Alaskan oil continued to press on Puget Sound. Recognizing time was of the essence, and seeking to protect its property, its economy, its marine environment, and the health and welfare of its citizens, Washington's legislature passed its Tanker Pollution Law which the *Arco* court held preempted by the Federal Ports and Waterways Safety Act of 1972.

The *Arco* court committed error. It rushed to judgment, ignoring the standing and abstention problems presented by the case. It adjudicated solely on preemption grounds without carefully analyzing whether Congress had clearly manifested a preemptive intent and apparently oblivious of standards currently required under the preemption doctrine; it adjudicated under the wrong test of preemption, ignoring the principles laid down in cases such as *Florida Lime & Avocado Growers,* although that case had been argued to it.[200] Moreover, the court evinced no awareness of the reaffirmation of *Florida Lime & Avocado Growers*'s preemption principles by *DeCanas v. Bica,* although *DeCanas* was unanimously decided only seven months before the *Arco* court rendered decision and it, too, was argued to the court.[201] Furthermore, the court discussed and cited only three cases in its opinion; one not concerning preemption,[202] and two upholding state regulations, discussed solely for the purpose of distinguishing them.[203] The court, therefore, relied on no affirma-

199. *Hearings on The Ports and Waterways Safety Act of 1972 Before the Senate Comm. on Commerce,* 94th Cong., 2d Sess. 4 (1976) (letter to committee from Daniel J. Evans, Governor, State of Washington).

200. Brief for Defendants at 20 and 28, Atlantic Richfield Co. v. Evans, No. C75-648M (W.D. Wash.).

201. *Id.* at 21, 44, 52, 79-80, and 84 n.33.

202. *Ex parte* Young, 209 U.S. 123 (1908). Defendant challenged the court's jurisdiction based upon this case, inviting the court to overrule it: the invitation was declined.

203. The three cases the Court cites were the only preemption cases it believed were relevant, evidently on the theory they involved ships! Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) (discussed in text at note 57 *supra*), was distinguished by invoking the discredited presumption of federal preemption, that is, The Ports and Waterways Safety Act of 1972, 33 U.S.C. §§ 1221-26 (Supp. V 1975), demanded exclusive regulation in the field because it introduced some minimum "environmental considerations into the federal tanker regulations." *Arco, supra* note 6, at 5 and n.4. Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973), which upheld Florida's deterrent approach to the problem by imposing strict liability on oil spillers, was distinguished on the grounds (1) that Florida's "statute did not attempt to regulate the design of the tanker or tanker operations, which were already federally regulated," and (2) that *Askew* "involved the Federal Water Quality Control Act, not the PWSA, and the holding of the

tive authority whatsoever. No case was discussed or cited giving credence to, or justifying, its approach or solution of the preemption problem present in *Arco*. Finally, the court did not carefully analyze Washington's Tanker Pollution Law or the federal statute it held preemptive of Washington's statute, that is, the Federal Ports and Waterways Safety Act of 1972. Instead, the court proceeded by speculation, surmise, and just plain guesswork, ultimately resting its decision implicitly on the discredited presumption of federal preemption of the 1940's, 50's, and 60's, to the effect that whenever Congress has touched a field also state regulated, the state law is precluded by supersession, irrespective of whether the two laws might consistently regulate the area, because Congress has occupied the field. Thus, the *Arco* court's radical preemption holding reached a result not intended by the framers of the PWSA. The sponsor of the PWSA in the Senate, Warren Magnuson, Chairman of the Senate's Commerce Committee, has disagreed publicly with the analysis of the *Arco* court:

> As the sponsor of the Act [the PWSA] in the Senate, I have made known my disagreement with the decision. I think it is wrong; I feel the Court has simply misread the intent of Congress as contained in the Ports and Waterways Safety Act. The weakness of the decision is highlighted by the complete absence of any analysis of the terms of the Act. The Court's reasoning was simplistic at best. Preemption is not favored in the law. Congress must show a clear intent to preempt before such a finding is made. This court summarily reached its decision on the thinnest of reasoning. I say they are wrong.[204]

Indeed, rather than intending to preempt the field, it appears Congress, in the PWSA and its legislative history, inferentially authorized joint state and federal regulation, at least until a federal regulation is issued under the PWSA actually conflicting with state law.

Finally, unlike court decisions in other areas, the subjects of the *Arco* case are oil, oil transportation, and protection of the marine environment. These subjects surely have full congressional attention today. For example, in February, 1977, the Commerce Committee reported out two pending bills; one would establish a uniform and comprehensive legal regime governing lia-

---

Court was in part reflective of the congressional policy of 'cooperative federalism' in the Federal Water Quality Act." *Arco, supra* note 6, at 5. (These distinctions, however, assume the answer to *Arco*'s question.)

204. S. 17575, 94th Cong., 2d Sess., 122 CONG. REC. 17575 (1976).

bility and compensation for damages and cleanup costs caused by oil spill pollution,[205] and the other would amend the PWSA to increase the standards for and use of U.S. vessels to carry imported oil in an attempt to reduce oil spill risks, expressly put oil tanker pilotage under state controls, and deal with other matters.[206] Because Congress is very active in these fields and because Congress is the proper regulator of our federal system, there can be little justification for doubtful judicial activity. Washington's Tanker Pollution Law is supplemental to Congress's PWSA which only establishes minimum standards. It is possible to comply with both statutes, and the two can stand together at least until the Secretary issues conflicting federal regulations. In light of the above; in light of the absence of express congressional intent to preempt, and in light of the proper inferences of congressional intent drawn from the PWSA impliedly authorizing state regulation, the *Arco* court's holding does not persuasively establish that the subject matter of the PWSA permits of one and only one conclusion—that federal power should be deemed preemptive because "Congress has unmistakably so ordained."[207]

---

205. S. 687, 95th Cong., 1st Sess. (1977). *See also Hearings on Recent Tanker Accidents Before the Senate Comm. on Commerce, Science and Transportation*, 95th Cong., 1st Sess. (1977).

206. S. 682, 95th Cong., 1st Sess. (1977). *See Hearings on S. 682 Before the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 1st Sess. (1977).

207. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).