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Who's Afraid of the Supremacy Clause? State Regulation of Air Pollution from Offshore Ships is Upheld in *Pacific Merchant Shipping Ass'n v. Goldstene*

JENNIFER HAMMITT*

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I. INTRODUCTION: STATE POLICE POWERS AND POLLUTION CONTROL IN A GLOBALIZED WORLD

International vessels emit greenhouse gases. Invasive species are released in ship ballast water. Oil pollution and related dangers from the tanker trade threaten state coastlines. Recent years have seen an explosion in international shipping trade and international commerce, along with a simultaneous rise in global awareness of the problem of pollution and a series of international conventions and agreements intended to address the transboundary pollution problem on a global scale.¹ Coastal

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1. Nicholas A. Robinson, *International Environmental Law*, SC56 ALI-ABA Course of Study Materials 185 (Feb. 11, 1998) sets forth some of the global framework of treaties designed to approximate a legal regime of international environmental law, including the UN Convention on the Law of the Sea (UNCLOS), Part XII; the UN Framework Convention on Climate Change; the Kyoto Protocol; the Basel Convention on Transboundary Movements of Hazardous Waste; and the Vienna Convention on Protection of the Stratospheric Ozone Layer (including the Montreal Protocol), among others. Within the field of international shipping, the most prominent international environmental protection agreement is the International Convention for the Prevention of Pollution from Ships of 1973 as modified by the Protocol of 1978 relating thereto

states of the United States have long sought to regulate ships in international commerce as a major source of pollution of both water and air, with varying degrees of success.²

The Ninth Circuit, in its decision in *Pacific Merchant Shipping Ass'n v. Goldstene (PMSA III)*,³ has fired a new salvo in the longstanding debate about the limits of state powers and the ability of states to regulate ships in international trade. The Court upheld California's Vessel Fuel Rules,⁴ which require ships calling at a California port to discontinue the use of low grade fuel, and instead use either marine gas oil or marine diesel oil that meets certain percentage requirements for the quantity of sulfur in the fuels.⁵ The regulations apply to the use of bunker fuel by ships calling at California ports in a geographical area identified by California law as "Regulated California Waters," which are defined as the waters within twenty-four nautical miles of the California shoreline.⁶ The regulations subject ship owners and operators of vessels entering California ports to a wide range of sanctions, including fines, injunctive relief, and criminal prosecution.⁷ The regulations also attempt to narrowly avoid various preemption and supremacy issues; they contain an exemption from the regulatory regime for ships in "innocent passage" and an express sunset clause that provides for termination when the regulatory board "makes a finding that the federal government has adopted and is enforcing requirements that will achieve equivalent emission reductions."⁸ However, with these regulations, California "pushes [the] state's legal authority to its very limits,"⁹ and breathes new life into

(MARPOL 73/78), which regulates pollution from oil, harmful substances, sewage, garbage, and, as of May 19, 2005, airborne emissions. International Convention for the Prevention of Pollution from Ships (MARPOL), International Maritime Organization, May 19, 2005, available at <http://www.imo.org/about/conventions/listofconventions/pages/international-convention-for-the-prevention-of-pollution-from-ships-%28marpol%29.aspx>.

2. See, e.g., *United States v. Locke*, 529 U.S. 89 (2000) (overruling certain Washington State regulations related to "general navigation watch procedures, English language skills, training and casualty reporting."); *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978) (overruling certain Washington State regulations that related to the design and equipment of oil tankers in Puget Sound); *Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325 (1973) (upholding the State of Florida's strict liability regime for oil spills); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960) (upholding the application of the City of Detroit's local air pollution laws to ships); *Lake Carriers Ass'n v. Kelley*, 527 F. Supp. 1114 (E.D. Mich. 1981) (upholding the State of Michigan's water pollution standards when applied to discharges of sewage from ships).

3. 639 F.3d 1154 (9th Cir. 2011).

4. CAL. CODE REGS. tit. 13, § 2299.2 (2009); CAL. CODE REGS. tit. 17, § 93118.2 (2009).

5. *Pac. Merch. Shipping Ass'n*, 639 F.3d at 1158.

6. *Id.*

7. *Id.* at 1159.

8. *Id.*

9. *Id.* at 1162.

an old question of how far states can reach in regulating pollution from ocean-going vessels in international trade.

The problem of state environmental regulation in a globalized world is recurrent and vexing. Some court-watchers thought that the question of the ability of the states to regulate pollution from ships in international trade would be definitively decided by the Supreme Court in the 2000 case *United States v. Locke*.¹⁰ This was a case in which an international shipping industry plaintiff (Intertanko) challenged a Washington State regulatory regime that addressed tanker equipment, staffing, personnel qualifications, reporting, and operating standards for oil tankers in Puget Sound.¹¹ However, the Supreme Court's decision in *United States v. Locke*, although discussing the concerns of the international community with Washington's regulatory scheme, was ultimately decided on the relatively narrow grounds that the state regulations relating to tanker design, operation, personnel qualifications, and manning of vessels were preempted by Title II of the Ports and Waterways Safety Act of 1972 (PWSA).¹² Thus, *Locke* was not the dispositive opinion regarding the limits of state environmental regulation that some had hoped it would be, and, while some specific provisions of the Washington laws were overturned, the opinion acknowledges that others were potentially permissible exercises of the state's police power.¹³ Instead, the question of how far a state may reach in setting and enforcing environmental standards on ships in international trade remains a matter for debate and speculation at the Supreme Court level.

The debate over the limits of state power is freshly relevant today, as concern with global warming and global greenhouse gas regulation has led states and localities to pass stringent standards for automobile fuels and emissions, again with varying degrees of success.¹⁴ While the

10. 529 U.S. 89 (2000).

11. *Locke*, 529 U.S. at 97. See also Barry Hart Dubner, *On the Interplay of International Law of the Sea and the Prevention of Maritime Pollution—How Far Can a State Proceed in Protecting Itself from Conflicting Norms in International Law*, 11 GEO. INT'L ENVTL. L. REV. 137 (1998) (analyzing both the *Intertanko* case and the situation in the Bosphorus Straits as case studies in state power to regulate in an international regime); Michael P. Mullahy, Note, *States' Rights and the Oil Pollution Act of 1990: A Sea of Confusion?*, 25 HOFSTRA L. REV. 607 (1996) (arguing that the Supreme Court should find in favor of Washington State in *Locke*).

12. *Locke*, 529 U.S. at 110–12.

13. Patrick O. Gudridge, *International Decisions: United States v. Locke*, 94 AM. J. INT'L L. 745, 748–49 (2000) (analyzing the gap left by the Court in relying only on PWSA preemption). It is unknown which state regulations might have met the Court's test, as the State of Washington repealed the regulations at issue before the case was heard on remand. *Int'l Ass'n of Independent Tanker Owners (Intertanko) v. Locke*, 216 F.3d 880 (9th Cir. 2000) ("*Intertanko III*").

14. See, e.g., *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 399 (D. Vt. 2007) (upholding Vermont's adoption of California's greenhouse gas emissions standard against an industry challenge); *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1189 (E.D. Cal. 2007) (upholding the same California greenhouse gas emissions

Supreme Court's decision in *Massachusetts v. EPA*¹⁵ opened the door for the federal regulation of greenhouse gases, there is as of yet no strong rule, and recent debate in Congress included a budget provision, passed by the House of Representatives, that would forbid the EPA from regulating greenhouse gases under the Clean Air Act.¹⁶ Furthermore, the United States government has been slow to participate in international agreements that would address global climate change by treaty.¹⁷ Thus, there are strong indications that states, frustrated with the federal process and desirous of swift change, will become the primary movers of climate change and greenhouse gas regulation. It is within this framework that the decision in *Pacific Merchant Shipping Ass'n* stands poised to act as a major precedent to allow coastal states to take the lead in regulating greenhouse gas emissions from inbound ships.

This Note will look at the background of Supreme Court jurisprudence in the field of state regulation of pollution from ships, with a particular focus on the line of cases regarding state oil tanker and oil spill prevention regulation that culminated in *United States v. Locke*. The tanker regulation cases provide the backdrop for the Ninth Circuit's decision in *Pacific Merchant Shipping Ass'n* by providing the analytical framework for the determination of when a state has overstepped its boundaries in regulation of ships. However, as this Note argues, the oil tanker cases left the question of pollution regulation undecided and incomplete, with competing case lines applying different presumptions depending upon whether a regulation is characterized as dealing with the traditional state realm of pollution or as an interference with the necessary uniformity of international standards.

The Note will then closely examine the *Pacific Merchants Shipping Ass'n* decision, including an evaluation of the Ninth Circuit's reasoning regarding the potential jurisdictional reach of state pollution regulation

standards from a challenge in California). *But see* *Metro. Taxicab Bd. of Trade v. City of New York*, No. 08 Civ. 7837(PAC), 2008 WL 4866021, at *15 (S.D.N.Y. Oct. 31, 2008) (enjoining enforcement of New York City's fuel efficiency standards for taxicabs as likely preempted by federal law).

15. 549 U.S. 497 (2007).

16. *House Vote 96 – Bars New Regulation of Certain Greenhouse Gases*, N.Y. TIMES, Feb. 18, 2011, <http://politics.nytimes.com/congress/votes/112/house/1/96>. This amendment was passed by a margin of 35 votes in the House of Representatives on February 18, 2011. *Id.*

17. *See* S. Res. 98, 105th Cong. (1997) (A unanimously approved resolution “[e]xpressing the sense of the Senate regarding the conditions for the United States becoming a signatory to any international agreement on greenhouse gas emissions under the United Nations Framework Convention on Climate Change” that such an agreement would cause serious harm to the economy of the United States.); John M. Broder, *A Novel Tactic in Climate Fight Gains Some Traction*, N.Y. TIMES, Nov. 8, 2010, <http://www.nytimes.com/2010/11/09/science/earth/09-montreal.html> (evaluating the likelihood of the United States participating in an agreement to regulate greenhouse gas emissions under the already-ratified Montreal Protocol).

and the potential conflict of the California statutes with national and international uniformity in maritime regulation. This Note will then ask whether the Ninth Circuit's decision presents a tenable position regarding state regulation of greenhouse gases or a legislative overreach by California into areas of federal and international domain. This Note will argue that the intrinsically global problems of air and water pollution can no longer be regarded as primarily within the domain of the states, and that more aggressive federal intervention into international environmental issues will soon be necessary in order to prevent a patchwork of regulation by state and local governments such as California.

II. NAVIGATING THE SHOALS OF HISTORY AND PRECEDENT: *RAY, HAMMOND, AND LOCKE*

Regulation and control over air and water pollution were traditionally matters of state concern in American jurisprudence, as part of the larger "traditional state police powers" over health and safety.¹⁸ However, regulation of ships, shipping, and the maritime environment are traditionally matters for federal regulation and involvement, as the need for uniformity in regulation is greatest for fields such as shipping that are particularly intended to cross state, national, and international borders.¹⁹ Indeed, "[t]he authority of Congress to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations, was cited in the Federalist Papers as one of the reasons for adopting the Constitution."²⁰ Thus, there is a historical tension that must be resolved whenever a state attempts to control pollution by regulating ships or shipping practices.

The first battleground in the series of challenges to state pollution control regimes with potential international effects was in a series of cases regarding oil tanker regulation and prevention of oil spills. Over the course of almost thirty years, the Supreme Court and the Ninth Circuit struggled to determine when state law oil spill and oil pollution prevention regimes that regulate ships interfere with federal and international prerogatives. The main Supreme Court cases from this era, *Ray v.*

18. See *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) ("Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power."). See also *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (holding that states "retain[] broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources [in the face of a Commerce Clause challenge].").

19. See *Cooley v. Bd. of Wardens*, 53 U.S. 299, 315 (1851).

20. *United States v. Locke*, 529 U.S. 89, 99 (2000) ("*Intertanko IP*") (citing *THE FEDERALIST* Nos. 44 (James Madison), 12 (Alexander Hamilton), 64 (John Jay)). See also Gudridge, *supra* note 13, at 748.

*Atlantic Richfield Co.*²¹ and *United States v. Locke (Intertanko II)*²² both invalidated at least some Washington State regulations that governed ships in Puget Sound—regulations that were intended to minimize the effects of oil pollution and oil spills. Yet in the intervening time period, in *Chevron U.S.A. v. Hammond*, the Ninth Circuit upheld Alaska state regulations governing the deballasting of oil tankers to prevent pollution from residual oil in ballast water.²³ Over a vigorous dissent by Justice Byron White,²⁴ the Supreme Court denied certiorari in *Hammond*.²⁵ The denial of certiorari in *Hammond* left some question as to the extent of federal supremacy over offshore pollution from ships that affected coastal states. The failure to directly address the limits of state power in this area left a loophole in the doctrine of federal supremacy that was not fully closed by the relatively narrow preemption holding in *Locke*, and that the Ninth Circuit revived to uphold state regulation in *Pacific Merchant Shipping Ass'n*.²⁶

In order to elucidate the line of cases relating to oil pollution from ships, it is helpful to set out the analytic framework of challenges to state regulatory regimes. State pollution control laws that regulate ships or shipping practices tend to be challenged on a variety of federal preemption and federal supremacy grounds, including 1) express federal statutory preemption; 2) implied field preemption by federal regulation; and 3) preemption due to conflict with federal statutes or treaties, executive authority over foreign affairs, or the Domestic and Foreign Commerce Clause.²⁷

For example, in *Intertanko v. Locke (Intertanko I)*, the industry trade group plaintiffs alleged that the state regulatory requirements at issue were preempted by federal statutes and regulations, preempted by international treaties, invalid under the Supremacy Clause, in violation

21. 435 U.S. 151 (1978).

22. 529 U.S. 89 (2000).

23. *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483 (9th Cir. 1984), *cert. denied*, 471 U.S. 1140 (1985) (White, J. dissenting).

24. *Chevron U.S.A., Inc. v. Sheffield*, 471 U.S. 1140, 1140–41 (1985) (White, J. dissenting).

25. *Id.* at 1140.

26. *See Pac. Merch. Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1180 (9th Cir. 2011) (citing *Hammond* for the proposition that states were permitted to regulate ships as a matter of coastal environmental regulation).

27. U.S. CONST. art. I, § 8, cl. 3 (the “Commerce Clause”) grants to Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Commerce Clause challenges to state regulatory regimes are often brought in conjunction with preemption challenges under the Supremacy Clause, U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

of the Commerce Clause, and infringed upon the exclusive foreign affairs power of the federal government.²⁸ Similarly, in *Ray v. Atlantic Richfield Co.*, the Supreme Court analyzed the industry plaintiffs' challenge to a set of Washington State pollution control laws under different potential preemption and conflict rubrics, such as express or implied federal preemption by statute, preemption due to a dominant interest in the field of regulation, actual conflict with a federal statute, and frustration of federal goals.²⁹

The various categories of preemption are not "rigidly distinct."³⁰ However, the analysis for each demands evaluation of the state, federal, and international interests at stake in the legislation in order to determine if the balance between federal interests and state interests is properly maintained. The tension between federal and state interests is heightened when the state regulation in a traditional state sphere touches upon international policy interests. The Supreme Court has long asserted an exclusive foreign relations power that lies with the federal government to the exclusion of state interference.³¹ In the 1968 case *Zschernig v. Miller*,³² the Supreme Court struck down an Oregon inheritance law that discriminated against citizens of certain Communist countries on the grounds that the law interfered with the foreign affairs prerogative of the federal government, even in the absence of an explicit federal policy.³³ Although probate law and distribution of estates are areas that were traditionally relegated to states, "those regulations must give way if they impair the effective exercise of the Nation's foreign policy."³⁴ This precedent set the stage for "dormant foreign affairs" preemption (also referred to as "Zschernig preemption"³⁵) of state laws that unreasonably interfere with the conduct of federal foreign policy.³⁶

Yet *Zschernig* remains the only case where the Supreme Court has explicitly applied the dormant foreign affairs power in a preemption

28. Int'l Ass'n of Indep. Tanker Owners (*Intertanko*) v. *Locke* (*Intertanko I*), 148 F.3d 1053, 1058 (9th Cir. 1998).

29. *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 160–78 (1978).

30. *Intertanko I*, 148 F.3d at 1060 n.8.

31. CONG. RESEARCH SERV., *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION*, 2008 Supplement 27 (Kenneth R. Thomas ed. 2008) [hereinafter *CONSTITUTIONAL SUPPLEMENT*]. See also *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("Our system of government . . . requires that federal power in the field affecting foreign relations be left entirely free from local interference."); *United States v. Pink*, 315 U.S. 203, 233 (1942) ("No state can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the states; it is vested in the national government exclusively.")

32. 389 U.S. 429, 441 (1968).

33. *Id.*; *CONSTITUTIONAL SUPPLEMENT*, *supra* note 31, at 28.

34. *Zschernig*, 389 U.S. at 440.

35. *CONSTITUTIONAL SUPPLEMENT*, *supra* note 31, at 29 n.43.

36. *Id.* at 27.

analysis to invalidate a state statute.³⁷ In *Crosby v. National Foreign Trade Council*,³⁸ a case that came out during the same term as *United States v. Locke*, the Court declined to use the robust *Zschernig* preemption analysis used by the First Circuit in the case below,³⁹ instead deciding to invalidate Massachusetts's Anti-Burma statute on the relatively narrow grounds that the statute was preempted by federal legislation that had been enacted shortly after the state statute.⁴⁰ Similarly, in the 2003 case *American Insurance Ass'n v. Garamendi*,⁴¹ the Court discussed the scope of the broad "dormant foreign affairs" preemption doctrine of *Zschernig*, but decided the case based on a direct conflict between a California insurance law and an executive order, in a traditional conflict preemption analysis.⁴²

Nevertheless, an aura of "foreign affairs preemption" emanates from the Supreme Court's analysis in *United States v. Locke* ("*Intertanko IP*") and informs the Court's discussion of the preemption issue. In *Ray v. Atlantic Richfield Co.*, the Court began the preemption analysis by granting the Washington State environmental law a presumption of validity:

The Court's prior cases indicate that a when a State's exercise of its police power is challenged under the Supremacy Clause, "we start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."⁴³

For decades this quote and similar language served as the analytical starting point for the resolution of whether a state environmental regulation was preempted under the Supremacy Clause.⁴⁴ But the Supreme

37. *Id.* at 28.

38. 530 U.S. 363 (2000).

39. *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 50 (1st Cir. 1999), *rev'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

40. Bernard H. Oxman, Brannon P. Denning & Jack H. McCall, *International Decision: Crosby v. National Foreign Trade Council*, 94 AM. J. INT'L L. 750, 753 (2000).

41. 539 U.S. 396 (2003).

42. *Id.* at 439; CONSTITUTIONAL SUPPLEMENT, *supra* note 31, at 29.

43. *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 157 (1978)(citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

44. *See, e.g., Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442-43 (applying a presumption against preemption when the state legislates in the area of pollution control, an area that "clearly falls within the exercise of even the most traditional concept [of the state's police power.]"); *Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325, 341 (1973) (upholding a Florida oil spill liability statute and noting that "[e]ven though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with federal law."); *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 488 (9th Cir. 1984), *cert. denied* 471 U.S. 1140 (1985) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), for the presumption of validity of state environmental laws, and upholding Alaska's regulation of ballast water released from ships).

Court in *United States v. Locke* explicitly rejected a presumption of validity for state environmental regulations:

As *Rice* indicates, an “assumption” of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence. . . . In *Ray*, and in the case before us, Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme. The state laws now in question bear upon national and international maritime commerce, and in this area *there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers.*⁴⁵

This rejection of a presumption in favor of state environmental regulation appears to be an effect of the international dimensions of the case, which, while present in *Ray*, were actively argued in the brief for the United States in *Locke*.⁴⁶

The United States, in its brief, detailed the historic role of the federal government in the regulation of interstate and international commerce, and argued that insofar as the federal regulations passed under the authority of the Ports and Waterways Safety Act were embodiments of international standards, the international standards preempted state regulation.⁴⁷ The United States contended that an international treaty could have as much preemptive force as a federal statute, and that international agreements restrict any concurrent power held by states to “the narrowest of limits.”⁴⁸ Although the Supreme Court, in the end, held that the regulations were directly preempted by a federal statute and not by the broad foreign affairs power, the tone and tenor of the opinion, including the discussion of international standards and the concerns of the United States with international reciprocity, hints at the federal foreign affairs powers arguments of *Zschernig*, and the presence of international considerations strengthens the federal interest in uniformity of

45. *United States v. Locke*, 529 U.S. 89, 108 (2000) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (emphasis added).

46. Sean D. Murphy, *Treaty Obligations as Evidence of Federal Preemption*, 95 AM. J. INT'L L. 132, 132 (2001) (discussing the international concerns voiced by the United States in the principal brief in *Locke*).

47. *Id.* at 132. Illustrative treaties to which the United States is a party include the International Convention for the Safety of Life at Sea 1974; the International Convention for the Prevention of Pollution from Ships 1973 as amended by the 1978 Protocol (MARPOL 73/78); and the International Convention of Standards of Training, Certification and Watchkeeping for Seafarers, With Annex 1978 (STCW). *Locke*, 529 U.S. at 102–03. See also United Nations Convention on the Law of the Sea, art. 21(2), Dec. 10, 1982, 1833 U.N.T.S. 397, 405 (stating that the laws and regulations of a coastal state, including laws relating to pollution control, shall not apply to the “design, construction, manning, or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.”).

48. Murphy, *supra* note 46, at 133.

regulation.⁴⁹

In the end, *Locke* answered the specific question presented (whether Washington State's regulation of international ships in the areas of event reporting, watch procedures, operating procedures, and vessel manning was preempted by the PWSA) without giving a sweeping doctrinal basis for the analysis of conflicts between state environmental regulation and federal policy over international trade and international affairs. Therefore, in many ways *Locke* left a vitally important question unanswered and relatively unaddressed: what is the proper balance between state and federal interests when the state law purports to regulate *pollution of its own* air or waters from international ships—an area where states have held historic police powers—as opposed to the regulation of design, manning, reporting, or operation of ships at sea?

The *Locke* Court did not address, nor even cite, such historical ship pollution cases such as *Huron Portland Cement Co. v. City of Detroit*⁵⁰ and *Chevron U.S.A. v. Hammond*.⁵¹ Indeed, the Court's fleeting mention of *Askew v. American Waterways Operators* indicates that there may still be a relevant difference between regulation of pollution and other forms of standards-setting as applied to international ships, at least where the statute, by a savings clause or some other mechanism, leaves some room for state regulation.⁵² The failure of the Court to resolve (or really even address) the question of when and how state regulation of ships would be permissible to prevent in-state pollution is particularly troublesome when applicable federal statutes, such as the Clean Air Act and the Clean Water Act, leave explicit allowance for more stringent state regulation than the federal minimum, thus opening the door to greater potential conflicts with federal and international standards-setting regimes.⁵³ It would be only a matter of time before a state regulatory body, such as the California Air Resources Board, would be more than willing to walk through that open door.

49. *United States v. Locke*, 529 U.S. at 102–03. *See also* Gudridge, *supra* note 13, at 747–48 (concluding that the justices “readily appreciated the conjoined national and international dimensions of the case [when finding the state regulations preempted].”).

50. 362 U.S. 440 (1960).

51. 726 F.2d 483 (9th Cir. 1984).

52. *Locke*, 529 U.S. at 106 (“We have upheld state laws imposing liability for pollution caused by oil spills.”) (citing *Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325 (1973)).

53. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7416 (2006) (Retention of State Authority); Clean Water Act, 33 U.S.C. § 1370 (2006) (State Authority). Both provisions explicitly retain the authority of states to regulate more stringently than the federal minimums set by the EPA.

III. *PACIFIC MERCHANT SHIPPING ASS'N V. GOLDSTONE*: THE NINTH CIRCUIT ONCE AGAIN ADDRESSES THE LIMITS OF STATE REGULATION OF INTERNATIONAL SHIPS

The Ninth Circuit's decision in *Pacific Merchant Shipping Ass'n v. Goldstone* (*PMSA III*),⁵⁴ is the most recent in a series of cases involving the California Air Resources Board (CARB) and its attempts to regulate emissions from ocean-going ships and decrease the exposure of Californians to sulfur oxides and other pollutants from the use of low-grade fuels. The Ninth Circuit upheld CARB's Vessel Fuel Rules, which regulated the type of fuel that ships could burn within "California Regulated Waters," defined as waters within twenty-four miles of the California coastline.⁵⁵

In order to uphold the California regulations, the Ninth Circuit had to analyze two different but interrelated issues: whether California had jurisdiction to regulate beyond the three-mile boundary of its territorial sea, as defined by the Submerged Lands Act, and whether the regulations—even though applicable only to vessels entering California ports (presumably internal waters of California)—impermissibly interfered with navigation and foreign and domestic commerce in violation of the Supremacy Clause and the Commerce Clause of the U.S. Constitution.⁵⁶ This meant that the Ninth Circuit again had to face the confluence of international interests and traditional state police powers that were present in the oil tanker regulation cases of *Ray*, *Hammond*, and especially *Locke*. The fact that the Ninth Circuit was able to uphold the California regulations starkly demonstrates the distinction between historical state regulation of pollution and federal supremacy over maritime and international trade that was left over by the Supreme Court's narrow holding in *Locke*. This distinction could provide a potential precedent for further fragmentation of state environmental regulations with effects on international ships and United States foreign policy in international trade.

A. *The Procedural Posture of the Case and the Decisions Below*

The factual circumstances that led to the Ninth Circuit's decision in *Pacific Merchant Shipping Ass'n* were undisputed. "[O]cean-going vessels, which typically utilize large diesel engines, are a significant source of air pollution in California, due in part to their widespread use of low-grade bunker fuel."⁵⁷ This bunker fuel consists of residual fuel remaining after primary fuel distillation, and "contains an average of about

54. 639 F.3d 1154 (9th Cir. 2011).

55. *Id.* at 1158.

56. *Id.* at 1162–63.

57. Relevant facts are cited from the district court's opinion below. *Pac. Merch. Shipping*

25,000 parts per million (ppm) of sulfur, as opposed to diesel fuel for trucks and other motor vehicles, which is limited to 15 ppm sulfur.”⁵⁸ The aggregate tonnage of sulfur emitted by ocean-going vessels made vessel emissions the largest source of sulfur oxides pollution in the state.⁵⁹ It was also undisputed that “twenty-seven million Californians, or eighty percent of California’s population, are exposed to” these emissions from ocean-going ships, increasing the risks of premature death, cancer, aggravated asthma and other respiratory illnesses, and heart disease.⁶⁰

CARB’s first attempt at regulation, the “Marine Vessel Rules,” applied emissions standards within twenty-four nautical miles of the California coast to ocean-going vessels entering or stopping at a California port of call.⁶¹ The emissions limits were set so that it would be unlawful for a ship entering a California port to emit within the “Regulated California Waters” (twenty-four miles from the coastline) more particulate matter, nitrous oxide, or sulfur oxide than would have resulted from the use of a cleaner fuel.⁶² These Marine Vessel Rules, which went into effect on January 1, 2007, were immediately challenged by the Pacific Merchant Shipping Association, a trade group of companies that own or operate ocean-going vessels flying under both the United States and foreign flags.⁶³ PMSA alleged that the Marine Vessel Rules were preempted by the Clean Air Act, which required the Administrator’s approval to set an emission standard for a non-motor-vehicle engine, and by the Submerged Lands Act (SLA), which defines the territorial waters of a state as three nautical miles.⁶⁴ The Ninth Circuit enjoined the application of the Marine Vessel Rules on the grounds that emission standards for non-motor-vehicles were exclusively federal under the 1990 Amendments to the Clean Air Act, and therefore could not be adopted without the approval of the Administrator, which California had not received.⁶⁵ The Ninth Circuit declined to reach the SLA preemption issue at that time.⁶⁶

Following the 2008 decision of the Ninth Circuit, CARB returned

Ass’n (PMSA) v. Goldstene (*PMSA II*), No. 2:09-cv-01151-MCE-EFB, 2009 WL 2777778, at *1 (E.D. Cal. Aug. 28, 2009).

58. *Id.*

59. *Id.* at *2.

60. *Id.*

61. Pac. Merch. Shipping Ass’n v. Goldstene (*PMSA I*), 517 F.3d 1108, 1109–10 (9th Cir. 2008).

62. *Id.* at 1111–12.

63. *Id.* at 1109–10.

64. *Id.* at 1112.

65. *Id.* at 1115.

66. *Id.*

to the drawing board to create the “Vessel Fuel Rules,” which, unlike the Marine Vessel Rules that the Court had found to be preempted, were not emissions standards but rather were regulations specifying that cleaner, lower-emissions fuels must be used within the California Regulated Waters, 24 nautical miles from the coastline.⁶⁷ These standards were scheduled to go into effect on July 1, 2009.⁶⁸ Again, PMSA challenged the regulations and sought to enjoin their application, this time on the basis that the twenty-four-mile application zone was preempted by the Submerged Lands Act, and that the regulations “otherwise ‘unlawful[ly] and impermissibly regulate[d] navigation and foreign and domestic commerce as delegated to the United States Congress’”⁶⁹

The district court, in an unpublished memorandum opinion, dismissed PMSA’s claims, holding that 1) the Submerged Lands Act did not preempt the state’s regulation of pollution beyond a three-mile zone, and 2) the regulations were permissible exercises of the state’s police power under the “effects test,” which would allow California to “enact reasonable regulations to monitor and control conduct that substantially affects its territory.”⁷⁰ The district court readily applied the presumption against preemption of state laws enacted in the environmental and pollution control field, distinguishing *United States v. Locke* on the basis that “the state regulations at issue in [*Locke*] served precisely the same purpose as analogous provisions of federal law under the Ports and Waterways Safety Act of 1972.”⁷¹ Thus, according to the Ninth Circuit, “the issue in *Locke* was consequently not whether any maritime regulation is inherently federal,” but rather whether a state law was preempted under the narrow confines of the PWSA.⁷² The state law being applied in the instant case was, according to the district court, a law that “relates to pollution, not maritime commerce,” an area where there is a historic presence of state law.⁷³ “Air pollution prevention falls under the broad police powers of the states, which include the power to protect the health of citizens in the state.”⁷⁴ “In short,” the district court wrote, “because pollution is an area falling within police powers historically delegated to

67. *Pac. Merch. Shipping Ass’n v. Goldstene (PMSA II)*, No. 2:09-cv-01151-MCE-EFB, 2009 WL 2777778, at *1 (E.D. Cal. Aug. 28, 2009).

68. *Id.*

69. *Id.* at *7.

70. *Id.*

71. *Id.* at *5.

72. *Id.*

73. *Id.*

74. *Id.* (citing *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960)).

the states, the presumption against preemption applies in this case.”⁷⁵

The district court then certified the case for an immediate interlocutory appeal to the Ninth Circuit, as the Order qualified as involving “a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal may materially advance the ultimate termination of the litigation.”⁷⁶ The Ninth Circuit granted the appeal on December 11, 2009, and on March 28, 2011, the decision in *Pacific Merchant Shipping Ass’n v. Goldstene (PMSA III)*⁷⁷ was issued, affirming the district court.

B. *The Ninth Circuit’s Analysis of the SLA Preemption/ Jurisdictional Claim*

The Ninth Circuit knew that it faced “a highly unique and challenging set of circumstances” in hearing *PMSA III*:

[W]e do believe that the regulatory scheme at issue here pushes a state’s legal authority to its very limits, although the state had clear justifications for doing so. More generally, we must take into account such fundamental considerations as, on the one hand, the supremacy of federal law, the various limitations on state regulations arising out of the dormant Commerce Clause and general maritime law preemption doctrines, and the federal government’s unquestioned authority over this nation’s relations with foreign countries, and, on the other hand, the sovereign police powers retained by California allowing the state to adopt a wide range of laws in order to protect the health, safety, and welfare of its own residents.⁷⁸

On balance, the Ninth Circuit held that the state interest in maintaining its sovereign police power authority outweighed the federal interest in regulation of foreign and maritime affairs.⁷⁹ However, before reaching that balance, the Court had to decide whether it was permissible for California to reach twenty-one miles beyond its territorial sea to regulate ships in the twenty-four mile area defined as the California Regulated Waters zone.

PMSA did not argue that the California Vessel Fuel Rules were expressly preempted by any federal statute. Instead, PMSA argued that the Submerged Lands Act gave rise to a claim of implied field preemption, the doctrine that provides for the invalidation of state laws when the state attempts to regulate “conduct in a field that the Federal Govern-

75. *Pac. Merch. Shipping Ass’n v. Goldstene (PMSA II)*, No. 2:09-cv-01151-MCE-EFB, 2009 WL 2777778, at *6 (E.D. Cal. Aug. 28, 2009).

76. *Id.* at *8 (citing 28 U.S.C. § 1292(b) (2006)).

77. 639 F.3d 1154 (9th Cir. 2011).

78. *Id.* at 1162.

79. *Id.* at 1182.

ment intended to occupy exclusively.”⁸⁰ This means that, for implied field preemption analysis, the only task of the Court is to “ascertain the intent of Congress” in passing the law.⁸¹ PMSA thus argued that the intent of Congress in passing the Submerged Lands Act was to comprehensively settle the question of where a state was free to enforce state laws by statutorily demarking the state’s territorial sea at a distance of three miles.⁸²

This argument would seem to have merit. After all, California purported to extend its legislative power beyond what was allowed as a state’s territorial sea in both the *United States v. California* decision and the SLA. Indeed, the regulation at issue here also extends beyond the federal territorial sea, which under the United Nations Convention of the Law of the Sea extends out to twelve nautical miles from the baseline.⁸³ The United States’ 1988 proclamation of its territorial sea as extending to twelve nautical miles was expressly intended to bring the United States into conformity with UNCLOS.⁸⁴ Instead, the twenty-four-mile limit that California used to create the Vessel Fuel Rules is to the limit of the “Contiguous Zone,” an area where the coastal state (in this case, the United States, as California is the subdivision of a State in the international sense) may exercise some limited control in order to prevent “infringement of its customs, fiscal, immigration or sanitary laws.”⁸⁵ There is no provision in the contiguous zone for regulation of air pollution, and UNCLOS provides for international cooperation and agreement in the control of pollution on the high seas.⁸⁶ Thus, there appears to be a strong basis for a claim that federal law preempts California from regulating air pollution beyond territorial limits. However, the Ninth Circuit rejected PMSA’s federal preemption claims.⁸⁷

The Ninth Circuit, like the district court below, applied the general presumption against preemption of state laws that are enacted to protect the health and safety of the state’s citizenry.⁸⁸ The Ninth Circuit recognized that the Supreme Court, in *Locke*, had rejected the application of a

80. *Id.* at 1165 (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)).

81. *PMSA III*, 639 F.3d at 1165.

82. *Id.* See also *United States v. California*, 322 U.S. 19, 40–41 (1947) (holding that California did not have sovereign rights over the three-mile sea belt off its shoreline). The Submerged Lands Act of 1953 was passed in part to reverse the Supreme Court’s holding in *United States v. California*, and to return state sovereignty to the three-mile band of ocean referred to as the state’s territorial sea.

83. UNCLOS, *supra* note 47, at art. 3.

84. Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988).

85. UNCLOS, *supra* note 47, at art. 33.

86. See *id.*, at pt. XII (“Protection and Preservation of the Marine Environment”).

87. *Pac. Merch. Shipping Ass’n v. Goldstene*, 639 F.3d 1154, 1182 (9th Cir. 2011).

88. *Id.* at 1164–67.

presumption against preemption in a field “where there has been a history of significant federal presence” such as national and international maritime commerce, “where there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers.”⁸⁹ However, rather than characterize the Vessel Fuel Rules as regulation that touches upon international and maritime commerce, the Ninth Circuit agreed with the district court that “these state regulations ultimately implicate the prevention and control of air pollution” where there is a historic presence of state law.⁹⁰ Thus, following the Supreme Court’s decision in *Wyeth v. Levine*,⁹¹ the court applied the presumption against implied field preemption of the Vessel Fuel Rules by the SLA.⁹²

It may be illustrative to pause here and ask, as a matter of law and logic, why the court would need to apply the presumption against preemption at this point in its analysis of the SLA preemption claim. After all, the presumption against preemption of a state law regulating historic state powers should apply only to those state laws within the territorial boundaries of the state. However, the court here used the presumption against preemption of health and safety regulations, a presumption that is traditionally justified at least in part by the state’s sovereignty over its lands, waters, and citizens,⁹³ to presume that the regulations were not preempted by a federal law that affirmatively defines the territorial reach of the state.⁹⁴ The question before the court was a question of the boundaries and reach of a state’s *legislative* jurisdiction and sovereign territory as defined by the federal law, not a question of whether the state’s traditional power to regulate health and safety *within* its territorial boundary should yield to a competing federal interest.⁹⁵ But does it not seem that the state’s expansive and traditional police powers authority to regulate pollution, as strong as it may be, should be diluted if the state reaches beyond its territorial boundaries into the high seas? Surely there is no

89. *Id.* (citing *United States v. Locke*, 529 U.S. 89, 108 (2000)).

90. *PMSA III*, 639 F.3d at 1167.

91. 555 U.S. ___, 129 S. Ct. 1187 (2009).

92. *PMSA III*, 639 F.3d at 1167.

93. *See, e.g.*, *Maine v. Taylor*, 477 U.S. at 151 (“[The state] retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources”); *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (discussing the territorial basis of sovereignty).

94. *See Submerged Lands Act of 1953*, 43 U.S.C. § 1301 (2006).

95. *Compare Pac. Merch. Shipping Ass’n v. Goldstene*, 639 F.3d at 1158–59 (9th Cir. 2011) *with Int’l Ass’n of Indep. Tanker Owners (Intertanko) v. Locke (Intertanko I)*, 148 F.3d 1053, 1069 (9th Cir. 1988) (focusing on the fact that the Washington regulations are confined to the three mile territorial limit of the state); *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 495 (9th Cir. 1985) (stating that stricter standards under the CWA are to apply within three miles of shore), *and Askew v. Am. Waterways Operators*, 411 U.S. 325, 327 (1973) (discussing that the Florida act applies in the state’s territorial waters).

traditional state power to regulate the conduct of ships outside the state's (and even the federal government's) sovereign domain?⁹⁶

The Ninth Circuit disagreed. Following the discussion of the traditional presumption against preemption, the Ninth Circuit analyzed the California law in terms of the "effects test," a doctrine of international law that allows a state to create reasonable regulation of conduct occurring outside its territorial borders if the conduct has or is intended to have a substantial effect within the territory of the state.⁹⁷ The Ninth Circuit relied on a series of cases where states had expanded their reach beyond the territorial waters of the state in order to enforce minimum wage regulations,⁹⁸ to require ships to take on a state-licensed pilot,⁹⁹ or to allow for the prosecution of rapists on cruise ships.¹⁰⁰ While the Ninth Circuit acknowledged that these cases were distinguishable from the question of whether a state can regulate pollution by regulation of off-shore activities, the court found that the clear weight of the case law, when combined with the presumption against preemption, favored the state's ability to regulate to prevent the harmful effects of pollution in the state.¹⁰¹ In so holding, the Court rejected the claim of PMSA that the Vessel Fuel Rules, unlike the previously invalidated Marine Vessel Standards, should not be evaluated under the effects test because it did not regulate "effects" (such as emissions), but rather required that ships at sea use a certain kind of fuel.¹⁰² The court instead held that "the harmful effects giving rise to the Vessel Fuel Rules appear to be even more severe than, for example, the somewhat more indirect effect of criminal acts committed on a foreign cruise ship on the high seas and on a state's tourism industry."¹⁰³

It should be noted that the effects of air pollution on the California population are physical harms, which may strengthen a claim to regulate based on the effects test.¹⁰⁴ However, pollution as an incidental effect of

96. See *supra* text accompanying notes 78–82.

97. Pac. Merch. Shipping Ass'n, 639 F.3d 1154, 1174–75 (9th Cir. 2011). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. §§ 402(1)(c), 403 (1987).

98. Pac. Merch. Shipping Ass'n v. Aubry, 918 F.2d 1409, 1411 (9th Cir. 1990).

99. Warner v. Dunlap, 532 F.2d 767, 768 (1st Cir. 1976).

100. State v. Stepansky, 761 So. 2d 1027, 1029 (Fla. 2000), *cert. denied*, Stepansky v. Florida, 531 U.S. 959 (2000).

101. Pac. Merch. Shipping Ass'n v. Goldstene, 639 F.3d 1154, 1177–78 (9th Cir. 2011).

102. *Id.* at 1175 n.6.

103. *Id.* at 1176. The Court is referring to *State v. Stepansky*, *supra* note 93, a Florida Supreme Court case interpreting a Florida statute that was particularly designed to deal with the problem of prosecuting common crimes (such as theft and rape) on foreign-flagged cruise ships on the high seas.

104. See LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 771 (5th ed. 2009) (citing Robert Y. Jennings, *Extraterritorial Jurisdiction and the United States Anti-Trust Laws*, 33 BRIT. Y.B. INT'L L. 146, 159 (1957)).

lawful activity completely outside the state's jurisdiction, such as shipping, would seem to lack the *mens rea* of an *intent* to cause harm in the territory which the harm takes place, and allowing a state to regulate based on remote repercussions of lawful activity wholly performed outside the state's territory could potentially provide nearly limitless regulatory power.¹⁰⁵ This could be particularly problematic in areas such as pollution control, where the potential harmful effects of lawful activity are wide-ranging, even global.

C. *The Ninth Circuit's Analysis of the Commerce Clause, Maritime, and Foreign Affairs Preemption Claims*

After determining that the reach of the California Air Resources Board could extend to ships twenty-four miles off the California coastline, the Ninth Circuit was then tasked to rule on whether the Vessel Fuel Rules acted as an impediment to foreign or domestic commerce in violation of the Commerce Clause of the United States Constitution, or whether the laws conflicted with the general federal authority over foreign affairs and navigation (a claim of "implied field preemption" similar to the implied foreign affairs preemption of *Zchernig*).¹⁰⁶ The circuit court again noted the presumption against preemption and dismissed PMSA's claim. However, in dismissing PMSA's claim, the Ninth Circuit relied upon what appears to be a traditional domestic dormant Commerce Clause analysis, mentioning, but not necessarily applying, the heightened standard for foreign dormant Commerce Clause analysis that the Supreme Court had applied in cases such as *Crosby* and *Garamendi*.¹⁰⁷ The Ninth Circuit also did not address the Supreme Court's concern with the proper balance of powers in fields touching upon foreign affairs that permeated the Court's decision to reject the presumption against preemption in *United States v. Locke*.

The Commerce Clause grants Congress the power "[t]o regulate Commerce with the foreign Nations, and among the several States, and with the Indian tribes."¹⁰⁸ "Under the dormant Commerce Clause doctrine, state legislation may be unconstitutional because of its effect on national and foreign commerce even in the absence of Congressional action."¹⁰⁹ Under traditional dormant Commerce Clause analysis, the first step is determining whether the challenged law "regulates even-

105. *Id.* ("If indeed it were permissible to found objective territorial jurisdiction upon the territoriality of more or less remote repercussions of an act wholly performed in another territory, then there would be virtually no limit to a State's territorial jurisdiction.").

106. *PMSA III*, 639 F.3d at 1177-78.

107. *See id.*

108. U.S. CONST. art. I, § 8, cl. 3.

109. *PMSA III*, 639 F.3d at 1177.

handedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce."¹¹⁰ A restriction that is discriminatory (gives differential treatment to in-state and out-of-state commerce) is virtually per se invalid and subject to strict scrutiny.¹¹¹ On the other hand, "nondiscriminatory regulations that have only incidental effects on interstate commerce are [presumed] valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'"¹¹² Instead, non-discriminatory regulations are evaluated under a balancing test to determine if the burdens outweigh the putative local benefits of the regulation.¹¹³

The Ninth Circuit also noted that the Commerce Clause imposes specific restrictions with respect to the extraterritorial reach of state laws, and recognized that the foreign commerce context "places further constraints on state power because of the special need for federal uniformity."¹¹⁴ However, the touchstone used by the Ninth Circuit in determining whether a regulation directly burdens commerce is whether the regulation's *central* purpose is to regulate commerce, "usually in order to benefit local interests."¹¹⁵ Similarly, the Ninth Circuit determines if there is a conflict with a local regulation and "general maritime law" (a traditionally federal affair)¹¹⁶ by allowing state laws to "supplement federal admiralty law as applied to matters of local concerns, so long as the state law does not *actually conflict* with federal law or *interfere* with the *uniform working* of the maritime legal system."¹¹⁷ The determination of whether there is any interference is yet another balancing test, "weighing the state and federal interests on a case-by-case basis."¹¹⁸

This collection of doctrinal touchstones means that the beginning presumptions that the Ninth Circuit applied in *Pacific Merchants Shipping Ass'n* are heavily weighted toward upholding state regulations that have a central purpose other than the regulation of commerce, such as pollution control. After applying a presumption against preemption, nar-

110. *Id.* (citation omitted).

111. *Id.*

112. *Id.* (citation omitted).

113. *Id.* The traditional Commerce Clause test is found in the Supreme Court's decision in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

114. *PMSA III*, 639 F.3d at 1178 (citation omitted).

115. *Id.* (citation omitted).

116. See also U.S. CONST. art. III, § 2, cl. 1 (The judicial power of the United States "shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . .").

117. *PMSA III*, 639 F.3d at 1178 (citing *Pac. Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1422 (9th Cir. 1990)).

118. *PMSA III*, 639 F.3d at 1178.

rowing the definition of discriminatory legislation to legislation that has a purpose to regulate commerce to the benefit of local interests, and premising federal maritime preemption on a balancing test of the federal and state interests even if the federal interest is uniformity in foreign affairs, it is little wonder that the Ninth Circuit upheld the Vessel Fuel Rules. Indeed, the court even looked at its previous decision in *Chevron U.S.A. v. Hammond*, where the court had written that “as to environmental regulation of deep ocean waters, the federal interest in uniformity is paramount,” before upholding the State of Alaska’s regulation of ballast water releases three miles from shore.¹¹⁹ However, the court did not discuss the Supreme Court’s decision in *United States v. Locke*, which would seem to argue that these heavily weighted presumptions are inappropriate in a case that touches upon international and maritime considerations. Instead the court directly applied the traditional doctrine of strong state interest from *Huron Portland Cement* and held that “the exceptionally powerful state interest at issue here far outweighs any countervailing federal interests.”¹²⁰

Arguably, however, there are enough factual and legal differences between the scenario presented by *Pacific Merchant Shipping Ass’n* and *United States v. Locke* to justify the revival of the presumption against preemption. First, there is the consideration that there is no federal regulation directly on point regulating the exact same area (vessel fuel requirements) for the same anti-pollution purpose as the California statute. This is unlike the Ports and Waterways Safety Act at issue in *Locke*, which mandated uniform national rules regarding general tanker design, operation, and seaworthiness¹²¹—similar subjects to those contained in the United Nations Convention on the Law of the Sea.¹²² The Clean Air Act, which had preemptive force in the case of the previous California emissions standards, does not apply to rules regarding vessel fuel use as states are permitted to set state in-use requirements—indeed, the Ninth Circuit noted that California was apparently required to regulate off-shore ships in order to meet the federal air quality standards set by the Clean Air Act.¹²³ Second, it is at least arguable that there was no premise for a claim of interference with foreign affairs: the federal laws

119. *Id.* at 1180(citing *Chevron U.S.A. v. Hammond*, 726 F.2d 483, 492 n.12 (9th Cir. 1984)).

120. *PMSA III*, 639 F.3d at 1181. *But see* *Piazza’s Seafood World v. Odom*, 448 F.3d 744, 750 (5th Cir. 2006) (“However, in the context of the Foreign Commerce Clause, other considerations come into play: nondiscriminatory state regulations affecting foreign commerce are invalid ‘if they (1) create a substantial risk of conflicts with foreign governments; or (2) undermine the ability of the federal government to ‘speak with one voice’ in regulating commercial affairs with foreign states.’”) (citation omitted).

121. *United States v. Locke*, 529 U.S. 89, 101 (2000).

122. UNCLOS art. 21.

123. *PMSA III*, 639 F.3d at 1181 n.8.

implementing Annex VI of the International Convention for the Prevention of Pollution From Ships (MARPOL 73/78) contain an express savings clause,¹²⁴ and the United States and Canada had proposed and established an international agreement under MARPOL that will require all ships within 200 nautical miles of the United States and Canada to meet the same sulfur limit as the California Vessel Fuel Rules in 2015.¹²⁵ The express sunset clause in the California legislation provides for the termination of the Vessel Fuel Rules when the CARB executive officer makes a finding that the federal government has adopted and is enforcing requirements that will achieve equivalent emissions reductions, so that California's rules would terminate if the MARPOL agreement has the desired effect.¹²⁶ The court also found that the burden of compliance with the regulations, while costly, would be a comparatively small burden: compliance with the regulations was not technically impossible or particularly difficult, and the cost of approximately \$30,000.00 per vessel call represents less than 1% of the cost of a typical trans-Pacific voyage, resulting in a negligible increase in consumer prices.¹²⁷ Thus, the balance of the burden on federal and foreign interests may indeed favor California's regulatory scheme.

Finally, as the Ninth Circuit noted, the Supreme Court in *Ray v. Atlantic Richfield Co.* upheld many of the Washington State requirements, including a tug-escort requirement that did not "impede[] the free and efficient flow of interstate and foreign commerce."¹²⁸ And, as discussed above, even the holding in *United States v. Locke* was relatively narrow, and provided space for potential regulation that was not in a direct conflict with a federal statute.¹²⁹ Thus, a final resolution of the question of how far a state can reach in enacting "an expansive and even possibly unprecedented state regulatory scheme"¹³⁰ for pollution control may have to wait for Supreme Court resolution—if not in this case, then the next one.

124. *PMSA III*, 639 F.3d at 1181. *See also* 33 U.S.C. § 1911 (2006) ("Nothing in this chapter shall limit, deny, amend, modify, or repeal any other authority, requirement, or remedy available to the United States, or any person, except as expressly provided in this chapter.").

125. *PMSA III*, 639 F.3d at 1161.

126. *Id.* at 1159.

127. *Id.* at 1159.

128. *Id.* at 1176–77 (citing *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 179–80 (1978)).

129. *See* Gudridge, *supra* note 13, at 748–49. *See also supra* text accompanying note 13.

130. *PMSA III*, 639 F.3d at 1181.

IV. CONCLUSION: *PACIFIC MERCHANT SHIPPING ASS'N* AND STATE ENVIRONMENTAL LAWS WITH INTERNATIONAL EFFECTS—
WHAT IS A FEDERAL SYSTEM TO DO?

Pacific Merchant Shipping Ass'n v. Goldstene represents a strongly-worded affirmation of a state's ability to regulate the sources of pollution beyond its borders. To some extent, it tracks recent Supreme Court jurisprudence, such as *Wyeth v. Levine*,¹³¹ that strongly supports the inference of states retaining regulatory authority in areas of traditional state concern.¹³² However, the potential of a widely-stretched variation of the "effects test" that allows for state regulation of offshore vessels should give pause to those concerned with the viability of a federal system to address global issues of pollution and climate change. After all, ships in domestic and international trade are now subject to differing fuel quality regimes off the California coast—a minor consideration, to be sure, but one that effectively makes the California regulation the default fuel requirement for all ships that call on California ports, wherever in the world those ships may be. This change also potentially affects the interests of other states in the United States, who will face price increases on imports that come in from California and will likewise face price differentials based on ports of call—a lack of uniformity that demonstrates why the federal government was given the Constitutional power to regulate commerce and navigation.¹³³

Furthermore, the decision in *Pacific Merchant Shipping Ass'n* is just one of a recent series of cases that have allowed states to enact more restrictive environmental regulations, even in the face of pre-existing federal and international regimes. A prime example of more stringent state regulation as an impetus for policy change is presented by the recent jurisprudence surrounding the problem of invasive species in ship ballast water. Invasive species have long been a problem because ocean-going ships draw in ballast water at ports often thousands of miles away from the port where the ballast water is eventually released.¹³⁴ In *Fednav Ltd. v. Chester*,¹³⁵ the Eastern District of Michigan upheld Michigan's Ballast Water Statute¹³⁶ against a preemption challenge based on federal law and foreign affairs field preemption.¹³⁷ The Michigan law was more stringent and required different practices than the fed-

131. 555 U.S. ___, 129 S. Ct. 1187 (2009).

132. *Wyeth*, 555 U.S. ___, ___, 129 S. Ct. 1187, 1194–95 (2009).

133. U.S. CONST. art. I, § 8, cl. 3; *Gibbons v. Ogden*, 22 U.S. (1 Wheat.) 22 (1824).

134. See Zdravka Tzankova, *The Political Consequences of Legal Victories: Ballast Regulation and the Clean Water Act*, 40 ENVTL. L. REP. 10154, 10156 (2010).

135. 505 F. Supp. 2d 381 (E.D. Mich. 2007).

136. MICH. COMP. LAWS § 324.3112(6) (2006).

137. *Fednav, Ltd.*, 505 F. Supp. 2d at 400.

eral regulations in place at the time of the litigation, which were based on a voluntary agreement that ships would exchange ballast water at sea at a minimum of 200 nautical miles from shore.¹³⁸ Shortly after *Fednav* was decided, the Ninth Circuit came down with its decision in *Northwest Environmental Advocates v. EPA*,¹³⁹ which required the EPA to regulate invasive species in ship ballast water as part of its mandatory duties under the Clean Water Act.¹⁴⁰

The EPA responded to the decision in *Northwest Environmental Advocates* by issuing a Vessel General Permit regulating ballast water discharges.¹⁴¹ However, the Vessel General Permit simply codified under the Clean Water Act the regulations that were already in place, such as offshore ballast water exchange. Since many states, including Michigan and California, have regulatory regimes that are far more strict than the Vessel General Permit, and since states are permitted to regulate more stringently than the federal standard under the Clean Water Act's NPDES program, it is unclear whether the Vessel General Permit will actually create the federal standard or simply become a background against which a patchwork of state regulatory regimes implement varying requirements for the ballast water discharge and treatment from international ships.¹⁴² The development of the International Maritime Organization's Ballast Water Management regime, including the as-yet unratified Ballast Water Management Convention, adds a further international dimension to the debate.¹⁴³ In the end, the potential for regulatory fragmentation inherent in more stringent state regulation of ballast water under the Clean Water Act may be the trigger for the shipping industry to throw its support behind comprehensive federal and international regimes.¹⁴⁴ In order to receive the political support of the states, these federal and international regulations might have to rise to the stringent regulatory level of the most stringent states, creating a standardized regime that would implement strong environmental controls.¹⁴⁵

Could California similarly act as the standards-setting leader in

138. *Id.* at 387.

139. 537 F.3d 1006 (9th Cir. 2008).

140. *Id.* at 1026. Ballast water had previously been exempted from Clean Water Act regulation by rule, which was the rule challenged by environmental advocates in the case. See 40 C.F.R. § 122.3(a) (2006).

141. See Final National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges Incidental to the Normal Operation of a Vessel, 73 Fed. Reg. 79473 (Dec. 18, 2008).

142. Tzankova, *supra* note 134, at 10166–67.

143. International Maritime Organization, International Convention for the Control and Management of Ships' Ballast Water and Sediments (BWM Convention), [http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Control-and-Management-of-Ships%27-Ballast-Water-and-Sediments-\(BWM\).aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Control-and-Management-of-Ships%27-Ballast-Water-and-Sediments-(BWM).aspx).

144. Tzankova, *supra* note 134, at 10169–70.

145. *Id.*

greenhouse gas regulation of ships? The Supreme Court's decision in *Massachusetts v. EPA*,¹⁴⁶ like the Ninth Circuit's decision in *Northwest Environmental Advocates*, would require the EPA to regulate in an area where the agency had previously declined to do so—carbon dioxide and other greenhouse gas emissions, including sulfur, from motor vehicle fuels.¹⁴⁷ California is already empowered to set higher emission control standards for land-based motor vehicles, which can then be adopted by other states under the Clean Air Act.¹⁴⁸ Coastal states, concerned with global warming and sea level rise, are already acting to raise emissions standards and force federal regulation.¹⁴⁹ As Congressional debate about climate change regulation heats up, states' frustrations with federal inaction could lead to more fragmentary regulation of the type upheld in *Pacific Merchant Shipping Ass'n*.¹⁵⁰ Again, it may be in the best interest of the shipping industry to fight for federal and international standards that rise to a level acceptable to coastal states rather than allow state-by-state regulation under a police power authority to fill a gap that would lead to varying requirements for international vessels.

The problem of airborne emissions from ships, like the problem of global greenhouse gas emissions and climate change generally, is, in the end, a worldwide problem begging for an international solution.¹⁵¹ To some extent, states, and on a larger scale regions, have been adopting international-law-based models to address climate change within the federal/state dichotomy of American federalism.¹⁵² Cross-border collaboration into voluntary programs that implement ideas such as carbon trading are expanding the legal vision of what is within the "exclusively state" sphere of pollution control and the "exclusively federal" sphere of

146. 549 U.S. 497 (2007).

147. *Id.* at 505, 532.

148. *See Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1156–57 (E.D. Cal. 2007) (discussing the California exception to the Clean Air Act preemption of motor vehicle emissions standards—California can apply to the EPA for a waiver to create more stringent standards, which can then be adopted by other states as federal standards). *See also Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 397–99 (D. Vt. 2007) (upholding the State of Vermont's adoption of California's emissions standards for motor vehicles).

149. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497 (2007); *Cent. Valley Chrysler-Jeep*, 529 F. Supp. 2d at 1157.

150. *See House Vote 96 – Bars New Regulation of Certain Greenhouse Gases*, N.Y. TIMES, Feb. 18, 2011, <http://politics.nytimes.com/congress/votes/112/house/1/96>. *See also supra* text accompanying notes 16–17.

151. *See GLOBAL CLIMATE CHANGE AND U.S. LAW* 133–82 (Michael B. Gerrard ed., 2007) (discussing extensively the role of the Clean Air Act and state clean air programs in addressing global climate change).

152. *See Judith Resnik et al., Kyoto at the Local Level: Federalism and Translocal Organizations of Government Actors (TOGAS)*, 40 ENVTL. L. REP. 10768, 10768–69 (2010).

foreign affairs.¹⁵³ It is argued that within the realm of environmental law, “it is no longer useful to draw sharp distinctions between international and domestic law. . . . In the brave new world of global environmental law, the focus is on ‘transnational legal processes, governmental and non-governmental networks, and judicial influence and cooperation across borders.’”¹⁵⁴ So the traditional distinctions of state and federal may come to be recognized as non-useful limitations when addressing truly global problems.

Until that day comes, however, courts, such as the Ninth Circuit, will wrestle with the implications of federalism and the complex balancing required by preemption doctrine when faced with local environmental laws with extraterritorial application and international effects. It remains to be seen whether *Pacific Merchant Shipping Ass’n* will be part of a new wave of cases that will eventually require the Supreme Court to decide the role of the states in solving international problems in a globalized world. But at least one precedent for the extraterritorial application of state environmental law has now been set.

153. See Jeremy Lawrence, *Where Federalism and Globalization Intersect: The Western Climate Initiative as a Model for Cross-Border Collaboration Among States and Provinces*, 38 ENVTL. L. REP. 10796, 10796–97 (2008) (discussing the Western Climate Initiative, an environmental partnership between some Western states and Canadian provinces to create a regional emissions trading program).

154. Tseming Yang & Robert V. Percival, *The Emergence of Global Environmental Law*, 36 ECOLOGY L.Q. 615, 625 (2009) (quoting Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT’L L. 485, 517 (2005)).

