

OIL POLLUTION LEGISLATION: THE NEED FOR UNIFORMITY

Although legislation has existed for some time dealing with the problem of oil pollution from vessels,¹ the international community did not seriously consider the pollution consequences of supertanker technology until the destruction of the Torrey Canyon off the southwest coast of England.² The wreck of the Argo Merchant off the coast of Massachusetts³ and the Amoco Cadiz tragedy off the coast of Brittany, France,⁴ have left no doubt that catastrophic oil spills are not only possible, but increasingly likely as the growing world demand for oil has led to larger tankers. President Carter, in a message to the Congress of the United States, declared that "the recent series of oil tanker accidents in and near American waters is a grave reminder of the risks associated with marine transportation of oil."⁵ In this message, he recommended that Congress approve legislation to establish a single national standard of strict liability for oil spills.⁶ Although comprehensive legislation in this area has been introduced in every session of Congress since 1975,⁷ these bills have yet to gain the support needed for passage. The major stumbling block has involved the question of federal preemption of state laws regarding oil spills. At war are two conflicting interests: the desirability of a uniform, predictable federal standard which applies nationally versus the rights of states to protect the environment, local resources and private property within their borders. At present, it appears that the latter position has triumphed because the Oil Pollution Liability and Compensation Act of 1978⁸ (S. 2083) introduced by Senator Muskie, does not include a preemption provision. Instead, it allows each state to impose additional liability and requirements with respect to the

1. The Oil Pollution Act of 1924, as amended by the Oil Pollution Act, Pub. L. No. 91-224, 84 Stat. 113, 33 U.S.C. §§ 431-39 (1970) was the first federal statute specifically relating to oil pollution. However, that Act provided only for criminal sanctions (33 U.S.C. § 434) and the suspension and revocation of licenses of masters and other officers of offending vessels (33 U.S.C. § 435). Although the Act was amended in 1966, Pub. L. No. 89-753, 80 Stat. 1252-1254, to provide that the offender was liable for all reasonable expenses incurred by the federal government in removing oil from navigable waters and adjoining shorelines it applied only to "grossly negligent or willful discharges." This Act was later repealed by the Water Quality Improvement Act, § 101, 33 U.S.C. §§ 1157-1171 (1970).
2. In that incident, approximately 100,000 tons of oil were spilled in the ocean and most of it ultimately found its way to the shores of the British Isles and the coast of France. While the resulting costs were somewhat difficult to compute, it is estimated that approximately \$15 million was spent on cleanup and approximately \$25 million in claims were asserted, which were ultimately settled for about \$7 million. See F. Cowan, *Oil and Water: The Torrey Canyon Disaster* (1968); Nanya, *The Torrey Canyon Disaster: Some Legal Aspects*, 44 *Denver L.J.* 400 (1967).
3. *Oil Pollution Liability and Compensation Act of 1978: Hearings on S. 2083 Before the Senate Comm. on Environment and Public Works*, 95th Cong., 2d Sess. 4 (1978) (General Statement) [hereinafter cited as *1978 Senate Hearings*]. This wreck in December of 1976 caused 7.7 million gallons of oil to spill into the sea.
4. *Id.* This supertanker went aground off the coast of Brittany, France, and lost its entire cargo of 230,000 tons of oil. Cleanup costs alone have reached \$85 million, as estimated by the French Government. Final estimates of damages to third parties range from \$100 million to \$800 million.
5. H. Doc. No. 105, 95th Cong., 1st Sess. 1 (1977).
6. *Id.* at 2.
7. See, e.g., S. 2162, 94th Cong., 1st Sess. (1975); H.R. 9294, 94th Cong., 1st & 2nd Sess. (1975-76); H.R. 14862, 94th Cong., 2d Sess. (1976); H.R. 6803, 95th Cong., 1st Sess. (1977); H.R. 3711, 95th Cong., 1st Sess. (1977); S. 1187, 95th Cong., 1st Sess. (1977); S. 2083, 95th Cong., 1st Sess. (1977); S. 2900, 95th Cong., 2d Sess. (1978).
8. *Oil Pollution Liability And Compensation Act of 1978*, S. 2083, 95th Cong., 2d Sess. (1978), 174 *Cong. Rec. S.* 5396 (daily ed. April 12, 1978).

discharge of oil within such state.⁹ This note will assess the wisdom of the decision of the Senate Committee on Environment and Public Works to eliminate the preemption provision in light of the traditional recognition of the need to maintain uniformity in the maritime law.

HISTORICAL BACKGROUND

The Torrey Canyon incident pointed out the overall lack of protection for innocent parties damaged by oil spills, and work was begun fairly rapidly in the Intergovernmental Maritime Consultative Organization¹⁰ to provide solutions to the problem. The IMOC conference meeting in November of 1969 concluded with the signing of two Conventions, one of which has been ratified by the United States and implemented by the passage in the 93rd Congress of the Intervention on the High Seas Act.¹¹ The second convention, known as the International Convention on Civil Liability for Oil Pollution Damage (CLC), addressed itself to liability for oil pollution damage.¹² This convention was submitted to the United States Senate for advice and consent to ratification, but the Senate declined to take action because of what it considered to be deficiencies in the Convention provisions.¹³ That fact had been recognized earlier by various other groups, and in an attempt to rectify the deficiencies, an additional conference was held in 1971 which resulted in the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.¹⁴ That Convention was also submitted to the Senate and once again the Senate declined to take action.¹⁵

The first significant domestic legislation in this area was enacted by the federal government in 1970 as the Water Quality Improvement Act.¹⁶ In subsequent years, Congress enacted the Trans-Alaska Pipeline Authorization Act¹⁷ and the Deepwater Port Act¹⁸ which dealt with specific aspects of the oil pollution problem. In addition, a number of coastal states have enacted

9. S. 2083, § 7(a), *supra* note 8.

10. IMOC is a United Nations agency.

11. Intervention on the High Seas Act § 2, 33 U.S.C. §§ 1471-1487 (1974). The Act extends certain rights to coastal states to intervene on the high seas to prevent or minimize oil pollution.

12. Reprinted at 64 Am. J. Int. Law 481 (1970). The CLC speaks to the liability of shipowners whose vessels carry cargoes of "persistent oils" (e.g. crude oil, animal and vegetable oils) in bulk. It establishes limits of liability - based on no-fault principles - for pollution damage to the territory or territorial sea of a party to the convention and these limits cover both the cost of cleanup and property damages.

13. *Oil Pollution Liability: Hearings on H.R. 14862 Before the Comm. on Merchant Marine and Fisheries*, 94th Cong., 2d Sess., 13 (1976) (General Statement) [hereinafter cited as *1976 House Hearings*].

14. Reprinted at 66 Am. J. Int. Law 712 (1972). The International Fund Convention establishes a revolving fund which is maintained by annual, mandatory contributions of cargo owners who receive more than 150,000 tons of crude or fuel oil at their facilities during a year.

15. *1976 House Hearings*, *supra* note 13 at 14.

16. 33 U.S.C. §§ 1157-1171 (1970). The Act declared, as a national policy, that there should be no discharges of oil into or upon the navigable waters of the United States, adjoining shorelines, or the waters of the contiguous zone. It included a legislative requirement for a national contingency plan for the removal of discharged oil and established liability for the removal costs. It also established a revolving fund not to exceed \$35,000,000, to be available for federal cleanup, subject to recoupment from the responsible spiller. This act was amended by the Federal Water Pollution Control Act, § 101, 33 U.S.C. §§ 1251-1376 (1972).

17. Trans-Alaska Pipeline Authorization Act, § 202, 43 U.S.C. §§ 1651-1655 (1973). The Act, for the first time in a federal statute, addressed liability for damages other than cleanup costs by creating a compensation fund available to respond to damages caused by oil pollution from vessels moving oil on the marine leg from the Trans-Alaska Pipeline to ports in the continental United States.

18. Deepwater Port Act of 1974, § 2, 33 U.S.C. §§ 1501-1524 (1974); 43 U.S.C. § 1333 (1974). The Act established a liability and compensation fund to respond to damages, including cleanup costs, for oil pollution from offshore facilities constructed pursuant to that Act or from the vessels at those facilities.

laws which provide for different degrees of liability and compensation for damages from oil spills. Taken as a whole, these arrangements provide a patchwork of different and sometimes conflicting systems of compensation for oil spill damages. Thus, Congress, recognizing the hardships to victims of oil pollution as well as the confusion and costs engendered by a lack of uniformity in state and federal law, directed the Attorney General to study this matter and make recommendations for legislation to provide a comprehensive system of liability.¹⁹ Also, the Maritime Law Association of the United States evidenced its concern over the trend away from uniformity in the maritime law by unanimously adopting the following resolution:

Resolved, That the Maritime Law Association of the United States considers it of the utmost importance and in the public interest that maritime law be uniform to the maximum extent possible throughout the United States; it is greatly concerned about, and strongly opposes the current proliferation of disparate State and local legislation adversely affecting such uniformity and advocates that Congress consider the matter and enact legislation designed to protect and maintain national uniformity in maritime law.²⁰

JUDICIAL TREATMENT OF UNIFORMITY

Traditionally, the regulation of maritime commerce has been the province of the federal government. The United States Constitution mandates that cases of admiralty and maritime jurisdiction are within the federal judicial power.²¹ Article III, § 2, together with the "Necessary and Proper" Clause²² vests in the federal courts and in Congress the paramount power to determine the extent of the admiralty jurisdiction and the substantive law to be applied in the maritime area. These clauses of the Constitution, along with the underlying commercial necessities, are the cornerstones upon which the courts have held that there must be a system of maritime law operating uniformly throughout the country.²³

Uniformity of law in maritime concerns has been promoted by the operation of the preemption doctrine. Early case law²⁴ determined that federal authority was paramount in the maritime field since the Constitution was cognizant of the need for a law of the sea common to all the states and as uniform as possible with the law of other maritime nations.²⁵ Even in an area wherein Congress has not legislated, maritime commerce is subject to the general

19. 33 U.S.C. § 1517(n) (1). See *supra* note 11.

20. Resolution Unanimously Adopted by the Maritime Law Association of the United States at its Annual Meeting held on April 25, 1975. Reprinted at *Oil Pollution Liability: Hearings on H.R. 9294 Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 94th Cong., 1st and 2nd Sess. 289 (1975-76) [hereinafter cited as *1975-76 House Hearings*].

21. U.S. Const. art. III, § 2, cl. 1.

22. U.S. Const. art. I, § 8, cl. 18: "The Congress shall have the power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers, vested by this Constitution in the Government of the United States or in any Department or Officer thereof."

23. *The Lottawanna*, 88 U.S. 558 (1875). In this case, Justice Bradley made one of the first references to the need for uniformity of maritime law: "One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in the whole country. It certainly could not have been the intention of the framers to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states." 88 U.S. at 575.

24. *The Moses Taylor*, 71 U.S. 411 (1866); *The Lottawanna*, 88 U.S. 558, 574-575, (1875); *Washington V.W.C. Dawson & Co.*, 264 U.S. 219 (1924).

25. Maloof, *Oil Pollution: Cleaning Up The Legal Mess*, 43 Ins. Counsel J. 605 (1976).

maritime law, as defined by the federal judiciary, rather than to state law, unless the area is one of purely local concern and does not require nationwide harmony and uniformity.²⁶ Accordingly, no state legislation in the maritime field may contravene the essential purpose of an act of Congress or the general maritime law.²⁷

The preemption doctrine reached its fullest development in the cases of *Southern Pacific Co. v. Jensen*²⁸ and *Knickerbocker Ice Co. v. Stewart*.²⁹ In *Jensen*, the Supreme Court stated, in referring to state statutes in the maritime area:

And plainly, we think no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself.³⁰

Three years later, the Supreme Court expanded the preemption doctrine to its broadest scope in the *Knickerbocker Ice* case. The Court said:

And so construed, we think the enactment is beyond the power of Congress . . . The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation, and to establish, so far as practicable, harmonious and uniform laws applicable throughout every part of the Union. Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended or changed except by legislation which embodies both the will and deliberate judgment of Congress. The subject was entrusted to it to be dealt with according to its discretion—not for delegation to others.³¹

The *Jensen* and *Knickerbocker Ice* decisions, however, have been limited by subsequent holdings of the Court. As stated by Mr. Justice Frankfurter in *Romero v. International Terminal Co.*, *Jensen* and its progeny mark isolated instances where "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system."³² It appears that *Jensen* and *Knickerbocker Ice* have been confined to their facts, i.e., to suits involving the relationship of the vessels to their crews.

26. *London Guarantee & Accident Co. v. Industrial Commission*, 279 U.S. 109, 124 (1929).

27. *The Moses Taylor*, 71 U.S. 411 (1866); *The Lottawanna*, 88 U.S. 74-75 (1875); *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924); *Detroit Trust Co. v. The Thomas Bartum*, 293 U.S. 21 (1934); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

28. 244 U.S. 205 (1917). The Court held in this case that the state of New York's workmen's compensation law was not applicable in the maritime context. The need for uniformity precluded New York from subjecting foreign shipping to the state's laws on employer-employee relationships.

29. 253 U.S. 149 (1920).

30. 244 U.S. at 216.

31. 253 U.S. at 164.

32. 358 U.S. 354, 373 (1959).

The recognition of state power to create rights and liabilities regarding maritime concerns was expressed in two decisions subsequent to *Jensen* and *Knickerbocker Ice*. In *Just v. Chambers*,³³ the right of a state to modify or supplement maritime laws was confirmed so long as the state action did not "run counter to federal laws or the essential features of an exclusive federal jurisdiction."³⁴ Perhaps the first noticeable erosion of uniformity in maritime law occurred in *Wilburn Boat v. Fireman's Fund Insurance Co.*³⁵ In this case, a divided Supreme Court held a Texas statute relating to insurance warranties applicable to a policy of marine insurance on a small houseboat operating on an artificial landlocked lake between Texas and Oklahoma. Justice Black, writing for the majority, concluded that since there was no judicially established federal maritime rule in this area, the regulation of marine insurance policies should be left to the states. Justice Frankfurter concurred in the result of the majority, but in his view, the majority opinion went beyond the needs of the problem before it.³⁶ The opinions in the *Just* and *Wilburn Boat* cases demonstrate a willingness on the part of the Court to allow state regulation in the maritime area where there is no effect on the essential characteristics of the maritime law. The Court's application of this principle to oil pollution legislation occurred in the landmark decision of *Askew v. The American Waterways Operators, Inc.*³⁷

The Askew Decision

"The knell of the uniformity doctrine may well have been struck by the 1973 decision of the Court in *Askew v. American Waterways Operators, Inc.*,³⁸ upholding the validity of a state pollution statute imposing strict liability without limit for all state-incurred costs in removing a wreck, and absolute liability, also without limit, for state-incurred pollution cleanup costs." *Askew* involved a request by American Waterways Operators, Inc. for a declaratory judgment holding the Florida Oil Spill Prevention and Pollution Control Act³⁹ unconstitutional. A three-judge federal district court declared the Act unconstitutional in its entirety,⁴⁰ as in conflict with the Admiralty Clause, but its decision was unanimously reversed on a direct appeal to the Supreme Court. Justice Douglas, writing for the Court, held that the states may constitutionally enact legislation respecting pollution and vessels within their territory so long as the federal government has neither enacted legislation

33. 312 U.S. 383 (1941).

34. *Id.* at 391.

35. 348 U.S. 310 (1955).

36. In *Wilburn Boat*, Justice Frankfurter made the following observations: "It cannot be that by this decision the Court means suddenly to jettison the whole past of the admiralty provision of Article III and to renounce requirements for nationwide uniformity, except insofar as Congress has specifically enacted them, in the field of marine insurance. It is appropriate to recall that the preponderant body of maritime law comes from this Court and not from Congress What reason is there for abruptly turning over, pending action by Congress, to the crazy-quilt regulation of the different States what so long has been the business of the courts?" 348 U.S. at 323.

37. 411 U.S. 325 (1973), *reh. denied*, 412 U.S. 933 (1973).

38. 1975-76 *House Hearings*, *supra* note 20, at 289 (statement of Herbert M. Lord, representing the Maritime Law Association).

39. Fla. Stat. Ann. §§ 376.011-376.21 (West Cum. Supp. 1978).

40. *American Waterways Operators, Inc. v. Askew*, 335 F. Supp. 1241 (M.D. Fla. 1971).

inconsistent with that of the state or preempted the field. The decision in *Askew* was based on the Court's construction of § 1161 (o) (1) and (2) of the Water Quality Improvement Act⁴¹ which explicitly waived preemption of state laws:

(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly-owned or privately-owned property resulting from a discharge of any oil or from the removal of any such oil.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil into any waters within such State.⁴²

The Court admitted that it could not say with certainty whether the Florida Act conflicted with any of the federal acts on the subject, and limited its decision to the resolution of the preemption issue. The Court stated:

We have only the question whether the waiver of preemption by Congress in § 1161 (o) (2) concerning the imposition by a State of any requirement or liability is valid.⁴³

Since the *Jensen* and *Knickerbocker Ice* cases had been limited to their facts, the Court declined to extend their reasoning to situations involving shoreside injuries by ships on navigable waters and held the waiver valid.⁴⁴ In addition, the Court limited the significance of two older federal acts by declaring that the Admiralty Extension Act⁴⁵ did not preempt state laws in situations involving sea-to-shore pollution and that any federal limitations of liability under the Limitation of Liability Act⁴⁶ run to vessels and not to shore facilities. In short, absent express federal preemption and any fatal conflict between the statutory schemes, a state may constitutionally exercise its police power respecting maritime activities concurrently with the federal government.⁴⁷

In the absence of preemption, *Askew* and *Wilburn Boat* appear to give the states extremely broad power to enact legislation regarding maritime affairs. However, the decisions do not challenge the paramount power of Congress in the maritime field.⁴⁸ In light of the above discussion, it appears that the decision of the Senate Committee on Environment and Public Works, not to preempt state law in the oil pollution area, further dampens prospects for a uniform maritime law. The *Askew* decision has, as of this date, spawned a number of disparate state statutes in the oil pollution liability and compensation field.

41. 33 U.S.C. §§ 1157-1171 (1970).

42. 33 U.S.C. § 1161 (o) (1), (2).

43. 411 U.S. at 343-44.

44. *Id.* at 344.

45. Admiralty Extension Act, 46 U.S.C. § 740 (1975). The Act provides that the admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

46. Limitation of Liability Act, 46 U.S.C. §§ 181-189 (1975). The Act limits the liability of vessel owners to the value of the vessel and freight pending as determined after, not before, the accident. See *Norwich and N.Y. Transport Co. v. Wright*, 80 U.S. 104 (1871).

47. *Just v. Chambers*, 312 U.S. 383 (1941).

48. *Maloof*, *supra* note 25, at 611.

ASKEW'S AFTERMATH: REVIEW OF DISPARATE STATE STATUTES

Eighteen coastal states have enacted legislation regarding oil pollution in waters subject to their jurisdiction.⁴⁹ Although these statutes vary considerably, they all impose liability of some type for cleanup costs. A minority of states follow federal law⁵⁰ in establishing a ceiling on damages to be paid by polluters, except in cases of willful negligence.⁵¹ Of these, only New Jersey holds oil polluters strictly liable. A majority of the state statutes provide for unlimited financial responsibility,⁵² *i.e.*, the polluter is held liable for all costs reasonably incurred in the removal of oil unlawfully discharged. Of these, five states provide for strict liability,⁵³ while the remaining jurisdictions subject the polluter to liability only when fault can be found.⁵⁴ Eleven of the eighteen states have established a state compensation fund from which victims of oil pollution can be compensated.⁵⁵ Five of the states that provide for funds require oil shippers who transact business in their state to contribute to the fund according to the number of gallons of oil they transport through that state's waters.⁵⁶ Seven of the state statutes only provide coverage for oil pollution⁵⁷ while out of the remaining ten state statutes, five provide coverage for hazardous substances⁵⁸ and five statutes cover a wide range of pollutants.⁵⁹ In regard to damages, thirteen states impose damages for cleanup and containment of the oil spill on the polluter.⁶⁰ Out of these jurisdictions, six impose a duty on the polluter to restore the quality of the water and land damaged by the spill,

49. Ala. Code tit. 22, §§ 140 *et seq.* (Supp.); Alaska Stat. tit. 46, §§ .03.050 *et seq.* (1971), §§ .03.210 *et seq.* (Supp. 1974); Cal. Water Code §§ 13000 *et seq.* (West 1971), §§ 13142 *et seq.* (Supp. 1975); Conn. Gen. Stat. Ann. §§ 25-54 *et seq.* (West Supp. 1975); Fla. Stat. Ann. §§ 376.011 *et seq.* (1975), §§ 376.011 *et seq.* (West Cum. Supp. 1978); Ga. Code Ann. tit. 17, §§ 501 *et seq.* (1971), §§ 503 *et seq.* (Supp. 1974); La. Rev. Stat. §§ 56.1431 *et seq.* (1952), §§ 56.1431 *et seq.* (West Supp. 1975); Me. Rev. Stat. Ann. tit. 38, §§ 541 *et seq.* (Supp. 1973); Md. Nat. Res. Code Ann. §§ 8-1401 *et seq.* (1973); Mass. Gen. Laws Ann. ch. 21, §§ 26 *et seq.* (West Supp. 1974); Miss. Code Ann. §§ 49-17-1 *et seq.* (Supp. 1974); N.J. Stat. Ann. §§ 58:10-1 *et seq.* (West Supp. 1975); N.Y. Envir. Conserv. Law §§ 71-1103 *et seq.* (Consol.) (1973), 71-1929 *et seq.* (Supp. 1974); N.C. Gen. Stat. §§ 143-211 *et seq.* (1974); Or. Rev. Stat. §§ 468.700 *et seq.* (1974); Tex. Water Code Ann. §§ 21.001 *et seq.* (1972), §§ 26.261 *et seq.* (Supp. 1974); Va. Code §§ 62.1-44.15:1 *et seq.* (Supp. 1973); Wash. Rev. Code §§ 90.48.010 *et seq.* (1962), §§ 98.48.010 (Supp. 1974).
50. Federal Water Pollution Control Act, § 101, 33 U.S.C. § 1321 (f) (1972).
51. Conn. Gen. Stat. Ann. § 25-54ee; Fla. Stat. Ann. § 376.12; N.J. Stat. Ann. § 58:10-23.11g; Tex. Water Code Ann. § 26.266.
52. Ala. Code tit. 22, § 140 (12d); Alaska Stat. tit. 46, § .03.758; Cal. Water Code § 3304; Ga. Code Ann. tit. 17, § 521.2; Me. Rev. Stat. Ann. tit. 38, § 552; Mass. Gen. Laws Ann. ch. 21, § 27; Miss. Code Ann. § 49-1743; N.C. Gen. Stat. § 143-215.90; Or. Rev. Stat. § 468.800; Va. Code § 62.1-44.34:2B; Wash. Rev. Code § 90.48.335.
53. Alaska Stat. tit. 46, § .03.822; Ga. Code Ann. tit. 17, § 521.1(2); N.C. Gen. Stat. § 143-215.93; Or. Rev. Stat. § 468.790; Wash. Rev. Code § 90.48.336.
54. Ala. Code tit. 22, § 140 (12d); Cal. Water Code § 13305; Fla. Stat. Ann. § 376.12; Me. Rev. Stat. Ann. tit. 38, § 552; Md. Nat. Res. Code Ann. § 8-1409; Mass. Gen. Laws Ann. ch. 21, § 27; Miss. Code Ann. § 49-17143; Va. Code § 62.1-44.34:2B.
55. Alaska Stat. tit. 46, § .03.030 (c); Cal. Water Code § 13400; Fla. Stat. Ann. § 376.11; Me. Rev. Stat. Ann. § 551; Md. Nat. Res. Code Ann. § 8-1411 (f); N.J. Stat. Ann. § 58:10-23.11i; N.Y. Envir. Conserv. Law § 71-0507; N.C. Gen. Stat. § 143-215.87; Or. Rev. Stat. § 468.215; Tex. Water Code Ann. § 26.265; Wash. Rev. Code § 90.48.390.
56. Fla. Stat. Ann. § 376.11 (4); Me. Rev. Stat. Ann. tit. 38, § 551 (4); Md. Nat. Res. Code Ann. § 8-1411 (c); N.J. Stat. Ann. § 58:10-23.11h(a); N.Y. Envir. Conserv. Law § 71-0507 (3).
57. Maine, Maryland, Massachusetts, New York, North Carolina, Virginia, Washington.
58. Alaska, Florida, Georgia, New Jersey, Texas.
59. Alabama, California, Connecticut, Mississippi, Oregon.
60. Alaska Stat. tit. 46, § .03.758; Cal. Water Code § 13304; Conn. Gen. Stat. Ann. § 75-54ee (b); Fla. Stat. Ann. § 376.09; Ga. Code Ann. tit. 17, § 521.1; Me. Rev. Stat. Ann. § 548; Md. Nat. Res. Code Ann. § 8-1411; Mass. Gen. Laws Ann. § 27 (10); N.C. Gen. Stat. § 143-215.84; Or. Rev. Stat. § 468.800; Tex. Water Code Ann. § 26.266; Va. Code § 62.1-44.34:2A; Wash. Rev. Code § 90.48.335.

and when necessary, a restocking of marine wildlife and natural resources that have been destroyed.⁶¹

THE STATES' POSITION ON OIL POLLUTION

The position of the states, essentially, is that they have power to enact laws regarding maritime affairs in general, and oil pollution in particular by virtue of their police power.⁶² The right of states to establish their own oilspill cleanup and liability programs has been upheld in the Supreme Court⁶³ and this respect for state prerogatives is also firmly established in the Federal Water Pollution Control Act.⁶⁴ Furthermore, the states which have enacted oil pollution statutes believe that preemption represents an unwise departure from the well-established Congressional policy of preserving state authority in this area.⁶⁵ The policy of the states who have passed legislation in this area is that pollution of state waters is inimical to the public health, welfare and safety of their inhabitants, and therefore should be a matter of state legislative determination. Another prominent state concern is that the current federal statute⁶⁶ and the oil pollution bills which have been introduced to date⁶⁷ are inadequate to protect local resources and private property.⁶⁸

States are concerned that the virtual total preemption of state law would result in a national law which is a lowest common denominator, *i.e.*, one which might provide sufficient coverage in some states, but which would be significantly less strict or comprehensive than many state laws.⁶⁹ State Senator Bernard C. Smith of New York has summed up his state's position by noting that state statutes are designed to provide the necessary protections – and in the cases of concurrent federal programs – the extra protections demanded by the citizens of the individual states, or dictated by the unique needs and conditions found in each state.⁷⁰ As Governor Ella Grasso of Connecticut explained in her letter to Senator Muskie on S. 2083:

Based on experience, I believe that any legislation that assumes a major Federal role in oilspill cleanup does not address the real problem. Although Connecticut is a maritime State oil-spills on navigable waters are minor in number compared to spills and leakage on land.⁷¹

61. Ala. Code tit. 22, § 140 (12d) (Q); Alaska Stat. tit. 46, .03.780; Ga. Code Ann. tit. 17, § 521.1.(1); Miss. Code Ann. § 49-17-43(b); N.Y. Envir. Conserv. Law § 71-1941; Or. Rev. Stat. § 468.745.

62. Maloof, *supra* note 25, at 608.

63. *Askew v. The American Waterways Operators*, 411 U.S. 325 (1973), *reh. denied*, 412 U.S. 933 (1973).

64. 33 U.S.C. §§ 1251-1376 (1972).

65. *Oil Spill Liability and Compensation: Hearings on S. 1187 Before the Senate Comm. on Commerce, Science, and Transportation*, 95th Cong., 1st Sess. 217 (1977) (statement of Maxine Lipeles, Environmental Policy Center) [hereinafter cited as *1977 Senate Hearings*].

66. Federal Water Pollution Control Act, § 101, 33 U.S.C. §§ 1251-1376 (1970).

67. *Supra* note 7.

68. *Oil Pollution Liability: Hearings on H.3711 Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess. 117 (statement of Marc Guerin, Division Director, Division of Oil Conveyance Service, Maine) [hereinafter cited as *1977 House Hearings*].

69. *1977 Senate Hearings*, *supra* note 65, at 320 (statement of Ernst W. Mueller, Commissioner, Dept. of Environmental Conservation, State of Alaska).

70. *1977 Senate Hearings*, *supra* note 65, at 307 (statement of Bernard C. Smith, State Senator from New York).

71. *1978 Senate Hearings*, *supra* note 3, at 22 (letter from Ella Grasso, Governor of Connecticut).

Governor Grasso's comments support Senator Smith's assertion that each state has unique needs which only can be protected by that state. Stephen M. Dorn, a member of the Department of Administration of the State of Wisconsin, has stated that preemption is not a wise policy because it would make it harder to remedy any shortcomings in the legislation which might appear later.⁷² In brief, many states recognize the need for a comprehensive program to supplement the coverage of the existing state laws, but believe that a single federal law may not be flexible enough to respond to the individual needs of the different states.

Another reason advanced by the states against preemption is that the level of government closest to the damaged parties – the state government – is more able to provide immediate and adequate compensation for losses than the federal government. Mr. Mueller, Commissioner of the Alaskan Department of Environmental Conservation, has noted that because of local knowledge and political institutions, control of oil pollution cleanup and restoration can be conducted more effectively and completely under the supervision of state and local officials.⁷³ Also, the State of Maine submitted a terse statement at the 1977 Senate hearings on this matter and emphasized the need for state action because states should not have to deal with a remote federal agency that is uninterested and burdened by red tape.⁷⁴ In sum, there is a concern about preemption of state laws in any context because of the possibility that the federal laws will be inadequate and the greater possibility that the federal laws will be improperly administered.⁷⁵

Finally, the probability exists that, in the next few years, a handful of coastal states will bear the "lion's share" of the environmental impacts of meeting the nation's petroleum needs. Mr. Mueller has pointed out that new methods of providing the nation's oil supply, such as offshore drilling, deepwater ports and Alaskan oil transportation, will benefit the entire nation at the expense of but a few states.⁷⁶ Since these states have generally recognized their obligation to absorb the necessary impacts, they should have a voice in determining how they will absorb them.⁷⁷

THE COMMITTEE'S DECISION TO REPORT WITHOUT PREEMPTION

The theory behind the Public Works Committee's decision to report S. 2083 without a preemption provision is that the federal statute is designed to provide basic protection for both the environment and for victims damaged by spills of oil.⁷⁸ States are free to impose greater degrees of protection for their resources and citizens or may opt to follow the proposed federal statute if they feel adequately protected.⁷⁹ The Committee stated that it would be unwise to establish a preemptive federal scheme which did not provide the same level

72. 1975-76 *House Hearings*, *supra* note 20, at 355 (letter from Stephen H. Dorn and Harvey Grasse, Cochairmen; Wisconsin Coastal Zone Coordinating and Advisory Council).

73. 1977 *Senate Hearings*, *supra* note 65, at 320 (statement of Ernst W. Mueller).

74. 1977 *House Hearings*, *supra* note 68, at 117 (statement of Marc Guerin).

75. 1975-76 *House Hearings*, *supra* note 20, at 249 (statement of Richard A. Frank, Esq., Center for Law and Social Policy).

76. 1977 *Senate Hearings*, *supra* note 65, at 321 (statement of Ernst W. Mueller).

77. *Id.*

78. 1978 *Senate Hearings*, *supra* note 3, at 11 (General Statement).

79. 1975-76 *House Hearings*, *supra* note 20.

of protection to citizens and the environment as currently provided under several state laws.⁸⁰ The wide variety of legislative approaches concerning these issues illustrates the difficulties state legislatures have had in coping with the oil pollution problem.⁸¹ This difficulty underscores the desirability of state legislative action so that individually-crafted laws adopted to unique state needs are allowed to function. The Committee declared that the adoption of a national uniform law would make it impossible to tailor a liability scheme which conforms to the demands of an individual state.⁸²

The Committee also rejected the frequently posed argument that preemption of state liability laws would prevent confusion and delay in adjudication of claims. Their rejection was based on the fact that the federal bill does not cover nonnavigable waters or spills on land.⁸³ Since state waters are not necessarily the same as the navigable waters of the U.S., state statutes might be applicable to state waters even if totally preempted with regard to navigable waters.⁸⁴ With preemption of state laws, the anomalous result would be the application of a different standard of liability to navigable waters than to nonnavigable waters and land.⁸⁵ Another consideration which reinforced the Committee's decision to reject preemption involved state compensation funds. Most states allocate a certain amount of money to the fund in addition to the damage surcharges assessed to polluting vessels. The Committee reasoned that the administrative and financial burden would exist whether states are allowed to assess damage surcharges or not.⁸⁶

The Committee concluded by stating that "preemption is a superficially attractive concern . . . but close examination reveals it is an argument rejected as flawed and dangerous to the adoption of the federal system 200 years ago."⁸⁷

THE GENERAL NEED FOR UNIFORMITY

The uniformity doctrine of maritime law has a dual foundation: (1) the need for uniformity with regard to domestic or internal affairs; and (2) the need for uniformity with regard to international law and foreign affairs. In regard to the first consideration, the courts have sometimes found the state policy or interest in support of state legislation overriding and held that the uniformity doctrine did not bar the state action.⁸⁸ However, in the area of foreign affairs, the Court has been reluctant to subordinate the need for uniformity to any state interest or policy.⁸⁹ Oil pollution legislation involves a state interest of the highest magnitude which must be balanced against the

80. 1978 Senate Hearings, *supra* note 3, at 11.

81. *Id.* at 21.

82. *Id.* at 22.

83. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1972).

84. See: *Statement of the First Assistant Attorney for the State of Oregon, Oral Proceedings - Approaches to Oil Pollution Responsibility*, 50 Or. L. Rev. 587, 590 (1971).

85. 1978 Senate Hearings, *supra* note 3, at 22.

86. *Id.* at 23.

87. *Id.*

88. See: *Davis v. Department of Labor*, 317 U.S. 249 (1942); *Huron Cement Co. v. Detroit*, 362 U.S. 440 (1960); *Victory Carriers v. Law*, 404 U.S. 202 (1971).

89. Note, *Oil And Water - A New Look At The Uniformity Doctrine*, 26 Baylor L. Rev. 194 (1974); See also *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) and *Windward Shipping Ltd. v. American Radio Assoc.*, 415 U.S. 104 (1974).

need for uniformity and predictability in maritime affairs. In light of the tendency of later cases to find the need for uniformity subordinate to the police power interests in support of state legislation, it is clear that uniformity can only be promoted by the operation of the preemption doctrine. During every House and Senate hearing at which comprehensive oil pollution acts have been considered, several arguments have been advanced in favor of preemption.⁹⁰ The basic position of all the various interests in favor of preemption is that a single problem is being solved in piecemeal, duplicative and costly fashion.

Users and handlers of oil must have a uniform system available to them so that meaningful business plans and decisions can be made. Preemption is essential to an effective nationwide system of oil pollution damage and liability because the array of state and federal laws creates confusion as to responsibility for reporting and cleanup. William C. McNeal, Chairman of the Legislative Committee of the American Waterways Operators, Inc., has stated that preemption of duplicative state laws and compensation funds is an absolute necessity because of a fear that oil spill cleanup operations will be delayed and chaotic, resulting in the loss of promptness and efficiency. This hinders rather than helps cleanup operations.⁹¹

Another significant problem caused by a lack of uniformity is that some types of oil pollution are not covered by state statutory provisions, so an injured party may find recovery impossible with the result that the harm to the environment may go uncompensated.⁹² Furthermore, it is only by preemption that claimants can be assured with certainty that their rights to recover damages will not be dependent on the location of the incident which caused their injury, or the nature of the source of the oil discharge which caused their injury.⁹³ Russell W. Peterson, Chairman of the Council on Environmental Quality, has noted that limited understanding of the type and magnitude of future compensable damages underscores the need for a comprehensive system.⁹⁴

Comprehensive oil spill legislation has great significance in the important effort to help meet domestic energy needs. Major changes in the way oil is produced and transported, such as exploration of the Outer Continental Shelf, tanker shipments between the Trans-Alaskan Pipeline Terminal and the West coast, and construction of deepwater ports to accommodate supertankers, increase the possibility of major oilspills and smaller, but incrementally significant spills.⁹⁵ Additional means of obtaining oil are vitally needed, but significant deterrents to orderly development are "presented by the lack of clear, uniform

90. 1976 House Hearings Before the Comm. on Merchant Marine and Fisheries; 1976 House Hearings Before the Subcomm. on Coast Guard and Navigation of the Comm. on Merchant Marine and Fisheries; 1977 House Hearings Before the Comm. on Merchant Marine and Fisheries; 1977 House Hearings Before the Subcomm. on Coast Guard and Navigation of the Comm. on Merchant Marine and Fisheries; 1977 Senate Hearings Before the Comm. on Commerce, Science, and Transportation; 1978 Senate Hearings Before the Comm. on Commerce, Science, and Transportation.

91. 1977 Senate Hearings, *supra* note 65, at 275 (statement of William C. McNeal, Chairman, Legislative Comm., The American Waterways Operators, Inc.).

92. *Id.* at 211 (statement of Charles P. Eddy, Acting Deputy Assistant Secretary, Dep't of Interior).

93. 1975-76 House Hearings, *supra* note 20, at 57 (statement of Adm. Owen W. Wiler, Commandant, United States Coast Guard).

94. *Id.* at 107 (statement of Russell W. Peterson, Chairman, Council on Environmental Quality).

95. *Id.*

standards of protection and the lack of clear incentives for operators of both facilities and ships to apply strong protective measures against spills.”⁹⁶

Domestic Considerations

The American shipping industry strongly believes that American ships and barges engaged in interstate commerce should face uniform regulations and laws.⁹⁷ John Donnelly, testifying on behalf of the shipping industry, stated that the existing host of pollution laws and funds creates a burden on the shippers of oil, and in turn, raises the price of petroleum products for consumers.⁹⁸ Briefly stated, since most of the compensation funds are based on a tax on oil, their proliferation places an unnecessary burden on consumers and the oil industry.

Another factor which supports the desirability of preemption by the federal government involves insurance coverage. Underwriters have found it impossible to provide insurance coverage to meet all of the varying standards and limits of liability provided in the laws of the several states.⁹⁹ This has resulted in shipowners and ship operators being uninsured to the extent that state legislation has imposed greater exposure or higher limits of liability and has failed to make the federal defenses available.¹⁰⁰ Testimony before members of Congress has demonstrated that to be insured or partially insured under different standards is a “most onerous burden for the vessel operator who, by the very nature of his business, must move freely from one jurisdiction to another.”¹⁰¹ In the judgment of those who have testified, there is no suitable answer to this problem other than federal preemption. Their position is amply demonstrated by the history of the Florida Oil Pollution Statute.¹⁰² As Florida authorities sought to enforce the Act’s provisions, vessel owners were unable to sail in Florida waters since special insurance was required for vessels entering those waters.¹⁰³ As a result, the most objectionable features of this Act were repealed in 1974 after the Florida legislature had assessed the damage caused by the Act to the State’s commerce.¹⁰⁴

International Considerations

The need to protect our marine environment transcends state regulatory power, and should be dealt with on a national and international scale. Former President Gerald R. Ford stated, when urging Congress to adopt comprehensive legislation, that “pollution of the oceans by oil is a global problem requiring global solutions.”¹⁰⁵ The international community has long recognized that oil pollution is an international problem because oil is transported in large quantities in international trade. According to Adm. Owen W. Wiler of the U.S. Coast

96. 1976 House Hearings, *supra* note 13, at 241 (statement of Joan Davenport, Assistant Secretary of the Dep’t of the Interior).

97. 1975-76 House Hearings, *supra* note 20, at 236 (statement of John W. Donnelly, Chairman, Legislative Comm., The American Waterways Operators, Inc.).

98. *Id.*

99. 1977 House Hearings, *supra* note 68, at 45 (statement of Donald H. Miller, representing American Institute of Marine Underwriters).

100. 1975-76 House Hearings, *supra* note 20, at 300 (statement of Francis A. Lewis, Insurance Co. of North America).

101. *Id.*

102. Fla. Stat. Ann. § 376.11 (1970).

103. Maloof, *supra* note 25, at 611.

104. Fla. Stat. Ann. § 376.11 (West Cum. Supp. 1978).

105. H. Doc. No. 214, 94th Cong., 2d Sess. 1 (1975).

Guard, it must be recognized that, as oil is transported in large quantities in interstate trade, "oil pollution resulting from this activity is a federal, rather than a state problem."¹⁰⁶ Mr. Nicholas Healy, past president of the Maritime Law Association and counsel for the American Waterways Operators in the *Askew* case, has testified before the House Subcommittee on Coast Guard and Navigation that "by its very nature the sea is international, and in the association's view, regulation of the maritime environment should, ideally, be international."¹⁰⁷

Because maritime trade is essentially interstate or foreign in character, it requires uniformity of law if it is to be dealt with in a meaningful and fair manner.¹⁰⁸ The consequences of the existing patchwork of state and federal laws threatens serious damage to the U.S. economy in the form of a drastic interruption and diminution of foreign trade.¹⁰⁹ Mr. Herbert Lord echoed the view of the Maritime Law Association and shipping interests when he testified at House Hearings that the combined impact of disparate laws and regulations is detrimental to our foreign trade and domestic waterborne commerce.¹¹⁰ He also noted that it astonishes foreign shipowners that they cannot safely charter tank vessels to discharge oil at United States ports and include in the charter parties (a contract by which a ship is let to a merchant for the conveyance of goods on a determined voyage to one or more places) a representation that their vessels qualify for such trades.¹¹¹

Another possibility that should be considered is the fact that regulation in this area could have an impact on the field of foreign relations. In the past, the Supreme Court has been more ready to conclude that state action is preempted when it affects foreign relations, then when it is of purely local concern.¹¹² In a recent case, the Court found the direct impact of an Oregon law upon the field of foreign relations sufficient to render it invalid, noting that state law "... may well adversely affect the power of the central government to deal with those problems."¹¹³ National efforts to secure international agreements and United States bargaining power at international conventions could be adversely affected if all coastal states are given a free reign in the field of oil pollution legislation.¹¹⁴ Furthermore, if state legislation makes inroads on international law or foreign policy, it might be attributed to the nation as a whole, the result being an erosion of the principle of freedom of the seas which would be detrimental to the United States and other shipping nations.¹¹⁵ In sum, the United States position as a flag state requires an international policy determined at the federal level.

106. 1977 *Senate Hearings*, *supra* note 65, at 58 (statements of Adm. Owen W. Wiler).

107. 1977 *House Hearings*, *supra* note 68, at 128 (statement of Nicholas J. Healy, Esq., Healy & Baillie).

108. Maloof, *supra* note 25, at 606.

109. 1977 *House Hearings*, *supra* note 68, at 129 (statement of Nicholas J. Healy, Esq.).

110. 1975-1976 *House Hearings*, *supra* note 20, at 68 (statement of Herbert M. Lord).

111. *Id.*

112. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

113. *Zchernig v. Miller*, 389 U.S. 429 (1968).

114. Note, *supra* note 89, at 204.

115. *Id.* at 209.

CONCLUSION

Despite several major oil pollution incidents, this country has yet to devise a law which compensates oilspill victims quickly and easily. It is clear from the foregoing analysis that there exists a patchwork of federal and state laws regarding liability for oil pollution which contains gaps, ambiguities and conflicts. Although a number of bills which provide a comprehensive national system to deal with the problem of oil pollution have been introduced in Congress, none have gained sufficient support for passage because of the dispute over the question of preemption of duplicative state laws. Two conflicting interests are involved: the traditional recognition of the need for uniformity of the maritime law versus the state's interest in protecting local resources and private property. Early case law confirmed the need for uniformity, but later cases allow the states more power to regulate in the maritime area when local interests are involved. As the Court stated in *Askew*, states may protect their waters and property from oil pollution damage as long as the federal government has neither enacted legislation inconsistent with that of the state or preempted the field. Many states believe that only their legislators can determine what laws are necessary to combat this problem.

Preemption is essential to the effectiveness of proposed federal oil pollution legislation and the compensation scheme provided in it. From an environmental standpoint, preemption is required so that all injured parties are compensated and all oil spills are cleaned up. Furthermore, if shippers and marine insurers are forced to comply with disparate sets of laws in almost every port, the cost of transportation by water is bound to soar, and the public will be adversely affected in the form of increased prices for waterborne products. Also, without uniformity, international trade will be reduced which will result in damage to the United States economy.

The Committee on Environment and Public Works failed to correctly balance the competing interests when it decided to report the Oil Pollution Liability and Compensation Act (S. 2083) without a preemption provision. The states' position has merit, but the need to protect our marine environment transcends state regulatory power, and should be dealt with on a national and international level. Uniformity of maritime law is desirable from the standpoint of those directly involved with maritime commerce, and from the standpoint of the public as well. Although Congressional action in this area is vitally necessary, Congress should refrain from enacting into law any oil pollution bill which does not totally preempt all state laws on the matter.

James P. Kilcoyne

B.A. Villanova University, 1977;
J.D. Candidate, University of Notre Dame Law School, 1980.