

Constitutional Law—First Circuit Vacates Preemption Finding Relating to Three Massachusetts Oil Spill Prevention Act Provisions—*United States v. Massachusetts*, 493 F.3d 1 (1st Cir. 2007)

Federalism is “[t]he legal relationship and distribution of power between the national and regional governments”¹ When state and federal laws conflict, the court will conduct a preemption analysis to determine whether an injunction of the state law is in order.² In *United States v. Massachusetts*,³ the First Circuit considered whether the federal Port and Waterways Safety Act (PWSA) preempted the Massachusetts Oil Spill Prevention Act (MOSPA).⁴ After the district court dismissed the action on the pleadings, the First Circuit vacated and remanded, holding that further analysis was necessary.⁵

Buzzards Bay (the Bay), the driving force behind MOSPA, lies off the coast of Massachusetts near Cape Cod and is one of five Estuaries of National Significance.⁶ Oil spills have historically threatened the Bay because of its treacherous areas for navigation.⁷ The most recent threat involved the Bouchard Transportation Co. Barge #120 (Bouchard grounding), whose cargo

1. See BLACK’S LAW DICTIONARY 644 (8th ed. 2004) (defining federalism). The inquiry into the balance of power begins with the second clause of Article VI of the Constitution, which states that federal law is “the supreme Law of the Land.” See U.S. CONST. art. VI, cl. 2. (setting forth maxim of federalism); *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n of Kansas*, 489 U.S. 493, 509 (1989) (indicating Supremacy Clause gives Congress preemptive power over state law).

2. See *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 866-74 (2000) (detailing preemption scheme); *Hillsborough Co., Fla. v. Automated Med. Labs.*, 471 U.S. 707, 712-13 (1985) (summarizing preemption principles). The Court’s decision to preempt will pivot on Congress’s intent. *Hillsborough Co., Fla. v. Automated Med. Labs.*, 471 U.S. 707, 713 (1985). The first question is whether Congress expressly declared its intent to preempt state law. *Id.* In the absence of express language, the Court may imply intent if it finds either field or conflict preemption. *Id.* Field preemption occurs when Congress has so pervasively regulated a field that it has left no room for state involvement. *Id.*; see also *SPGGC, LLC v. Ayotte*, 488 F.3d 525, 530 (1st Cir. 2007) (citations omitted) (noting state regulation invalid despite no direct conflict with federal law). In contrast, conflict preemption presents a situation where compliance with state and federal laws is not feasible, or where the state law impedes its federal counterpart’s objective. *SPGGC, LLC v. Ayotte*, 488 F.3d 525, 531 (1st Cir. 2007).

3. 493 F.3d 1 (1st Cir. 2007).

4. *Id.* at 4 (stating issue and parties’ arguments thereto).

5. *Id.* at 4-5 (vacating, remanding, and criticizing district court’s approach).

6. See *United States v. Massachusetts*, 440 F. Supp. 2d 24, 27 n.2 (D. Mass. 2006) (stating Buzzards Bay’s location), *vacated*, 431 F.3d 1 (1st Cir. 2007); Navigation and Waterways Management Improvement, Buzzards Bay, MA, 69 Fed. Reg. 62,427, 62,428 (Oct. 26, 2004) (to be codified at 33 C.F.R. pt. 165) (indicating Buzzards Bay’s status as Estuary of National Significance since 1985); *infra* note 10 and accompanying text (indicating Bouchard grounding impetus for Massachusetts legislature passing MOSPA).

7. See Regulated Navigation Area; Buzzards Bay, MA; Navigable Waterways With the First Coast Guard District, 71 Fed. Reg. 15,649, 15,650 (Mar. 29, 2006) (to be codified at 33 C.F.R. pts. 161, 165) (reporting on Buzzards Bay’s environmental risks). In 1969, for instance, the tank barge Florida spilled about 175,000 gallons of oil into the Bay. *Id.* Similar incidents recurred in 1977, 1986, 1999, and 2003. *Id.*

tank ruptured in April 2003, spilling approximately 98,000 gallons of oil near the Bay.⁸ The incident impacted an estimated fifty-three miles of shoreline and elicited a legislative response in the form of MOSPA.⁹

Attempting to prevent future incidents like the Bouchard's grounding, Massachusetts passed MOSPA, "An Act Relative to Oil Spill Prevention and Response in Buzzards Bay and Other Harbors and Bays of the Commonwealth."¹⁰ Subsequently, the United States, the American Waterways Operators International Association of Independent Tank Owners, Bimco, and Chamber of Shipping of America brought suit arguing to enjoin key MOSPA provisions.¹¹ The plaintiffs moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 12(c).¹² The United States District Court for the District of Massachusetts granted a permanent injunction on all seven provisions, finding that PWSA preempted the Massachusetts statute.¹³

Massachusetts challenged the district court's decision as to three of the seven enjoined provisions: sections 4, 6, and 50C.¹⁴ Section 4 enhanced the manning requirements for tank barges and tow vessels in Buzzards Bay.¹⁵ Section 6 required a tug escort in special interest waters.¹⁶ Finally, section 50C compelled some vessels to seek a financial assurance certificate.¹⁷ The First

8. See Regulated Navigation Area; Buzzards Bay, MA; Navigable Waterways With the First Coast Guard District, 71 Fed. Reg. 15,649, 15,651 (Mar. 29, 2006) (to be codified at 33 C.F.R. pts. 161, 165) (referencing Bouchard grounding in 2003); see also Massachusetts Department of Environmental Protection, *Buzzard's Bay Bouchard Barge: #6 Fuel Oil Spill Shore Impacts*, <http://www.mass.gov/dep/cleanup/sites/bouchard.htm> (last visited Dec. 15, 2007) [hereinafter *Bouchard Barge Fuel Oil Spill*] (specifying repercussions of 2003 Bouchard spill).

9. See *Bouchard Barge Fuel Oil Spill*, *supra* note 8 (estimating direct oil damage to shoreline); see also National Oceanic and Atmospheric Administration, *Remedial/Injury Assessment: Buzzards Bay/Bouchard 120, MA*, <http://www.darrp.noaa.gov/northeast/buzzard/injury.html> (last visited Dec. 15, 2007) (estimating more than ninety miles of shoreline impacted to some extent); *infra* note 10 and accompanying text (noting Massachusetts legislature passed MOSPA after Bouchard grounding).

10. See 493 F.3d at 3-4 (further detailing MOSPA emergence); *United States v. Massachusetts*, 440 F. Supp. 2d 24, 28 (D. Mass. 2006) (portraying MOSPA as response to Bouchard grounding in Bay), *vacated*, 431 F.3d 1 (1st Cir. 2007).

11. See *United States v. Massachusetts*, 440 F. Supp. 2d 24, 27 & n.4 (D. Mass. 2006) (setting up background for motion before court), *vacated*, 431 F.3d 1 (1st Cir. 2007).

12. See *United States v. Massachusetts*, 440 F. Supp. 2d 24, 28 (D. Mass. 2006) (describing nature of 12(c) motion), *vacated*, 431 F.3d 1 (1st Cir. 2007). A 12(c) motion is similar to a 12(b)(6) motion in that both require the court to draw reasonable inferences in favor of the nonmoving party based solely on the pleadings. *Id.*

13. *United States v. Massachusetts*, 440 F. Supp. 2d 24, 48 (D. Mass. 2006) (granting plaintiff's motion to enjoin), *vacated*, 431 F.3d 1 (1st Cir. 2007).

14. See 493 F.3d at 4 (stating appeal challenged injunction of three MOSPA provisions); Press Release, The Coalition for Buzzards Bay, AG Reilly Fights Feds to Protect Buzzards Bay (Sept. 7, 2006), available at <http://www.savebuzzardsbay.org/newsevents/press-releases/09-07-06-pr.htm> [hereinafter AG Reilly Fights Feds] (discussing Attorney General's appeal of district court's judgment). Massachusetts challenged the district court's decision regarding sections 4, 6, and 50C of Massachusetts General Laws chapter 21. See 493 F.3d at 4.

15. 493 F.3d at 4, 13-14 (describing MOSPA section 4).

16. *Id.* at 4, 15-19 (describing MOSPA section 6).

17. *Id.* at 4, 20-25 (describing MOSPA section 50C).

Circuit reasoned that a court could not enjoin the appealed provisions without evidence and therefore vacated and remanded the judgment.¹⁸

Federal maritime trade regulation dates back to the founding of the United States.¹⁹ Federal regulation of dangerous cargo, however, did not begin until Congress passed the Tank Vessel Act of 1936.²⁰ After the Torrey Canyon oil spill off the coast of England in 1967, Congress passed the Ports and Waterways Safety Act of 1972 to increase environmental protection.²¹ In 1978, the Port Tanker Safety Act (PTSA) modified both the Tank Vessel Act and the PWSA by requiring the Secretary of Transportation to regulate tank vessels in various ways.²² After the Exxon Valdez oil spill of 1989, Congress took further measures to prevent spills by passing the Oil Pollution Act (OPA).²³ Despite steadily increasing federal regulation in the field of oil spills and tanker safety, several states, including Massachusetts, have passed their own more stringent regulations.²⁴

Federal regulations can preempt state regulations expressly or implicitly.²⁵ When Congress takes a particular action, stricter state regulations are not necessarily helpful.²⁶ State oil spill regulations have generated some discussion and litigation between pro-environmental and pro-maritime interests.²⁷ Thus,

18. *Id.* at 25 (concluding district court erred in dismissing on pleadings).

19. *See* Act of Sept. 1, 1789, ch. 11, §§ 1-37, 1 Stat. 55 (regulating vessel licensing and commerce).

20. *See* Act of June 23, 1936, ch. 729, 49 Stat. 1889 (regulating vessel design, construction and alteration); *see also* K. Allen Brooks, *California Oil Spill Laws in the Wake of United States v. Locke*, 12 U.S.F. MAR. L.J. 227, 230 (2000) (declaring Congress began regulating dangerous cargo with Tank Vessel Act); Michael F. Vitt, *United States v. Locke: After a Rough Passage, Intertanko Crosses the Bar of State Regulation to Reach the Safe Harbor of Preemption*, 25 TUL. MAR. L.J. 573, 581 (2001) (noting purpose of Tank Vessel Act); Peter J. Carney, Note, *The International Association of Independent Tanker Owners (Intertanko) v. Locke: Do Oil and State Tanker Regulation Mix?*, 5 OCEAN & COASTAL L.J. 117, 120 (2000) (indicating Tanker Vessel Act first attempt at tanker regulation). The purpose of the Tank Vessel Act was to promulgate uniform standards and encourage safe tanker navigation. H.R. REP. NO. 74-2962, at 2 (1936).

21. *See* *United States v. Locke*, 529 U.S. 89, 101 (2000) (stating PWSA prompted by Torrey Canyon spill); *see also* Brooks, *supra* note 20, at 231 (describing PWSA in terms of contemporary environmental concerns); Carney, *supra* note 20, at 120 (noting PWSA's importance in tanker regulation after Tank Vessel Act). PWSA consists of two titles, whose purposes sometimes overlap. *See* *United States v. Locke*, 529 U.S. 89, 101 (2000) (delineating nature of PWSA).

22. *See* 46 U.S.C. §§ 9101-02 (2006) (promulgating requirements for Secretary of Transportation under Act); Carney, *supra* note 20, at 120 (commenting PTSA modified Tank Vessel Act and PWSA).

23. *See* *United States v. Locke*, 529 U.S. 89, 101-02 (2000) (outlining OPA effects on PWSA); *see also* John B. Garry, *Intertanko Returns Fire—It's a Direct Hit: Rhode Islands's Marine Oil Transportation Policies in the Wake of United States v. Locke*, 34 SUFFOLK U. L. REV. 241, 241 (2001) (commenting Exxon Valdez led to OPA); U.S. Environmental Protection Agency, *Oil Pollution Act Overview*, <http://www.epa.gov/emergencies/content/lawsregs/opaover.htm> (last visited Feb. 3, 2008) (declaring OPA Congress's response to growing public concern over Valdez incident).

24. *See* Garry, *supra* note 23, at 242, 277-78 (discussing state regulations in Rhode Island, California, Maine, and Washington); *cf.* AG Reilly Fights Feds, *supra* note 14 (noting Massachusetts Attorney General expressed dissatisfaction with federal safety standards and suggested Bay vulnerability).

25. *See supra* note 2 and accompanying text (describing preemption analysis).

26. *See* *Charleston & W. Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915) (stating preemption maxim stricter state law not always helpful following Congressional action).

27. *See* Garry, *supra* note 23, at 251-59, 263-72, 277-79 (discussing state oil laws and reactions to court

two groups with distinct interests underlie the litigation: one that favors increased environmental protection and one that favors the uniform standards of federal regulation.²⁸

Two key Supreme Court cases, *Ray v. Atlantic Richfield Company*²⁹ and *United States v. Locke*,³⁰ have outlined the PWSA's preemptive framework.³¹ Decided before OPA, *Ray* held that states could generally pass regulations aimed at protecting the environment provided they did not regulate ship construction or design.³² *Ray*'s analysis turned on its conclusion that conflict preemption controlled Title I of PWSA and that field preemption controlled Title II.³³ By passing OPA in 1990, however, Congress confused the analysis resulting in increased state regulation of oil spills.³⁴ In 2000, the Supreme Court in *Locke* revisited the subject of PWSA preemption attempting to reconcile the seemingly contradictory OPA savings clauses with PWSA.³⁵ Nonetheless, the *Locke* analysis has left gaps that continue to be the source of

decisions affecting interests at play).

28. See, e.g., Elizabeth A. Rosso, *The Supremacy Clause Requires State Law to Yield to Federal Law When the State Law Conflicts with the Federal Government, or Stands as an Obstacle to Achievement of Federal Goals: United States v. Locke*, 39 DUQ. L. REV. 865, 891 (2001) (acknowledging some dichotomy between uniform federal standards and state regulation of local environment); Timothy E. McCarthy, Casenote, *Title II of the Ports and Waterways Safety Act as Interpreted by Ray v. Atlantic Richfield Co. Preempts Washington's Oil Tanker Regulations Concerning General Navigation Watch Procedures, English Language Proficiency, Training, and Casualty Reporting—United States v. Locke*, 120 S.Ct. 1135 (2000), 10 SETON HALL CONST. L.J. 1209, 1231 (2000) (recognizing environmental interests cannot trump federal supremacy); Bernard H. Oxman & Patrick O. Gudridge, Case Report, *United States v. Locke*, 94 AM. J. INT'L L. 745, 747-48 (2000) (noting international dimensions of maritime litigation).

29. 435 U.S. 151 (1978).

30. 529 U.S. 89 (2000).

31. See *United States v. Locke*, 529 U.S. 89, 103-12 (2000) (supplementing analytical framework set forth in *Ray*); *Ray v. Atl. Richfield Co.*, 431 U.S. 151, 158-80 (1978) (analyzing preemptive effect of PWSA); see also Brooks, *supra* note 20, at 233-42 (discussing *Ray* and *Locke* as cornerstones of oil spill regulation cases).

32. See *Ray v. Atl. Richfield Co.*, 431 U.S. 151, 158-80 (1978) (analyzing legal effects of Titles I and II); Garry, *supra* note 23, at 246-47 (summarizing and explaining *Ray* holding).

33. See *Ray v. Atl. Richfield Co.*, 431 U.S. 151, 161-65 (1978) (establishing preemption scheme for PWSA). Notably, *Ray* recognized but did not expand on the notion that both titles are "somewhat overlapping." *Id.* at 161.

34. See Garry, *supra* note 23, at 241 (discussing issues arising from vague OPA language). The issue with OPA was that it included two provisions that allowed states to impose additional liability relating to the discharge of oil. *Id.*; see also 33 U.S.C. §§ 2718(a)(1),(c) (2006) (limiting Act's boundaries in preempting or otherwise affecting state authority for regulating certain activities). States used OPA as a blank check to pass marine oil transportation regulation that was stricter than the federal standard. See Garry, *supra* note 23, at 241-42.

35. See *United States v. Locke*, 529 U.S. 89, 103-12 (2000) (setting forth analytical scheme based on *Ray* and OPA); Oxman & Gudridge, *supra* note 28, at 747 (summarizing holding in *Locke*). Significantly, *Locke* held that the preemptive analysis in *Ray* controls despite the OPA savings provisions that the Ninth Circuit had viewed as a carte-blanche for state regulation. *United States v. Locke*, 529 U.S. 89, 107 (2000). The *Locke* Court recognized that the overlapping nature of PWSA's Titles I and II presented difficulty for determining whether conflict or field preemption applied pursuant to the *Ray* analysis. *Id.* at 111. To that end, *Locke* set up the overlap analysis, a new form of preemption analysis, whereby states could regulate local waters as long as regulations did not affect national regulation. *Id.* at 111-12.

uncertainty.³⁶

In *United States v. Massachusetts*, the First Circuit held that the district court erred in enjoining the MOSPA provisions based on the pleadings.³⁷ The court first determined that Title II did not unambiguously cover the § 4 manning provisions, which were therefore subject to a *Locke* overlap analysis.³⁸ Regarding the § 6 tug escort requirements, the First Circuit remanded for a more careful review of the Coast Guard's intent.³⁹ Finally, the court held that Title II did not preempt the § 50C financial assurance clause on the pleadings.⁴⁰ In short, the First Circuit concluded that a preemption holding would require further evidence.⁴¹

Based on *Ray* and *Locke*, the First Circuit correctly held that the district court hastily decided the case on the pleadings.⁴² MOSPA's language was sufficiently ambiguous to justify further analysis.⁴³ Although the holding represented a preliminary defeat for those who valued maritime commercial interests and a victory for pro-environmentalists, some uncertainty remains as to the future of this litigation.⁴⁴

36. See *infra* note 47-48 and accompanying text (indicating unanswered questions in court's analytical framework).

37. See 493 F.3d at 5 (stating district court should have adhered to more elaborate analytical framework).

38. See *id.* at 13 (noting record required further development regarding manning issue). The court analyzed whether the § 4 manning requirements were more properly defined in terms of marine environment protection under Title I, or in terms of tanker regulation under Title II. *Id.* at 12-13. The distinction between a Title I and a Title II finding is outcome determinative. See *supra* notes 31-35 (explaining significance of *Ray* and *Locke* holdings). The First Circuit noted that both titles are concerned with marine environment protection and that both titles include references to "manning." 493 F.3d at 12. The court accordingly held that the manning inquiry correctly began with Title II but should not have ended there. *Id.*

39. See 493 F.3d at 19 (noting remand better course for addressing questions of Coast Guard's intent). The law of preemption by agency action requires a clear statement from the federal agency of its intention to preempt the state regulation at issue. See *id.* The court inquired whether the Coast Guard had expressed intent to preempt § 6. *Id.* at 18-19. In 2006, the Coast Guard had announced that *Ray* and *Locke* preempted MOSPA. *Id.* at 19. The First Circuit remanded for a determination of whether preemption in the form of a legal conclusion rather than an explicit statement was sufficient. See *id.* at 19.

40. See *id.* at 25-26 (stating district court incorrectly enjoined financial assurance provision). Pursuant to § 50C(d), the Massachusetts Department of Environmental Protection may lower the amount of the bond if vessels meet certain criteria. *Id.* at 20. Although some of the criteria strike at the core of Title II, the court held that the United States did not meet its burden of showing that § 50C(d) is not within state power. *Id.* at 21. The court viewed the issue as a spectrum problem because OPA permits states to assign liability while indirectly affecting areas traditionally under Title II. *Id.* at 21-22. The First Circuit did not hold that the MOSPA one billion dollar penalty necessarily infringed on Title II because it was not plainly unreasonable. *Id.* at 23-24.

41. *Id.* at 4-5 (noting district court "acted prematurely"). The court pointed out that the district court dismissed the case without taking evidence. *Id.* at 4.

42. See *supra* notes 31-35 and accompanying text (discussing precedent).

43. See 493 F.3d 1 at 24 (criticizing district court's failure to adhere to complex overlap analytical scheme).

44. See Garry, *supra* note 23, at 258 (analyzing stakes between pro-environmental and pro-maritime interests). Despite the state's vindication after the initial disappointment at the district court level, the Coast Guard passed regulation that directly conflicted with MOSPA in 2007. See AG Reilly Fights Feds, *supra* note 14 (noting Attorney General stated district court decision "blow to . . . responsible protection of . . . coastline"); Massachusetts Department of Environmental Protection, *Oil Spill Guidance Information*,

The First Circuit's decision is consistent with *Locke*, the Supreme Court's last word on the preemptive effect of PWSA.⁴⁵ The Supreme Court's analytical scheme in *Locke* supports cooperative federalism, whereby courts carefully balance coexisting state and federal interests.⁴⁶ Despite the correct holding, the case brings out some deficiencies in the analytical framework established under *Locke*.⁴⁷ The difficulty of determining which PWSA title should apply renders the overlap analysis almost always applicable.⁴⁸ Similarly, the OPA savings doctrines potentially allow state regulation of a traditionally federal sphere.⁴⁹

The First Circuit's decision helps illustrate that the *Locke* analytical scheme is a vague balancing standard that yields undesirable results.⁵⁰ Federal law, regardless of its alleged inadequacy, has the potential to address any environmental problems.⁵¹ The current scheme leaves too many exploitable variables and blurs lines.⁵²

In sum, the First Circuit in *Massachusetts v. United States* correctly held that the district court acted too quickly in enjoining key MOSPA provisions. As it currently stands, however, the statutory scheme is vague at best. Courts reviewing state oil spill statutes must determine which of two overlapping PWSA titles applies to a given provision. The First Circuit's decision indicates that courts can easily blur the line between Title I and Title II, and that the OPA savings doctrines allow states to interfere in traditionally federally-regulated areas. Given that federal regulations are best suited to balance uniformity and environmentalism, Congress should strengthen the language of the relevant statutes to preempt state oil laws.

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<http://www.mass.gov/dep/cleanup/laws/spillact.htm> (last visited Jan. 21, 2008) (noting Coast Guard regulations effective and stating legal repercussions).

45. See *supra* notes 35, 39-40 and accompanying text (discussing First Circuit holding in light of *Locke*).

46. See Garry, *supra* note 23, at 273 (stating *Locke* indicates shift toward balancing state and federal interests); McCarthy, *supra* note 28, at 1227, 1231 (highlighting strong federal tanker regulation history and *Locke*'s balancing of federal and state interests).

47. See Oxman & Gudridge, *supra* note 28, at 749 (describing problems with *Locke*). *Locke* did not address the legal analysis when a state rewords its statute to specifically address local peculiarities and no direct Coast Guard regulation is in place. *Id.*

48. See *United States v. Locke*, 529 U.S. 89, 111 (2000) (recognizing difficulty in determining Title I or II application). Although the First Circuit recognized that the overlap analysis will not always apply when a state regulates a particular local waterway, the court failed to illustrate any specific instance when it would not. See 493 F.3d at 13.

49. See Garry, *supra* note 23, at 241 (addressing ambiguous nature of OPA savings clauses).

50. See Garry, *supra* note 23, at 274 (indicating *Locke* overlap facilitates pro-environmental interests); *supra* notes 39-40 (describing First Circuit's broad overlap analysis).

51. See Vitt, *supra* note 20, at 592 (arguing potential disasters addressable within federal process).

52. See Garry, *supra* note 23, at 274 (indicating *Locke* holding opened potential pro-environmental door). Compare 493 F.3d at 11-12 (holding manning requirements not unambiguously analyzed under Title II field preemption), with Vitt, *supra* note 20, at 593 (arguing *Locke* holding renders manning requirements exclusively under Title II).