

# Conchs on Cruises: Taking the “Sovereign State of Mind” Too Far in Key West’s New Cruise Ordinance

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*This Comment argues that Key West’s recently enacted ordinance—which limits the total amount of people allowed to disembark to 1,500 per day, prohibits cruise ships with 1,300 or more passengers from docking and prioritizes ships with the best records on health and the environment—conflicts with maritime law because it destroys harmony and uniformity in interstate and maritime commerce. State and local governments may use their police powers to implement laws that abate pollution; however, local laws may not regulate the primary conduct of vessels to the extent it disrupts the uniformity that is essential to maritime activity. Key West’s ordinance regulates primary conduct and, therefore, is invalid under maritime law.*

## I. INTRODUCTION

On November 3, 2020, the electorate of the County of Monroe, Florida, approved three amendments to the City Charter to be applied in the City of Key West, Florida.<sup>1</sup> The three ordinances regulate cruise ship activities at all ports—both public and privately owned—in the city by (1) imposing a limit of 1,500 people disembarking from cruise ships per day; (2) prohibiting cruise ships from disembarking people if their capacity is 1,300 or more persons (passengers and crew); and (3) giving priority to cruise ships and lines that have “the best environmental and health records.”<sup>2</sup> The Key West Committee for Safer Cleaner Ships (“KWSCS”) petitioned the Key West voters to put the initiatives on the August ballot.<sup>3</sup>

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1. See KEY WEST, FLA., CODE OF ORDINANCES pt. I, art. I, § 1.09 (2021), [https://library.municode.com/fl/key\\_west/codes/code\\_of\\_ordinances?nodeId=PTICH\\_ARTIGE\\_1.09LINUPEDICRSH](https://library.municode.com/fl/key_west/codes/code_of_ordinances?nodeId=PTICH_ARTIGE_1.09LINUPEDICRSH) [<https://perma.cc/8Y8K-QS8D>].

2. *Id.* To determine the cruise ships and cruise lines with the most optimal environmental record, the City will review who has “the lowest number of environmental violations, penalties and fines.” *Id.* For prominent health records, the City will assess the Center for Disease Control Vessel Sanitation Program’s health inspection reports that display “the best scores and least number of violations.” *Id.* The presiding officer authenticated the amendment to the City Charter and filed it with the clerk on November 16, 2020. *Id.*

3. Jayme Deerwester & Morgan Hines, *Key West Votes to Ban Large Cruise Ships from Docking, Limit Cruise Visitors to 1,500 Per Day*, USA TODAY (Nov. 5, 2020, 4:06 PM), <https://www.usatoday.com>

The federal government and state governments have an interest in regulating maritime activity.<sup>4</sup> However, the extent that state and local governments can regulate without federal intervention is uncertain.<sup>5</sup> This Comment argues that the City of Key West does not have the authority to enact an ordinance regulating cruise ships because the ordinance regulates primary conduct and disrupts uniformity in maritime law.

## II. BACKGROUND

### A. Ordinance History

Before the City of Key West added the initiatives to its ballot, the KWCSGS sponsored a report illustrating why restrictions should be placed on cruise ships.<sup>6</sup> The report advised the public that cruise ships considerably increase the risk of spreading COVID-19 and that the only hospital in Key West would quickly exceed its capacity if an outbreak occurred.<sup>7</sup> Next, the report asserted that cruise ships harm the environment by diminishing air and water quality and damaging marine ecosystems.<sup>8</sup> Last, the report alleged that cruise ships and their passengers contribute little to Key West's overall tourist revenue.<sup>9</sup>

The sponsored report asserted that Key West's authority to regulate cruise activities is derived from article VIII, section 2(b) of the Florida Constitution, which grants cities the police power to regulate local activities for health, safety, or welfare purposes.<sup>10</sup> However, the report cautioned that the regulation would be invalid if "preempted by state or federal law." Federal admiralty law permits local regulations as long as they do not

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om/story/travel/cruises/2020/11/05/key-west-florida-voters-opt-ban-large-cruise-ships-visiting/6171877002/ [https://perma.cc/PB6H-ZADR].

4. See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 224–25 (1917).

5. *Id.* at 216.

6. KEY WEST COMM. FOR SAFER CLEANER SHIPS, CASE STUDY ON LIMITING CRUISE SHIPS IN KEY WEST (2020), <https://static1.squarespace.com/static/5eb2ca1c6ef3bc37557e468f/t/5eb458f04d82e917df6dd57f/1588877552966/WHITE+pAPER.pdf> [https://perma.cc/B269-QV4L]. The report was a "paid political advertisement" sponsored by the Key West Committee for Safer Cleaner Ships. *Id.*

7. *Id.* at 2. According to Robert R. Redfield, the CDC director, "cruise ship travel exacerbates the global spread of Covid-19 and . . . markedly increases the risk and impact of the Covid-19 disease outbreak within the United States." *Id.* (citing No Sail Order and Suspension of Further Embarkation; Notice of Modification & Extension & Other Measures Related to Operations, 85 Fed. Reg. 21,004 (Apr. 15, 2020)).

8. *Id.* at 2–3. The environmental regulations in place appear to be virtually ineffective as cruise lines have been fined millions of dollars for environmental violations and then fined millions more for failing to comply with the terms of its probation. *Id.* The report notes that in 2016, Carnival Corporation was fined \$40 million "for environmental offenses that included the dumping of plastics and oily discharge into ocean waters." *Id.* at 2. Then in 2019, Carnival violated its probation and was fined another \$20 million. *Id.* at 3. The proposed restrictions, if adopted, would reduce the detrimental effect on the environment because smaller vessels may frequent the docks more often, and less traffic would allow the aquatic communities to recover and grow. *Id.* at 4.

9. *Id.* at 3–4.

10. *Id.* at 5.

“conflict with federal law or interfere with the uniform working of the maritime legal system.”<sup>11</sup>

The report stated that the U.S. Supreme Court established “a presumption against federal preemption of local police power” in 1991 by permitting local police powers to regulate land use and zoning.<sup>12</sup> The report also cited a 2008 case that ostensibly “emphasiz[ed] the need to remain ‘ever mindful’ that ‘land use questions . . . are the peculiar concern of local and state governments.’”<sup>13</sup> Finally, the report claimed that the Dormant Commerce Clause permitted regulation, because a city has authority to implement “local zoning and development ordinances that have only an incidental effect on interstate commerce.”<sup>14</sup> Despite KWCS’s simplistic perception of maritime law, the analysis to determine who has the authority—local governments, state legislatures, the U.S. Congress, or federal courts—to regulate maritime commerce is much more complex and controversial.<sup>15</sup>

### B. Legal Background

Article III, Section 2, Clause 1 of the U.S. Constitution grants federal courts jurisdiction of admiralty and maritime cases.<sup>16</sup> In section 9 of the Judiciary Act of 1789, Congress provided federal district courts with “exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy.”<sup>17</sup> The current jurisdictional statute is 28 U.S.C. § 1333.<sup>18</sup> Federal

11. *Id.* at 5–6. The report claims to be quoting an unidentified 2011 Supreme Court case; however, there is only one case—a Ninth Circuit Court of Appeals case from 2011—which contains the quote from the report. *See Pac. Merch. Shipping Ass’n v. Goldstene*, 639 F.3d 1154, 1178 (9th Cir. 2011) (quoting *Pac. Merch. Shipping Ass’n v. Aubry*, 918 F.2d 1409, 1422 (9th Cir. 1990)) (emphasis omitted).

12. KEY WEST COMM. FOR SAFER CLEANER SHIPS, *supra* note 6, at 6. The report asserted that the relevant cases are from 1858, 1970, 1991, and 2008; however, the report does not specifically identify these cases. *Id.* This author found only one case containing the specific quotations from what the report referred to as a 1991 case: a 1999 case from the U.S. Court of Appeals for the Fourth Circuit. *See Casino Ventures v. Stewart*, 183 F.3d 307, 310 (4th Cir. 1999). The report also referred to an 1858 case, which appears to be the Supreme Court case *Cushing v. Owners of the John Fraser*, that was decided in February 1859. *Cushing v. Owners of the John Fraser*, 62 U.S. 184, 187 (1859).

13. KEY WEST COMM. FOR SAFER CLEANER SHIPS, *supra* note 6, at 6 (omission in original).

14. *Id.* The report referred to a 1970 case without identifying the case; however, this author was unable to locate a case with that specific language. *See id.* (“Local benefits outweigh any burdens on interstate commerce unless it can be shown that the burden on interstate commerce is truly excessive.”).

15. *See, e.g., United States v. Locke*, 529 U.S. 89, 116–17 (2000).

16. U.S. CONST. art. III, § 2, cl. 1. This grant creates a conflict between Congress and the federal courts—Congress may legislate within maritime law, but the federal courts were initially granted jurisdiction to determine whether that law is consistent with federal common law. *See generally Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354 (1959).

17. Judiciary Act of 1789 § 9, 1 Stat. 73.

18. 28 U.S.C. § 1333 (2018). The statute provides:

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:  
(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

courts have exclusive jurisdiction concerning *in rem* proceedings, where the vessel itself is sued.<sup>19</sup> In all other proceedings, including *in personam*, state courts have concurrent jurisdiction.<sup>20</sup> The Saving to Suitors Clause<sup>21</sup> allows state courts to hear admiralty cases<sup>22</sup> where a common law remedy exists.<sup>23</sup> State courts have long been competent to adjudicate admiralty claims, provided that the state remedies do not conflict with federal maritime law and the “needs of a uniform federal maritime law.”<sup>24</sup>

### 1. Jurisdiction for Admiralty and Maritime Cases

Generally, maritime jurisdiction in tort cases is found when the location (also known as *situs*) and the connection (also known as *nexus*) tests are satisfied.<sup>25</sup> The location test requires that the tort occurred on navigable waters or the injury suffered on land was “caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.”<sup>26</sup> The connection test requires two elements to be met to trigger maritime jurisdiction. First, the accident must have “a potentially disruptive impact on maritime commerce.”<sup>27</sup> Second, the general character of the

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(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

*Id.* Admiralty and maritime jurisdiction is not founded in 28 U.S.C. § 1331. *Romero*, 358 U.S. at 360–67. Admiralty and maritime law do not “arise under the Constitution or laws of the United States,” rather it preexisted the Constitution. *Id.* at 368. Article III, through Congress’ express powers, only granted federal courts jurisdiction over admiralty and maritime cases. *Id.*; *see also id.* at 367 (“[T]he constitutional grant . . . deal[s] with a distinct class of cases, that . . . precluded ‘identity’ with any other class of cases contained in Article III. Thus the grant of jurisdiction over ‘suits of a civil nature at common law or in equity arising under the Constitution or laws of the United States, in the Act of 1875, as derived from Article III, could not reasonably be thought of as comprehending an entirely separate and distinct class of cases—‘Cases of admiralty and maritime Jurisdiction.’”); 28 U.S.C. § 1331.

19. Legal Info. Inst., *Jurisdiction of Supreme Court & Inferior Federal Courts*, CORNELL L. SCH. <https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/jurisdiction-of-supreme-court-and-inferior-federal-courts> [<https://perma.cc/R592-GZPQ>] (last visited May 24, 2021).

20. *Id.*

21. “This role of the States in the administration of maritime law was preserved in the famous ‘saving clause’—‘saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.’” *See Romero*, 358 U.S. at 362 (quoting Judiciary Act of 1789 § 9).

22. This Comment uses “admiralty cases” and “maritime cases” interchangeably.

23. *See Romero*, 358 U.S. at 362.

24. *See id.* at 373; *see also* *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917) (“No [state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic feature 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.”).

25. *See generally* *Jerome B. Grubart, Inc., v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995).

26. *Id.* at 532 (quoting The Admiralty Extension Act, 46 U.S.C. App. § 740 (recodified at 46 U.S.C. § 30101)). The Admiralty Extension Act replaced the original locality rule which “asked only whether the tort occurred on navigable waters.” *Id.* at 531.

27. *Id.* at 534 (quoting *Sisson v. Ruby*, 497 U.S. 358, 364 n.2 (1990)).

activity giving rise to the incident must bear a “substantial relationship to a traditional maritime activity.”<sup>28</sup>

Determining whether a state law conflicts with federal maritime law or interferes with uniformity is a heavily litigated area.<sup>29</sup> Contrary to the customary use of the *Erie* doctrine, the adjudication of admiralty actions must sometimes yield to federal substantive admiralty law if the state law conflicts.<sup>30</sup> Alternatively, states may make some modifications or supplement state law remedies when the law concerns a maritime and local matter.<sup>31</sup> There are no clear rules, but courts have been shifting toward upholding state law.<sup>32</sup>

## 2. When Does Federal Law Preempt State Law?

### i. *Southern Pacific Co. v. Jensen*

The U.S. Supreme Court created the test to determine if state legislation conflicts with federal maritime law in *Southern Pacific Co. v. Jensen*.<sup>33</sup> The Court held that the New York Workmen’s Compensation statute (“Compensation statute”) was unconstitutional under the Admiralty Clause because it placed an absolute duty on the employer to provide compensation, and if the ship failed to comply, the employer could be subject to penalties.<sup>34</sup> A widow of a stevedore received compensation under

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28. *Id.* (quoting *Sisson*, 497 U.S. at 365). In cases involving airplane accidents, even if the location of the harm is on navigable waters, a claim is “‘not cognizable in admiralty’ . . . unless ‘the wrong bear[s] a significant relationship to traditional maritime activity.’” *Id.* at 532–33 (alteration in original) (quoting *Exec. Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 268 (1972)).

29. *See generally Jensen*, 244 U.S. 205; *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623 (1st Cir. 1994); *United States v. Locke*, 529 U.S. 89 (2000); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996) (upholding state wrongful death statutes, survival statutes, and punitive damages when a young girl using a jet ski in territorial waters died in a collision with a vessel).

30. *See Jensen*, 244 U.S. at 215–16. “[T]he extent to which state law may be used to remedy maritime injuries is constrained by a so-called ‘reverse-*Erie*’ doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.” *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223 (1986).

31. *See W. Fuel Co. v. Garcia*, 257 U.S. 233 (1921); *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961). In *Kossick*, the Supreme Court held a contract that specified a seaman’s medical treatment would be subject to maritime law because it required uniformity and had “a more genuinely salty flavor.” *Kossick*, 365 U.S. at 741–42.

32. David W. Robertson, *The Applicability of State Law in Maritime Cases After Yamaha Motor Corp. v. Calhoun*, 21 TUL. MAR. L.J. 81, 95–96 (1996).

33. *Jensen*, 244 U.S. 205.

34. *See id.* at 213–15. The *Jensen* Court hardly elaborated on the general provisions of the statute but referenced a recent decision upholding the constitutionality of the statute. *See id.* at 213 (citing *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188 (1916)). The Compensation statute created a remedy for employees injured or killed on navigable waters that placed an absolute duty on the employer to pay for injuries which the employee must accept. *White*, 243 U.S. at 194–95. The statute could compel employers to provide sufficient proof of their financial capacity to pay future compensation claims and pay into a state fund as security. *Id.* If a vessel owner did not comply with the Compensation statute, then the ship would be subject to a penalty or could be prevented from loading or unloading cargo at a dock in New York. *Jensen*, 244 U.S. at 213–14.

the statute after her husband had been fatally injured within the scope of his employment.<sup>35</sup> The employer of the decedent appealed this award to the U.S. Supreme Court, arguing that the Compensation statute was unconstitutional pursuant to the Admiralty Clause.<sup>36</sup> The Court held that the Compensation statute was unconstitutional because it would destroy “the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded.”<sup>37</sup> The Court recognized that state legislation may to an indefinite extent “change[,], modif[y], or affect[.]” general maritime law, but “it would be difficult, if not impossible, to define with exactness just how far.”<sup>38</sup>

Accordingly, the Court outlined three factors to determine if a state law affects maritime commerce: whether the state law (1) “contravenes the essential purpose expressed by an act of Congress[.]” (2) “works material prejudice to the characteristic features of the general maritime law[.] or” (3) “interferes with the proper harmony and uniformity of that law in its international and interstate relations.”<sup>39</sup> Additionally, the Court emphasized that if New York could require foreign ships entering into New York’s ports to comply with the Compensation statute, then other states would likely implement their own variation of regulations.<sup>40</sup> Thus, the Court held that the remedy offered by the Compensation statute was not available at common law, and the state had no authority to enforce such a statute.<sup>41</sup>

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35. *Jensen*, 244 U.S. at 212. A stevedore is “one who works at or is responsible for loading and unloading ships in port.” *Stevedore*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/stevedore> [<https://perma.cc/K32V-6A6F>] (last visited May 25, 2021).

36. *Jensen*, 244 U.S. at 209–10.

37. *Id.* at 217.

38. *Id.* at 216.

39. *Id.* The Court determined admiralty jurisdiction existed in the case because, at the time of his death, the stevedore’s job responsibilities, employment contract, and injuries received were all “maritime in its nature,” and the rights and liabilities of the connected parties clearly fell under admiralty jurisdiction. *Id.* at 217.

40. *Id.* at 217–18.

41. *Id.* Following the *Jensen* opinion, the Supreme Court created the “maritime but local” exception that allows recovery under State negligence laws or State Worker’s Compensation statutes, even though the incident occurred on navigable waters. *See* *W. Fuel Co. v. Garcia*, 257 U.S. 233 (1921). For example, in *Western Fuel Co. v. Garcia*, the Supreme Court upheld a California statute that imposed a one-year statute of limitation on a claim for wrongful death. *See id.* The decedent, Manuel Souza, was a stevedore who was killed instantly after a coworker negligently allowed a steel hoisting bucket to drop coal on the decedent. *Id.* at 238. The decedent’s widow initially recovered under the California Workmen’s Compensation statute, but the Supreme Court annulled her award one year and one day after the decedent’s death. *Id.* The Supreme Court invalidated the award because a suit to recover damages for the death of a person caused by negligence in admiralty courts had not yet been established. *Id.* at 240. *But see* *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) (creating a cause of action for wrongful death under unseaworthiness in admiralty law and saving to suitors any State law remedy within a State’s territorial waters). The widow initiated an *in personam* action in admiralty court to recover under the California negligence and wrongful death statute. *Garcia*, 257 U.S. at 239. The Court acknowledged the absence of a clear line discerning the applicability of state law “rule of nonliability adopted and enforced by our admiralty courts in the absence of an applicable statute [that] may be modified, changed or supplemented by state legislation” and that this case makes no finding on the

ii. Ballard Shipping Co. v. Beach Shellfish

The U.S. Court of Appeals for the First Circuit expanded the *Jensen* test in *Ballard Shipping Co. v. Beach Shellfish*.<sup>42</sup> The First Circuit Court held that a Rhode Island statute allowing recovery for economic losses was constitutional because it regulated secondary conduct and did not impose a burden on maritime commerce.<sup>43</sup>

The court expanded on the second and third prongs of the *Jensen* test concerning, respectively, both the phrase “characteristic feature” and whether a state legislation “‘interferes with the proper harmony and uniformity’ of maritime law.”<sup>44</sup> Under the second prong, the meaning of “characteristic feature” refers exclusively to a “federal rule that either ‘originated in admiralty’ or ‘has exclusive application there.’”<sup>45</sup>

Under the third prong, a state statute is not preempted by federal law “where the relevant state law is procedural rather than substantive.”<sup>46</sup> Where substantive law is involved, the court emphasized that the Admiralty Clause no longer requires a “rigid national uniformity” standard but requires a balancing of federal and state interests in commercial and maritime affairs.<sup>47</sup> The court indicated that a state has a strong interest in preventing

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matter. *Id.* at 240. The Court then cited to cases acknowledging “that as to certain local matters a state statute may grant rights which will be enforced in an admiralty court.” *Id.* (citing *Cooley v. Bd. of Wardens*, 53 U.S. 299 (1852); and then *Ex parte McNiel*, 80 U.S. 236 (1872)). Further, other cases permitted recovery for death on navigable waters under a local statute in admiralty court. *Id.* (citing *Am. Steamboat Co. v. Chase*, 83 U.S. 522 (1873); *Sherlock v. Alling*, 93 U.S. 99 (1876)). Thus, the Court determined that the action could be considered in admiralty court if a state statute provided a cause of action because it “is maritime and local in character and the specified modification . . . to the rule applied in admiralty courts” was consistent with the *Jensen* test and did not conflict with maritime law. *Id.* Unfortunately, the widow was still unable to recover because the California statute had a one-year statute of limitations, and because the Supreme Court annulled her claim one year and one day following the death of her husband, her claim was barred. *Id.* at 243–44. Thus, the Court’s determination on a state statute permitting wrongful death was only dicta and, as previously mentioned, the true understanding of wrongful death in admiralty courts was not realized until 1970. See *Moragne*, 398 U.S. 375.

42. See *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623 (1st Cir. 1994).

43. See *id.* at 630.

44. *Id.* at 627–28 (quoting *Jensen*, 244 U.S. at 216). The Court emphasized Justice Scalia’s statement in *American Dredging* that “[i]t would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence.” *Id.* (alteration in original) (quoting *Am. Dredging Co. v. Miller*, 510 U.S. 443, 452 (1994)).

45. *Id.* at 627 (quoting *Am. Dredging Co.*, 510 U.S. at 450). The Court in *American Dredging* originally provided the interpretation of the meaning of “characteristic features.” *Id.*

46. *Id.* at 628 (citing *Am. Dredging Co.*, 510 U.S. at 453).

47. *Id.* (quoting *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 207 (1st Cir. 1988)). The Court cited to Professor Currie’s summary of the preemption issue in maritime law:

The maritime nature of an occurrence does not deprive a state of its legitimate concern over matters affecting its residents or the conduct of persons within its borders; but the federal admiralty powers were granted to protect certain federal interests in maritime and commercial affairs. An issue created by such a conflict of interests can be resolved only by reference to those interests and by an attempt to maximize the effectuation of the proper concerns of both state and nation.

pollution within its navigable waters and providing a remedy for such pollution.<sup>48</sup> Further, states have the ability to use their police power to enact laws, such as air pollution laws, “in many areas of interstate commerce *and maritime activities*.”<sup>49</sup> Additionally, the court distinguished state regulations of primary versus secondary conduct, where primary conduct is “the out-of-court behavior of ships or sailors” and secondary conduct does not affect the decision making of crew and masters of vessels.<sup>50</sup> Regulating primary conduct creates the greatest risk of conflict and disruption of uniformity.<sup>51</sup>

*iii. United States v. Locke*

In *United States v. Locke*, the U.S. Supreme Court struck down the state of Washington’s statute regulating oil tanker design, equipment, reporting, and operating requirements.<sup>52</sup> The Washington legislature had implemented the statute in response to a spill of eleven million gallons of crude oil in 1989, after the *Exxon Valdez* ran aground in Alaska.<sup>53</sup> Under the statute, a vessel that failed to comply with the regulations could be subjected to “sanctions includ[ing] statutory penalties, restrictions of the vessel’s operations in state waters, and a denial of entry into state waters.”<sup>54</sup>

The International Association of Independent Tank Owners (“Intertanko”) brought suit in district court for “declaratory and injunctive relief against state and local officials responsible for enforcing the . . . regulations.”<sup>55</sup> Intertanko argued that the interest of national uniformity was at stake and Washington’s regulations “invaded areas long occupied by the Federal Government.”<sup>56</sup> Further, Intertanko urged that “if local political subdivisions of every maritime nation were to impose differing regulatory regimes on tank operations, the goal of national governments to develop effective international environmental and safety standards would be defeated.”<sup>57</sup>

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*Id.* at 629 (quoting David P. Currie, *Federalism and the Admiralty: “The Devil’s Own Mess”*, 1960 SUP. CT. REV. 158, 169 (1960)).

48. *Id.* at 629.

49. *Id.*

50. *Id.*

51. *Id.*

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

53. *Id.* at 94. In 1984, “the tanker ARCO Anchorage grounded in Port Angeles Harbor and spilled 239,000 gallons of Alaskan crude oil.” *Id.* at 96.

54. *Id.* at 97 (citing WASH. REV. CODE §§ 88.46.070, 88.46.080, 88.46.090 (1994)).

55. *Id.*

56. *Id.*

57. *Id.* Intertanko provided the district court with a diplomatic note that thirteen nations also shared Intertanko’s concern. *Id.* at 98. The nations indicated that

legislation by the State of Washington on tanker personnel, equipment and operations would cause inconsistency between the regulatory regime of the US Government and that of an individual State of the US. Differing regimes in different parts of the US would create

In its analysis, the Supreme Court emphasized the importance of preserving Washington's waters and maintaining international agreements that allow channel access.<sup>58</sup> The Court also noted that Washington has some of the United States' largest oil facilities, which receive or transport massive amounts of oil.<sup>59</sup> Although the majority of the crude oil transported to Washington is extracted from Alaska, Washington also hosts "[f]oreign-flag vessels arriving from nations such as Venezuela and Indonesia."<sup>60</sup>

The Supreme Court held that the state statute interfered "in an area where the federal interest has been manifest since the beginning of our Republic and is now well established."<sup>61</sup> The Court emphasized that one of the reasons for adopting the Constitution was to allow "Congress to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations."<sup>62</sup> Further, the state statute was preempted by the federally enacted Oil Pollution Act of 1990 ("OPA").<sup>63</sup> The Court explained that the OPA tolerates state laws regulating secondary conduct such as "liability rules and financial requirements relating to oil spills[,] but not "substantive regulation of a vessel's primary conduct."<sup>64</sup> The Court further delineated that subject to very few exceptions, "only the Federal Government may regulate the 'design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning' of tanker vessels."<sup>65</sup>

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uncertainty and confusion. This would also set an unwelcome precedent for other Federally administered countries.

*Id.* (quoting Note Verbale from the Royal Danish Embassy to the U.S. Dep't of State 1 (June 14, 1996)). The district court upheld the regulations, and the Court of Appeals for the Ninth Circuit reversed in part and affirmed in part that the enforcement of the laws except "the one requiring the vessels to install certain navigation and towing equipment." *Id.*

58. *Id.* at 95–96. Washington's waters contain two vast estuaries and an inland sea called Puget Sound, which contains over 200 islands and "sustains fisheries and plant and animal life of immense value to the Nation and to the world." *Id.* at 95. Washington's channels provide access to Canada's largest port in Vancouver, and Washington controls inbound traffic whereas Canada directs outbound traffic. *Id.* The United States and Canada adopted this system in 1979 through the Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region, Can.-U.S., Dec. 19, 1979, 32 U.S.T. 377. *Id.*

59. *Id.* at 95. Notably, many ports that have refineries and product stations are adjacent to Puget Sound, and crude oil is carried to Puget Sound. *Id.*

60. *Id.* at 96.

61. *Id.* at 99.

62. *Id.* at 99 (citing THE FEDERALIST NO. 12 (Alexander Hamilton), NO. 44 (James Madison), NO. 64 (John Jay)).

63. *Id.* at 101–02.

64. *Id.* at 105.

65. *Id.* at 111 (quoting 46 U.S.C. § 3703(a)). The holding in *Locke* was specific only to tanker vessels and their operation. *Id.* The Supreme Court has not made any decision regarding regulations of cruise ships, and this Comment argues that the regulatory restrictions described in *Locke* should also apply to the state and local regulation of cruise ships.

### 3. *Kossick v. United Fruit Co.*

In *Kossick*, the U.S. Supreme Court held that a contract specifying a seaman's medical treatment would be subject to maritime law—not the state law governing the contract—because it required uniformity and had “a more genuinely salty flavor.”<sup>66</sup> The Court examined whether the contract would disrupt uniformity in maritime law and instead be considered “maritime and local.”<sup>67</sup> The Court emphasized that because the issue concerned a contract, rather than a public regulation, it “creates some presumption” that the contract was valid.<sup>68</sup> However, applying state law would invalidate the contract and not supplement a remedy to effectuate maritime rights.<sup>69</sup> Thus, the “salty flavor” of the contract favored the application of maritime law to uphold the contract.<sup>70</sup>

### 4. *Huron Portland Cement Co. v. City of Detroit*

In *Huron*, the U.S. Supreme Court held that the Constitution does not prohibit the application of a criminal penalty under the City of Detroit's Smoke Abatement Code pertaining to ships.<sup>71</sup> The Court denied two assertions made by ship owners: first, that the City may not impose inconsistent or additional standards as Congress has already legislated in the field, and second, that “even if congress has not expressly pre-empted the field, the municipal ordinance [‘]materially affects interstate commerce in matters where uniformity is necessary.’”<sup>72</sup> The Court declared that the City may exercise its police power to promote health, safety, and welfare “in many areas of interstate commerce and maritime activities, concurrently with the federal government.”<sup>73</sup> However, a state may not—where uniformity is

66. *Kossick v. United Fruit Co.*, 365 U.S. 731, 741–42 (1961).

67. *Id.* at 738 (quoting *W. Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921)).

68. *Id.* at 741. The Court specifically stated,

we are dealing here with a contract, and therefore with obligations, by hypothesis, voluntarily undertaken, and not, as in the case of tort liability or *public regulations*, obligations imposed simply by virtue of the authority of the State or Federal Government. This fact in itself creates some presumption in favor of applying that law tending toward the validation of the alleged contract.

*Id.* (emphasis added).

69. *Id.* at 741–42.

70. *Id.*

71. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 447 (1960).

72. *Id.* at 442. The shipowner argued his vessel had already “been inspected, approved and licensed to operate in interstate commerce” in compliance with a comprehensive legislation enacted by Congress. *Id.* The Court held the state law was not pre-empted because there was “no overlap between the scope of the federal ship inspection laws and that of the municipal ordinance here involved.” *Id.* at 446.

73. *Id.* at 442. The goal of the City of Detroit's ordinance was to eliminate air pollution for the health and cleanliness of the community. *Id.* at 445. The Court noted that Congress endorsed state action for “abating such pollution.” *Id.* at 445–46 (quoting 42 U.S.C. § 1857 (transferred to 42 U.S.C. § 7401)). Further, a Senate Committee Report recognized this as being a state and local concern. *Id.* (citing S. REP. NO. 389 (1955), reprinted in 1955 U.S.C.C.A.N. 2459). Thus, the court determined that

necessary—enforce legislation that “materially affects interstate commerce.”<sup>74</sup>

The shipowner also argued that the ordinance could not obstruct a vessel that had obtained a federal license from its federal right to use navigable waters in the U.S.<sup>75</sup> The Court held that owning a federal license does not preclude ships from being subject to “local police power, not constituting a direct regulation of commerce.”<sup>76</sup> The Court reasoned that the ordinance did not “destroy the right of free passage” nor prevent a licensed vessel from docking in the Port of Detroit, and thus, the ordinance was upheld.<sup>77</sup>

### 5. Passenger Vessel Services Act

The Passenger Vessel Services Act of 1886 (“PVSA”) prevents a vessel from transporting passengers between ports in the U.S. unless that vessel is “wholly owned by citizens of the United States” and “has been issued a certificate of documentation.”<sup>78</sup> The purpose of the statute is to promote American shipping and limit foreign competition by placing restrictions on foreign vessels from carrying on domestic traffic and commerce within the U.S. ports.<sup>79</sup> Foreign flagged cruise ships that leave from

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“[l]egislation 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.” *Id.* at 442.

74. *Id.* at 444.

75. *Id.* at 447.

76. *Id.* The Court stated that federally licensed vessels may be subject to local laws such as: pilotage, quarantine, safety inspections, or regulations of wharves and docks. *Id.*

77. *Id.* at 448.

78. 46 U.S.C. § 55103 (2018). The transportation of passengers statute states,

(a) In general.—Except as otherwise provided in this chapter or chapter 121 of this title, a vessel may not transport passengers between ports or places in the United States to which the coastwise laws apply, either directly or via a foreign port, unless the vessel—

(1) is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade; and

(2) has been issued a certificate of documentation with a coastwise endorsement under chapter 121 or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement.

(b) Penalty.—The penalty for violating subsection (a) is \$300 for each passenger transported and landed.

*Id.* The “U.S. Customs and Border Protection (CBP) enforces various navigation laws which deal with the use of vessels in what is recognized as coastwise trade.” U.S. Customs Serv., Coastwise Trade; Sailing Instruction; Foreign Vessel; Passenger Vessel Services Act, HQ 116494, 2005 WL 1762448 (June 22, 2005).

79. See *The Granada*, 35 F. Supp. 892, 893 (E.D. Pa. 1940); see also *Sea Princess Servs., Inc. v. United States*, No. CIV. 95–00129, 1996 WL 33362120 (D. Guam June 5, 1996) (citing *Autolog Corp. v. Regan*, 731 F.2d 25, 28 (D.C. Cir. 1984)) (“The general intent and purpose of this legislation was to provide a ‘legal structure that guarantees a coastwise monopoly to American shipping and thereby promotes development of the American merchant marine.’”). Many cruise lines fly flags registered under foreign countries, so they will not be subject to American labor laws and enjoy the advantages of less burdensome regulations. See Bruce Parkinson, *Maritime Law: The One Change That Could Save the Cruise Industry*, CRUISERADIO.NET (Oct. 26, 2020), <https://cruiseradio.net/the-jones-act-passenger>

a U.S. port must go to a “distant foreign port” before being permitted to disembark passengers at another U.S. port other than the original port at which they began.<sup>80</sup> Legislatures have unsuccessfully attempted to evade the PVSA by proposing to temporarily suspend the Act if the foreign vessels “utilize U.S. shipyards to some extent for vessel repairs or building.”<sup>81</sup>

### III. COMMENTARY

Under the *Jensen* test, Key West’s ordinance regulating cruise ship activity is preempted by a federal statute and attempts to regulate maritime activity beyond what is permissible.<sup>82</sup> Congress enacted the PVSA, which directly regulates and restricts foreign vessels carrying passengers between U.S. ports.<sup>83</sup> Key West’s ordinance contravenes the essential purpose of the PVSA—to promote American shipping and commerce—because the ordinance suppresses commerce and economic value among the local business owners and the state as a whole.<sup>84</sup> Further, the ordinance subjects *all* cruise ships to the regulation, making no distinction between U.S. flagged and foreign flagged ships.<sup>85</sup>

Second, the Key West ordinance interferes with the proper harmony and uniformity of international and interstate relations. The ordinance could disrupt the supply chain of goods brought into the state and potentially drive out maritime commerce because the vessels will seek “a more consistent and predictable operating environment.”<sup>86</sup> Further, the limitations of the ordinance may disturb the international and interstate regulations and planning of seaport operations.<sup>87</sup> According to the Key West Chamber of Commerce, banishing the cruise industry would cost Key West “\$90 million in lost jobs and income.”<sup>88</sup> If Key West is permitted to place

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-vessel-services-act-1886-maritime-law/ [https://perma.cc/2SPC-ESWQ]. Norwegian Line’s *Pride of America* is the only cruise ship that is registered in the United States. *Id.*

80. 10 Benedict on Admiralty § 2.02 (2021) (citing 19 C.F.R. § 4.80a(a)(3), (b)(3)) (“The term ‘distant foreign port’ is defined as ‘any foreign port that is not a nearby port’”). “[F]oreign ports in North America, Central America, Bermuda, the West Indies, and the U.S. Virgin Islands are excluded.” *Id.* (citing § 4.80a(a)(2)).

81. Jeff Kvandal, Comment, *Analysis of the Senate’s Proposed Cruise Vessel Act as an Innovative Approach Towards Increased U.S. Participation in the North American Cruise Ship Tourism Market*, 26 TUL. MAR. L.J. 353, 354 (2001).

82. *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 215–18 (1917).

83. *See* 46 U.S.C. § 55103.

84. *See* S.B. 426, 123d Reg. Sess. (Fla. 2021), <https://www.flsenate.gov/Session/Bill/2021/426/BitText/Filed/PDF> [https://perma.cc/2LM9-ZE25].

85. *See* KEY WEST, FLA., CODE OF ORDINANCES pt. I, art. I, § 1.09 (2021), [https://library.municode.com/fl/key\\_west/codes/code\\_of\\_ordinances?nodeId=PTICH\\_ARTIGE\\_1\\_09LINUPEDICRSH](https://library.municode.com/fl/key_west/codes/code_of_ordinances?nodeId=PTICH_ARTIGE_1_09LINUPEDICRSH) [https://perma.cc/8Y8K-QS8D].

86. *See* S.B. 426, 123d Reg. Sess. (Fla. 2021).

87. *See id.*

88. Nancy Klingener, *Key West Votes to Limit Number of Cruise Passengers and Ship Size*, WLRN (Nov. 4, 2020 12:12 AM), <https://www.wlrn.org/2020-11-04/key-west-votes-to-limit-number-of-cruise-passengers-and-ship-size> [https://perma.cc/24Z3-3L29].

restrictions on cruise ships to this extent, other local governments and states may implement their own variation of regulations on cruise ships, essentially destroying the industry and uniformity among states and international relations.<sup>89</sup>

Third, the ordinance regulates primary conduct of cruise ships, which creates the greatest conflict with maritime law and local regulation.<sup>90</sup> Congress, federal agencies, and states are permitted to regulate, and have regulated, pollutants in navigable waters.<sup>91</sup> Key West's interest in passing the ordinance is to reduce the pollution in its navigable waters, which the courts in *Ballard Shipping* and *Huron* characterized as a strong interest.<sup>92</sup> However, the Key West ordinance neither provides a remedy for, nor specifically regulates, pollution within its navigable waters.<sup>93</sup> Instead, the ordinance regulates the primary conduct of cruise ships and restricts access to its ports.<sup>94</sup> Key West's ordinance regulates the primary conduct of vessels by limiting the amount of passengers, including crew, and the size of cruise ships.<sup>95</sup> This is a step beyond the state statute in *Ballard Shipping* (which the court upheld), because the Key West ordinance is not attempting to provide a remedy, but to directly affect the design and manning of the cruise ship, which is similar to the state statute in the *Locke* case (which the Court struck down).<sup>96</sup> Contrary to *Ballard Shipping*, there is no pending congressional legislation that supports Key West's ordinance;<sup>97</sup> however, the

89. See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 215–18 (1917).

90. Compare *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 629 (1st Cir. 1994), with KEY WEST, FLA., CODE OF ORDINANCES pt. I, art. I, § 1.09 (2021), [https://library.municode.com/fl/key\\_west/codes/code\\_of\\_ordinances?nodeId=PTICH\\_ARTIGE\\_1.09LINUPEDICRSH](https://library.municode.com/fl/key_west/codes/code_of_ordinances?nodeId=PTICH_ARTIGE_1.09LINUPEDICRSH) [<https://perma.cc/8Y8K-QS8D>].

91. See International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 1340 U.N.T.S. 184, amended by Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, Feb. 17, 1978, 1340 U.N.T.S. 61 (regulating discharges of pollutants at sea); 33 U.S.C. § 1402(f) (2018) (prohibiting deliberate waste discharges into the ocean, enacted as part of the Ocean Dumping Act); Asia N. Wright, Note, *Beyond the Sea and Spector: Reconciling Port and Flag State Control over Cruise Ship Onboard Environmental Procedures and Policies*, 18 DUKE ENV'T L. & POL'Y F. 215, 226–27 n.77 (2007) (providing examples of multiple states that have passed cruise ship pollution statutes).

92. See KEY WEST COMM. FOR SAFER CLEANER SHIPS, *supra* note 6, at 6; see also *Ballard Shipping Co.*, 32 F.3d at 629.

93. Compare *Ballard Shipping Co.*, 32 F.3d at 629, with KEY WEST, FLA., CODE OF ORDINANCES pt. I, art. I, § 1.09 (2021), [https://library.municode.com/fl/key\\_west/codes/code\\_of\\_ordinances?nodeId=PTICH\\_ARTIGE\\_1.09LINUPEDICRSH](https://library.municode.com/fl/key_west/codes/code_of_ordinances?nodeId=PTICH_ARTIGE_1.09LINUPEDICRSH) [<https://perma.cc/8Y8K-QS8D>].

94. Compare *Ballard Shipping Co.*, 32 F.3d at 629, with KEY WEST, FLA., CODE OF ORDINANCES pt. I, art. I, § 1.09 (2021), [https://library.municode.com/fl/key\\_west/codes/code\\_of\\_ordinances?nodeId=PTICH\\_ARTIGE\\_1.09LINUPEDICRSH](https://library.municode.com/fl/key_west/codes/code_of_ordinances?nodeId=PTICH_ARTIGE_1.09LINUPEDICRSH) [<https://perma.cc/8Y8K-QS8D>].

95. See KEY WEST, FLA., CODE OF ORDINANCES pt. I, art. I, § 1.09 (2021), [https://library.municode.com/fl/key\\_west/codes/code\\_of\\_ordinances?nodeId=PTICH\\_ARTIGE\\_1.09LINUPEDICRSH](https://library.municode.com/fl/key_west/codes/code_of_ordinances?nodeId=PTICH_ARTIGE_1.09LINUPEDICRSH) [<https://perma.cc/8Y8K-QS8D>].

96. Compare *id.*, with *Ballard Shipping Co.*, 32 F.3d at 629, and *United States v. Locke*, 529 U.S. 89, 111 (2000).

97. Recent Congressional legislation that has been proposed for regulation of cruise ships failed. See Kvandal, *supra* note 81, at 354.

state legislature has pending legislation that would make Key West's ordinance invalid.<sup>98</sup>

Invalidating Key West's ordinance does not signify that the local government does not have the authority to implement regulations concerning the health, safety, and welfare of its city.<sup>99</sup> As mentioned in *Huron*, a city may utilize its police powers to implement legislation that mitigates pollution in areas affecting interstate commerce and maritime activities.<sup>100</sup> Contrary to the ordinance in *Huron*, however, Key West's ordinance prevents the right of free passage by explicitly preventing cruise ships with more than 1,300 passengers from docking at any port on the island and limiting the amount of visitors from ships to 1,500 per day.<sup>101</sup> Thus, Key West's ordinance extends beyond its authorization and is therefore not permissible.

#### IV. CONCLUSION

The Key West ordinance is not permitted by federal maritime law, because the ordinance regulates primary conduct to such an extent that it would disrupt the harmony and uniformity of international and interstate relations. This conclusion should not discourage commitment by the local and state governments to implement laws deterring pollution within Key West's navigable waters. However, such laws must focus on the pollution itself rather than regulate the primary conduct of vessels.

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98. See S.B. 426, 123d Reg. Sess. (Fla. 2021) ("preempting to the state the regulation of commerce in state seaports"). The validity of the proposed state legislation is outside the scope of this Comment. The question of validity could be the subject of future research as the proposed statute is attempting to prohibit all local regulation that interferes with maritime commerce, which the court in *Huron* found permissible if the state is utilizing its police power and the interest of uniformity is not imperative. See *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 441–44 (1960).

99. See *Huron Portland Cement Co.*, 362 U.S. at 441–43.

100. *Id.*

101. See *id.* at 446–47; KEY WEST, FLA., CODE OF ORDINANCES pt. I, art. I, § 1.09 (2021), [https://library.municode.com/fl/key\\_west/codes/code\\_of\\_ordinances?nodeId=PTICH\\_ARTIGE\\_1.09LINUPEDICRSH](https://library.municode.com/fl/key_west/codes/code_of_ordinances?nodeId=PTICH_ARTIGE_1.09LINUPEDICRSH) [<https://perma.cc/8Y8K-QS8D>].