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Jason G. Howe

*University of Maine School of Law*

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# FEDNAV, LTD. V. CHESTER: BALLAST WATER AND THE BATTLE TO BALANCE STATE AND FEDERAL REGULATORY INTERESTS

Jason G. Howe\*

## I. INTRODUCTION

In *Fednav, Ltd. v. Chester*,<sup>1</sup> the United States Court of Appeals for the Sixth Circuit upheld the dismissal of a constitutional challenge to the Michigan Ballast Water Statute (MBWS).<sup>2</sup> By unanimously affirming the decision of the United States District Court for the Eastern District of Michigan,<sup>3</sup> the *Fednav* Court not only declined to invalidate state laws protecting Michigan's waters from aquatic nuisance species (ANS),<sup>4</sup> but also rejected claims that the MBWS should be preempted by broad federal regulation.<sup>5</sup>

Through its *Fednav* decision, the Sixth Circuit iterated that Michigan may still play a vital role in protecting its ecological and economic interests. ANS pose a serious threat to the ecological well-being of Michigan's waters and the state's economic health.<sup>6</sup> Accordingly, ANS

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\* J.D. Candidate, 2011, University of Maine School of Law. I would like to thank both Professor David Owen, whose insight and guidance proved invaluable, and my wife, Amanda, for her patience and support. Any errors herein are entirely my own.

1. 547 F.3d 607 (6th Cir. 2008).

2. MICH. COMP. LAWS SERV. § 324.3112 (LexisNexis 2009).

3. *Fednav, Ltd., v. Chester*, 505 F. Supp. 2d 381 (E.D. Mich. 2007), *aff'd*, 547 F.3d 607 (6th Cir. 2008).

4. 16 U.S.C. § 4702(1) (1994) (defining ANS as “nonindigenous species that threaten[] the diversity or abundance of native species or the ecological stability of infested waters.”). See Jason A. Boothe, Comment, *Defending the Homeland: A Call to Action in the War Against Aquatic Invasive Species*, 21 TUL. ENVTL. L.J. 407, n.1 (2008).

5. U.S. CONST. art. I, § 8, cl. 3. (“The Congress shall have the Power . . . to regulate Commerce . . . among the several States.”) (emphasis added).

6. See *Fednav*, 547 F.3d at 610; Boothe, *supra* note 4, at 410-11; Loren Remsberg, *Too Many Cooks in the Galley: Overlapping Agency Jurisdiction of Ballast Water Regulation*, 76 GEO. WASH. L. REV. 1412, 1414-15 (2008). Introduction of ANS results “in severe and irreversible impacts on environmental quality and biological diversity, on

control measures must be comprehensive, particularly in the Great Lakes region, since incomplete measures are unlikely to provide adequate protection.<sup>7</sup> While federal laws clearly preempt those of a state when conflicts arise,<sup>8</sup> states may nonetheless contribute to achieving the common goal of protecting the state's environmental and economic interests. Furthermore, states are obligated by a duty to their citizens' health and economic security to enact state-centric legislation when Congress leaves loopholes<sup>9</sup> in its regulatory scheme. As such, the pertinent legal question addressed in this Note is whether *Fednav* struck an appropriate balance between federal and state regulatory interests in allowing the MBWS to stand.

This Note initially considers the federal attempts to regulate ANS in the Great Lakes along with the evolution of overlapping federal and state regulatory schemes for managing ANS. After analyzing the Sixth Circuit's reasoning in *Fednav*, this Note briefly explains that the *Fednav* Court appropriately recognized Congress' intent to balance the supremacy of federal law with Michigan's duty to implement legislation that protects its ecological and economic interests. Finally, this Note considers *Fednav* in the broader context of federal-state cooperation on issues such as ballast water regulation and ANS. It posits that the key issue is how to best manage overlapping state and federal control, then proposes a solution for implementing coterminous federal and state regulations.

## II. BACKGROUND

### *A. The Evolution of Environmental Regulation in a Nutshell*

A brief history of state and federal environmental regulations is necessary to put current ANS regulations into context.<sup>10</sup> Modern

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economic and recreational activities, and on public health." *Id.* at 1414 (citations omitted). Damage estimates for the Great Lakes region alone exceeded \$5 billion in 1995. *Id.* at 1414-15.

7. See Boothe, *supra* note 4, at 414-26.

8. *Ohio Mfrs. Ass'n v. City of Akron*, 801 F.2d 824, 825-28 (6th Cir. 1986).

9. *Fednav*, 547 F.3d at 612.

10. Detailing the rich and invariably complex history of environmental regulation is well beyond the scope of this Note. For more detailed treatment of the subject, consider the following: Richard J. Lazarus, *The Making of Environmental Law* (Uni. Chicago Press 2004); Robert V. Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 ALA. L. REV. 717 (2004) (tracing the history of trans-boundary environmental disputes in the United States during the late 19th and early

environmental laws began as something else entirely—nuisance claims.<sup>11</sup> These claims more or less dealt with local issues such as factory smoke or dust, on a city-by-city, state-by-state basis.<sup>12</sup> However, as industrialization proliferated during the late nineteenth and early twentieth centuries, so did problems with various environmental hazards, ultimately resulting in a push to centralize federal control of such ecological hazards.<sup>13</sup> Inter-state industrial and commercial competition drove this change, as state-centric regulation could no longer manage increasing environmental hazards produced on a regional and national scale.<sup>14</sup> By the latter half of the twentieth century, Congress had enacted broad laws intended to protect the nation's ecology, along with the social and economic health tied thereto.<sup>15</sup> Sweeping federal mandates such as the Clean Water Act of 1970 and the Clean Air Act of 1972 frequently displaced state-centric environmental regulations.<sup>16</sup>

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20th Centuries); Neil Gunningham, *Environment Law, Regulation and Governance: Shifting Architectures*, 21 J. ENV. L. 179 (2009) (examining the evolution of environmental law, regulation and governance from the early 1970s into the present); Jared Snyder & Jonathan Binder, *The Changing Climate of Cooperative Federalism: The Dynamic Role of the States in a National Strategy to Combat Climate Change*, 27 UCLA J. ENVTL. L. & POL'Y, 231 (2009) (arguing that states have progressively taken a greater role in environmental regulation over the past several decades).

11. Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 600 & n.90 (1996). See also *Aldred's Case*, (1611) 77 Eng. Rep. 816 (K.B.) (reasoning that one should use his property in such a manner as not to injure that of another.); *Tenant v. Goldwin*, (1702) 92 Eng. Rep. 222, 224 (Q.B.) (expressing the maxim that "every man must so use his own as not to damnify another.").

12. Esty, *supra* note 11, at 600 n.90. See also Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141,1156 (1995) (suggesting that even federal environmental programs of the 1950s and 1960s were "premised on the notion" that environmental problems fell within the purview of state and local governments).

13. Esty, *supra* note 11, at 600 & n.93.

14. *Id.* at 601-2 (arguing Congress enacted broad federal laws because patchwork state laws led to interstate businesses shopping state-by-state for more lenient standards).

15. *Id.* at 602. Congress enacted the Clean Air Act in 1970, the Clean Water Act in 1972, the Safe Drinking Water Act in 1974, and the 1976 Resource Conservation Act, among others. *Id.*

16. *Id.* at 602. See also Percival, *supra* note 12, at 1155.

*B. Federal and State Attempts to Regulate Aquatic Nuisance Species*

In 1990, Congress recognized the zebra mussel<sup>17</sup> as one of several new environmental hazards in the Great Lakes region, passing the Nonindigenous Aquatic Nuisance Prevention and Control Act (NANPCA) in response.<sup>18</sup> NANPCA recognized that ballast water<sup>19</sup> discharges caused the ANS hazard, and sought to control ballast water management systems<sup>20</sup> by charging the United States Coast Guard (USCG) with developing and implementing such regulations.<sup>21</sup> In 1993, the USCG issued regulations requiring ballast-carrying vessels entering the Great Lakes from beyond the exclusive economic zone (EEZ)<sup>22</sup> to meet one of three ballast water management practices: (1) exchange ballast water beyond the EEZ; (2) retain ballast water; or (3) use an environmentally sound alternative.<sup>23</sup> Ships were also encouraged to keep records of each ballast water exchange.<sup>24</sup> While compliance was originally voluntary, it became mandatory two years later.<sup>25</sup>

By 1996, Congress recognized that ANS posed a threat not only to the Great Lakes, but to the entire country and amended NANPCA with the National Invasive Species Act (NISA).<sup>26</sup> NISA retained the ballast water regulations of NANPCA, and required that ballast-carrying vessels entering inland U.S. waters file a ballast water management plan with the USCG twenty-four hours prior to entering port.<sup>27</sup> Furthermore, NISA

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17. *Fednav*, 547 F.3d at 610. The zebra mussel, a bi-valve mollusk native to the Black and Caspian Seas, quickly coated water pipes, boat hulls, and consumed large quantities of microscopic organisms that local species relied on to survive. *Id.*

18. See 16 U.S.C. § 4701 *et seq.* (2006).

19. Sea-going vessels often use water as ballast to add stability while at sea. *Fednav*, 505 F. Supp. 2d at 384. Once in port, a vessel may discharge tens-of-millions of tons of water. Remsberg, *supra* note 6, at 1413-14.

20. 16 U.S.C. § 4701(b)(1) (2006).

21. *Id.* at § 4711(b)(1) (2006).

22. 33 C.F.R. § 151.1504 (2008) (defining the EEZ as “the area . . . which extends from the base line of the territorial sea of the United States seaward 200 [nautical] miles.”).

23. *Id.* at § 151.1510(a) (2008).

24. Boothe, *supra* note 4, at 415-16.

25. 16 U.S.C. §§ 4711(a)-(b). Failure to comply is punishable by a fine of up to \$27,500 and a “felony conviction for knowing violations.” See also Boothe, *supra* note 4, at 415-16.

26. Boothe, *supra* note 4, at 416-18. See also *Fednav*, 547 F.3d at 611-12 (detailing control measures under NISA); 16 U.S.C. 4701(a)(13) (explaining that national action is required immediately).

27. *Fednav*, 547 F.3d at 612. See also 33 C.F.R. § 151.2041(b) (2008); Remsberg, *supra* note 6, at 1418-19.

specifically recognized that “participation and cooperation of the Federal Government and state governments” would eventually be necessary.<sup>28</sup> Atop NISA, Congress amended the Clean Water Act (CWA) to require the Environmental Protection Agency (EPA) to regulate “vessels and other floating craft,” along with the discharge of “biological materials” such as ANS.<sup>29</sup> However, the EPA refused to regulate ballast water discharges until it was ordered to do so in 2006 by the United States District Court for the Northern District of California.<sup>30</sup> The California court gave the EPA until September 30, 2008 to enact ballast water regulations that would coexist with NISA.<sup>31</sup> The ramifications of this decision for *Fednav* are discussed in greater detail below.<sup>32</sup>

However, the CWA, NANPCA, and NISA have each failed to fully regulate vessels with the potential to spread ANS via ballast water, leaving open an “enormous loophole”<sup>33</sup> in the federal regulatory scheme. No federal ballast water regulation controlled vessels designated as “No Ballast On Board” (NOBOB).<sup>34</sup> Vessels designated NOBOB have ballast tanks and can still carry ballast water.<sup>35</sup> However, NOBOBs are usually already loaded with cargo, and therefore neither need, nor carry ballast when they enter the Great Lakes region.<sup>36</sup> Although considered empty, a NOBOB vessel’s ballast tanks retain residual sediment and water that may house ANS.<sup>37</sup> Once in port and unloaded, NOBOB vessels are free to take in water or adjust ballast levels as operators see

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28. 16 U.S.C. § 4701(a)(15) (2006).

29. Remsberg, *supra* note 6, at 1415 (quoting 33 U.S.C. § 1251(a) (2006)).

30. Remsberg, *supra* note 6, at 1418-19.

31. As of the publication of this Note, the EPA has enacted no such plan. Remsberg, *supra* note 6, at 1418-19. As a point of context, in 2005, Judge Illston of the Northern District of California found that the EPA’s failure to regulate ballast water as a pollutant under the Clean Water Act was contrary to the clear intent of that statute, despite the fact that the EPA had exempted ballast water from regulation since 1973. *Nw. Env’tl. Advocates v. EPA*, 2005 WL 756614, at \*8-9 (N.D.Cal. Mar. 30, 2005), *aff’d*, 537 F.3d 1006 (9th Cir. 2008). She granted the EPA two years to promulgate regulations regarding the discharge of ballast water pursuant to the Clean Water Act. *Nw. Env’tl. Advocates v. EPA*, 2006 WL 2669042, at \*1 (N.D.Cal. Sept. 18, 2006). The EPA has begun the process of soliciting comments for rulemaking, but has not yet enacted final rules. *See Development of Clean Water Act National Pollutant Discharge Elimination System Permits for Discharges Incidental to the Normal Operation of Vessels*, 72 Fed. Reg. 34241, 34241 (June 21, 2007).

32. *See infra*, Section III.

33. *Fednav*, 547 F.3d 612; Boothe, *supra* note 4, at 419.

34. *Fednav*, 547 F.3d at 612; 33 C.F.R. § 151.1502 (2008).

35. Boothe, *supra* note 4, at 419 nn.92-93.

36. *Id.*

37. *Id.*; *Fednav*, 547 F.3d at 612.

fit, potentially introducing ANS in the very manner NISA sought to avoid.<sup>38</sup> This is significant because eighty-five percent of all vessels entering the Great Lakes are designated NOBOB.<sup>39</sup> In essence, these NOBOB vessels are “unregulated with respect to their ballast-water practices.”<sup>40</sup>

*C. Michigan’s Implementation of the Michigan Ballast Water Statute*

Recognizing this deficiency in the existing federal regulations, Michigan amended its Natural Resources and Environmental Protection Act to include the MBWS,<sup>41</sup> under which all vessels “engaging in port operations in Michigan” as of January 1, 2007 had to obtain a state permit.<sup>42</sup> The permit required a vessel’s operator to fill out a multi-page application<sup>43</sup> and agree to follow state ANS regulations.<sup>44</sup> Compliance required filing a report with the Michigan Department of Environmental Quality (MDEQ) prior to entering a Michigan port.<sup>45</sup> A vessel not planning to exchange ballast water in Michigan had to certify such a decision with the MDEQ.<sup>46</sup> Alternatively, vessels that planned to exchange ballast water had to employ one of four state ballast water treatment methods.<sup>47</sup> *Fednav* arose in response to the MBWS, placing the security of both Michigan’s MBWS, and the security of the local health and economy in jeopardy.

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38. Boothe, *supra* note 4, at 419 n.93; *Fednav*, 547 F.3d at 612.

39. Boothe, *supra* note 4, at 419.

40. *Fednav*, 547 F.3d at 612.

41. See MICH. COMP. LAWS SERV. § 324.3112 (LexisNexis 2009).

42. *Id.* § 324.3112(6).

43. *Fednav*, 547 F.3d at 613 (“[t]o obtain a General Permit, a vessel operator is required to fill out a three-page application and pay a \$75 application fee and a \$150 annual fee.”).

44. MICH. COMP. LAWS SERV. § 324.3112(6) (LexisNexis 2009).

45. *Id.* (indicating that reports must include vessel name, port destination, date and type of last ballast-water management practice, total volume or weight of ballast on board, and a statement regarding whether the vessel intends to exchange any ballast water while in a Michigan port).

46. *Id.*

47. *Fednav*, 547 F.3d at 613. Treatment options under the MBWS include (1) hypochlorite treatment, (2) chlorine dioxide treatment, (3) ultraviolet light radiation treatment, or (4) deoxygenation treatment. *Id.*

III. THE *FEDNAV, LTD. V. CHESTER* DECISION

In *Fednav*, a consortium of shipping companies and their associations, and port companies and their trade associations,<sup>48</sup> sued MDEQ Director Steven Chester and other officials,<sup>49</sup> seeking an injunction preventing enforcement of the MBWS on grounds that it violated the Michigan Constitution, the Due Process and Commerce Clauses of the United States Constitution, and should be preempted by broad federal regulations.<sup>50</sup> The plaintiffs moved for summary judgment shortly thereafter, while the defendants filed a corresponding motion to dismiss.<sup>51</sup>

Assessing the case procedurally, the United States District Court for the Eastern District of Michigan should have considered whether the plaintiffs had standing to bring their case. However, the court never addressed standing.<sup>52</sup> Instead, the court first addressed the jurisdictional issues raised under the Eleventh Amendment,<sup>53</sup> finding the plaintiffs lacked authorization to bring state-law claims against a Michigan official in federal court without state consent.<sup>54</sup> The court then applied the “rational basis” test to the defendants’ due process claim,<sup>55</sup> finding “[i]t was clearly rational for Michigan to enact [the MBWS],”<sup>56</sup> then quickly dismissed the Commerce Clause claim for lack of “discriminatory affect”

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48. Plaintiff-Appellants: *Fednav, Ltd.*; Canadian Forest Navigation Co., Ltd; Baffin Investments, Ltd.; Confornav, Ltd.; Shipping Federation of Canada; Seaway Great Lakes Trade Association; United States Great Lakes Shipping Association; Nicholson Terminal and Dock Co.; and, the American Great Lakes Ports Association. They are collectively referred to hereinafter as Plaintiffs. See *Fednav*, 547 F.3d at 607.

49. Michigan Attorney General Michael Cox is also a Defendant-Respondent. Several environmental groups also intervened, including Michigan United Conservation Clubs, Alliance for the Great Lakes, National Wildlife Federation and Natural Resource Defense Council, Inc. *Fednav*, 505 F. Supp. 2d at 384 n.2. They are collectively referred to hereinafter as Defendants.

50. *Fednav*, 505 F. Supp. 2d at 388-89.

51. *Id.* at 389-90.

52. *Fednav*, 505 F. Supp. 2d at 391.

53. U.S. CONST. amend. XI. See *Hans v. Louisiana*, 134 U.S. 1 (1890) (holding the Eleventh Amendment encompasses claims against a state by citizens of *that* state).

54. *Fednav*, 505 F. Supp. 2d at 391 (citing *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 124-25 (1984) (indicating that the Supreme Court has “insisted . . . that the State’s consent be unequivocally expressed.”)).

55. *Id.* at 391-92; see 37712, Inc. v. Ohio Dept. Liquor Control, 113 F.3d 614, 619-20 (6th Cir. 1997) (holding substantive due process is only violated if a law fails to advance a legitimate interest).

56. *Fednav*, 505 F. Supp. 2d at 391.

because the plaintiffs failed to state a claim of undue burden.<sup>57</sup> In addressing plaintiffs' primary claim that federal law must preempt the MBWS under *United States v. Locke*,<sup>58</sup> the court tested for field preemption and conflict preemption.<sup>59</sup> The trial court distinguished *Locke* from *Fednav*, holding that neither field preemption nor conflict preemption could apply when: (1) "NISA indisputably contemplates a role for states" to play,<sup>60</sup> (2) there is no clear "interest in uniformity" at issue under NISA,<sup>61</sup> unlike the state code at issue in *Locke*,<sup>62</sup> and (3) the NISA savings clause exempts laws like the MBWS from preemption.<sup>63</sup>

After oral arguments on all motions, the court dismissed each of plaintiffs' claims.<sup>64</sup> In dicta, the court indicated that if plaintiffs "want to make the policy argument that federal law should preempt all state regulation of ballast water management, they are free to do so before Congress."<sup>65</sup>

On appeal, the Sixth Circuit first considered whether each plaintiff had standing to challenge the MBWS requirements that all vessels capable of carrying ballast water first obtain a permit and then employ a treatment system approved by the MDEQ.<sup>66</sup> The court ultimately found that the shipping companies had standing to challenge the permit requirement because compliance required them to purchase a permit,<sup>67</sup>

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57. *Id.* at 397-98.

58. 529 U.S. 89 (2000) (holding federal law preempted Washington state laws regulating aspects of the oil tanker industry because the state laws frustrated Congress' intent to create a uniform regulatory scheme to control oil tanker design).

59. *Fednav*, 505 F. Supp. 2d at 392-97. Furthermore, "field preemption" occurs when "the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation," while "conflict preemption" occurs when a provision of state law "actually conflicts with federal law." *Akron*, 801 F.2d at 828 (internal quotations omitted).

60. *Fednav*, 505 F. Supp. 2d at 395-96.

61. *Id.* at 395-96 (identifying this issue as key to both field preemption and conflict preemption considerations). Unlike the flexible treatment regulations at issue in *Fednav*, in *Locke*, it was impossible to comply with incongruous vessel design regulations. *Id.* at 396-97.

62. *Locke*, 529 U.S. 89, 97 (identifying WASH. REV. CODE § 88.46.040(3) (1994) as the issue).

63. *Fednav*, 505 F. Supp. 2d at 396.

64. *Id.* at 390-91.

65. *Id.* at 396.

66. *Fednav*, 547 F.3d at 614.

67. *Id.* at 615.

hence injury-in-fact.<sup>68</sup> As a result, the court also conferred standing to the shipping associations, since their members had standing independent of the association.<sup>69</sup> However, the court refused to confer standing to either the dock company or its association, as both failed to allege suffering injury-in-fact as a result of the permit requirement.<sup>70</sup> Additionally, the court found no plaintiff had standing to challenge the treatment requirement, because rather than allege that compliance would cost large sums of money, each plaintiff disavowed ever discharging ANS in their ballast water.<sup>71</sup> As the court noted, rather than allege that the fee structure in place was too costly to shipping companies moving goods into Michigan ports, the plaintiffs argued only that their vessels did not release any ballast water.<sup>72</sup> Had the plaintiffs argued that such treatment systems cost upwards of half-a-million dollars per vessel—as is the case—the court likely would have addressed the issue.<sup>73</sup> However, as the Sixth Circuit noted, the plaintiffs’ “complaint is bereft of *any* allegation that *any* of the Plaintiffs has spent a single dollar, or otherwise been harmed, because of the treatment requirement.”<sup>74</sup> As a result, the Sixth Circuit only addressed the treatment requirement.<sup>75</sup> The plaintiffs’ failure to allege injury-in-fact under the MBWS treatment prong means that Michigan’s stricter ballast water treatment requirements, and others like it, remain open to challenge in the future.<sup>76</sup>

While the Sixth Circuit agreed with the trial court that NISA specifically contemplated state and federal cooperation, the court found NISA’s savings clause related to ANS “control measures,” not “prevention.”<sup>77</sup> Nonetheless, the court applied the intent test from *Shaw v. Delta Air Lines, Inc.*<sup>78</sup> in finding that Congress intended to allow states to employ preventative ANS measures in addition to “control measures.”<sup>79</sup> In reaching its conclusion, the court looked to NISA and reasoned that Congress not only recognized the potential for a symbiotic

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68. A “party bringing suit ‘must show that the action injures him in a concrete and personal way.’” *Mass. v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring)).

69. *Fednav*, 547 F.3d at 615.

70. *Id.* at 616.

71. *Id.* at 616-17.

72. *Id.*

73. *Id.*

74. *Id.* at 616 (emphasis in original).

75. *Fednav*, 547 F.3d at 618.

76. Boothe, *supra* note 4, at 423.

77. *Fednav*, 547 F.3d at 619-20.

78. 463 U.S. 85, 95 (1983) (stating that courts must “ascertain Congress’ intent.”).

79. *Fednav*, 547 F.3d at 620-21.

relationship between state and federal regulation,<sup>80</sup> but encouraged it,<sup>81</sup> finding neither field preemption nor conflict preemption.<sup>82</sup> Furthermore, the court found plaintiffs' argument that shipping was inherently federal under *Locke*—and therefore beyond state control—to be misguided.<sup>83</sup> Instead, the court reasoned that *Locke* only required a court to consider the scope of a state's regulation in relation to its federal counterpart, not the relative federal nature of the activity being regulated.<sup>84</sup> Since it was "physically possible" to comply with both NISA and MBWA standards, and because additional reporting requirements under the MBWS do not infringe on NISA's intent, the Sixth Circuit found no conflict whatsoever.<sup>85</sup>

Having found that NISA contemplated state regulations like the MBWA, the Sixth Circuit affirmed the trial court's dismissal of the plaintiffs' Commerce Clause and due process claims. Unlike the trial court, which applied the *Pike v. Bruce Church, Inc.*<sup>86</sup> balancing test in finding the relative benefits of ANS regulation far outweighed the burden of completing "a few forms,"<sup>87</sup> the Sixth Circuit found no balancing was necessary.<sup>88</sup> The court reasoned that the Commerce Clause cannot act in dormancy when a federal regulation such as NISA specifically contemplates the enactment of state regulations like MBWS.<sup>89</sup> Emphatically, the court indicated that by "enacting NISA . . . Congress expressly contemplated, and indeed encouraged, state participation in ANS prevention measures. We would lose our constitutional bearings if we were to hold that the Commerce Clause, in its dormancy, strikes

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80. *Id.* at 620 (citing 16 U.S.C. § 4723 (recognizing the need for coordination with the states)).

81. *Fednav*, 547 F.3d at 620. See 16 U.S.C. § 1401(15) (calling for the "participation and cooperation" of federal and state governments).

82. *Fednav*, 547 F.3d at 622-23. See *supra* note 59.

83. *Fednav*, 547 F.3d at 622.

84. *Id.* See also *Locke*, 529 U.S. at 108.

85. *Fednav*, 547 F.3d at 623.

86. 397 U.S. 137, 142 (1970) (establishing the balancing test between commercial burden and putative state benefits).

87. *Fednav*, 547 F.3d at 624 (finding the permit requirement, an application fee of \$75, and a "yearly fee" of \$150 "*de minimis*"). See also *Ferndale Labs, Inc., v. Cavendish*, 79 F.3d 488, 495 (6th Cir. 1996) (finding that an Ohio statute requiring all prescription drug wholesalers to fill out a two-page registration and pay a \$100 fee did not violate the Commerce Clause, because, *inter alia*, "[w]e do not consider the \$100 fee a burden.").

88. *Fednav*, 547 F.3d at 624 (reasoning that "[i]ndeed, there is no need to conduct the *Pike* balancing at all.")

89. *Id.*

down state regulation that Congress, in *actively exercising* its power under the Clause, expressly contemplated.”<sup>90</sup>

Next, using reasoning parallel to that of the trial court, the Sixth Circuit found a rational basis<sup>91</sup> for the MBWS, affirming the dismissal of plaintiff’s due process claim in just four paragraphs.<sup>92</sup> Simply stated, “Michigan has a legitimate state interest in protecting its waters from further introductions of ANS from ballast-water discharges by oceangoing vessels.”<sup>93</sup> Finally, in summing up its ruling, the court indicated it had “no basis to disrupt the . . . democratic process[.]”<sup>94</sup> The court’s final words are telling.

#### IV. ANALYSIS

##### *A. Fednav Correctly Seeks to Balance Federal and State Regulations*

The *Fednav* decision correctly indicates that federal courts will not find state environmental regulation unconstitutional when Congress provides avenues for state and federal regulatory cooperation. Although the Sixth Circuit affirmed the trial court’s dismissal of constitutional challenges to the MBWS without reaching the key issue of ballast water treatment, it nonetheless *specifically* recognized that Congress contemplated a regulatory future in which states may provide gap-fillers when federal regulations fail to sufficiently protect state interests.<sup>95</sup> In effect, *Fednav* recognizes that federal and state authorities must cooperate.

*Fednav* does not mark the first time courts have recognized that Congress intends states to have a broader, and perhaps more influential role in meeting federal regulatory ends. For instance, in *Massachusetts*

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90. *Id.* at 624 (emphasis in original).

91. *See* 37712, Inc., v. Ohio Dept. Liquor Control, 113 F.3d 614, 620 (6th Cir. 1997) (holding substantive due process is only violated if a law fails to advance a legitimate interest); *Thompson v. Ashe*, 250 F.3d 399, 407 (6th Cir. 2001) (holding that a state law permit requirement “need only be rationally related to a legitimate government purpose” to be upheld); *Doe v. Michigan Dept. of State Police*, 490 F.3d 491, 503-04 (6th Cir. 2007) (indicating that “any reasonably conceivable state of facts that could provide a rational basis” will suffice).

92. *Fednav*, 547 F.3d at 624-25.

93. *Id.* at 625.

94. *Id.*

95. *Id.* at 621 (“NISA’s test thus reveals that Congress expressly contemplated ANS prevention measures . . . that are conducted by the states.”); *Fednav*, 505 F. Supp. 2d at 396 (“This indicates that a role for the states was forefront in the minds of the drafters of NISA.”).

v. *EPA*, the Supreme Court not only found that the EPA should control greenhouse gas emissions under the Clean Air Act; it also granted Massachusetts the standing necessary to bring its case,<sup>96</sup> thus affording Massachusetts a chance to dramatically influence federal policy.

Similarly, the Supreme Court affirmed Georgia's right to protect its citizens from environmental and chemical hazards originating outside the state. As stated by Justice Holmes in *Georgia v. Tennessee Copper Co.*, each state "has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."<sup>97</sup> The Supreme Court granted Georgia's injunction, and upheld the state's right to employ legal avenues when protecting its citizens. Both cases stand as broad recognitions of a state's right to protect their local environmental and economic interests when federal regulations fail to do so sufficiently. Without standing, neither of the states in either *Mass. v. EPA*, or *Georgia v. Tennessee Copper Co.* could have been heard, let alone defended their citizens from outside environmental threats. In the broadest sense, all three—*Mass. v. EPA*; *Georgia v. Tennessee Copper Co.*; and, *Fednav*—represent an understanding that states may play a vital role in protecting their local ecology and economy.

*B. Fednav and an Evolving Clean Water Act under Northwest  
Environmental Advocates v. U.S.*

The CWA provides another glimpse of congressional intent to allow states more control over local environmental measures, since "states can restrict water pollutants more stringently than the federal government pursuant the [CWA]."<sup>98</sup> While the EPA had—until recently—refused to regulate ballast water under the CWA, the Ninth Circuit in *Northwest Environmental Advocates v. U.S.*<sup>99</sup> affirmed a decision by the United States District Court for the Northern District of California to invalidate 40 C.F.R. § 122.3(a).<sup>100</sup> Under 40 C.F.R. § 122.3(a), the EPA stated its position that the CWA did not require it to regulate the release of ballast

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96. *Mass. v. EPA*, 549 U.S. at 532.

97. 206 U.S. 230, 237 (1907) (holding Georgia had a right to protect its citizens from air pollution that originated outside its borders by granting state's injunction and affirming state's standing to bring suit).

98. *Fednav*, 505 F. Supp. 2d at 394.

99. 537 F.3d 1006 (9th Cir. 2008).

100. The invalidated section provided not only that vessel owners need not obtain a permit for "discharge incidental to the normal operation of a vessel, *including the discharge of ballast water*," but that the EPA could not set such regulations. *Id.* at 1010 (emphasis added).

water.<sup>101</sup> *Northwest Environmental Advocates* not only required the EPA to rework the invalidated regulation in a manner that recognizes the EPA is required to regulate ballast water under the CWA, but also in a manner that comports with Congress' intended cooperation between both federal agencies and state powers.<sup>102</sup> While *Northwest Environmental Advocates* does not directly entail federal preemption of state laws, the broad regulatory implications for managing ballast water will nonetheless impact preemption in the future, as an overbroad regulation under the CWA would undoubtedly displace many state-centric regulations similar to the MBWS. Yet, as the Ninth Circuit indicated in *Northwest Environmental Advocates*, the savings clauses of NANPCA, NISA, EPA guidelines on cooperation, along with the CWA, all broadly "demonstrate a congressional intent to address the serious national problem of ballast water discharges of invasive species, and to do so on *multiple, nonexclusive fronts.*"<sup>103</sup> Because the proposed replacement regulation has not yet been finalized, it remains unclear when the issue of conflict preemption will again become ripe.<sup>104</sup> Nonetheless, the proposed permitting regulations are substantially similar to those already imposed by Michigan, and as is discussed in Section V of this Note, the EPA must act under the cooperation requirements of a council formed under President Clinton,<sup>105</sup> and by its own internal mandates.<sup>106</sup> For the time

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101. *Id.* at 1027.

102. *Id.* at 1025 (mandating that the EPA include the Coast Guard, along with state and local agencies in any action).

103. *Id.* (emphasis added).

104. Proposed changes to the invalidated code section include a clear intent to regulate ballast water in the Great Lakes. However, the manner of that regulation, and whether the EPA plans to defer to the MBWS remains unclear. The proposed regulation provides little detail. See 73 Fed. Reg. 34296 (June 17, 2008).

105. See *infra*, Section IV.

106. Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125, 2159 (2009) (arguing that "congressional acts mandate enforcement by state regulatory agencies, establishing an institutional framework for agency-state cooperation."). See also Exec. Order No. 13132, 64 Fed. Reg. 43255 (Aug. 4, 1999) (mandating that to "the extent practicable, State and local officials shall be consulted before any such action is implemented."); EPA's Action Development Process, Guidance on Exec. Order No. 13132: Federalism (2008), available at <http://www.govexec.com/pdfs/111908rb1.pdf> at 21 (emphasizing the importance of agency consultation with state and local government officials given that "[state and local] governments carry out most of the day-to-day administration of many national environmental programs.").

being, it is clear that states continue to play a substantial role in determining their regulatory future.<sup>107</sup>

*C. Employing Fednav's Guidance to Better Manage Overlapping  
Federal and State Regulatory Schemes*

*Fednav* correctly recognizes that the intent of Congress is neither to vest total control of ANS and ballast water regulations in the federal government,<sup>108</sup> nor for states to again seize sole control of such measures.<sup>109</sup> Rather, a court weighing the constitutional challenge of a state regulation such as the MBWS must lean toward letting the regulation stand, particularly when the court can infer that Congress intended cooperation. As the Sixth Circuit correctly noted in *Fednav*, "Congress also found that 'resolving the problems associated with aquatic nuisance species will require the participation and cooperation of the Federal Government and State governments.'"<sup>110</sup> Furthermore, the executive branch, by way of the USCG, indicated in 2004 that "*the congressional mandate is clearly for a Federal-State cooperative regime in combating the introduction of [ANS] into U.S. waters from ship's [sic] ballast tanks. This makes it unlikely that preemption, which would necessitate consultation with the States under Executive Order 13132, will occur.*"<sup>111</sup> Titled "Federalism," Executive Order 13132 mandated intensive consultation with states prior to imposing regulations that may trump those of a state.<sup>112</sup> Furthermore, the USCG specifically stated that

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107. See Mark D. Rosen, *Contextualizing Preemption*, 102 NW. U. L. REV. 781, 797 (2008) (reasoning that the issue of "whether state law should be preempted is best characterized as a subjective 'political' decision that is most appropriately made by Congress, the most politically representative branch."). In NISA, Congress clearly indicated that federal and state agencies and political bodies should cooperate in regulating ANS.

108. As was the case during much of the mid- to late-twentieth century. See Esty, *supra* note 11, at 601-02.

109. As was the case prior to the mid-twentieth century. Esty, *supra* note 11, at 600. See also Ophelia Eglene, Comment, *Transboundary Air Pollution: Regulatory Schemes & Interstate Cooperation*, 7 ALB. L. ENVTL. OUTLOOK J. 129, 133-34 (2002) (proposing the continuation of successful interstate regulatory control of air pollution under the Clean Air Act of 1970 after the federal government failed to provide sufficiently strict guidelines).

110. *Fednav*, 547 F.3d at 611 (quoting 16 U.S.C. § 4701(15) (1996)).

111. *Id.* at 621 (quoting 69 Fed. Reg. 32864, 32868 (June 14, 2004)) (emphasis in original).

112. See Exec. Order No. 13132, 64 Fed. Reg. 43255 (Aug. 4, 1999), available at <http://www.epa.gov/fedreg/eo/eo13132.htm>.

“each State is authorized under NISA to develop their own regulations if they feel that Federal regulations are not stringent enough.”<sup>113</sup> Nonetheless, *Fednav* can not be taken as definitive guidance on the issue of actually treating ballast water under the MBWS, as such direction will only come when a court hears the merits of the plaintiffs’ claim that the MBWS treatment requirement imposes undue burden on interstate commerce.

### 1. Existing Theories for Managing Overlapping Federal and State Regulatory Schemes

Before spinning *Fednav*’s guidance into a proposal for better managing overlapping federal and state regulatory schemes, it is important to understand—very briefly—existing suggestions for how best to achieve such an end. Several proposals for managing overlapping regulatory issues deal more with the allocation of power—such as granting control to *either* a state, *or* the federal government, but seldom both at the same time.<sup>114</sup> Fully addressing this and the myriad other existing theories is well beyond the scope of this Note.<sup>115</sup> It is sufficient to say that outside of the ANS issue addressed in *Fednav*, examples of the federal-state power struggles abound, and that there exist innumerable proposed solutions for each such struggle.<sup>116</sup>

A notable exception to the traditional concept of granting power to either federal or state agencies is a proposal for “modular environmental regulation,” which seeks to treat each environmental issues as a module to be addressed by several different agencies at both the state and federal

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113. 69 Fed. Reg. 32864, 32865 (June 14, 2004).

114. Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L. J. 795, 807-08 (2005).

115. For a number of different conceptualizations of managing the overlap of state and federal regulation, see Bradley C. Karkkainen, *Environmental Lawyering in the Age of Collaboration*, 2002 WIS. L. REV. 555 (2002) (tracing the history of environmental regulation and a detailed consideration of different concepts for effecting that regulation); Dennis D Hirsch, *Symposium Introduction: Second Generation Policy and the New Economy*, 29 CAP. U. L. REV. 1 (2001) (detailing the history of traditional state and federal environmental regulation and proposing a move toward cooperation at all levels); Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103 (1998) (warning that the modern trend of reinventing traditional concepts of environmental regulation could be hazardous).

116. Freeman & Farber, *supra* note 114, at 807-08. Currently, state and federal regulators are fighting over control of air and water pollution, endangered species protection, wetlands regulation, and water and energy supply. *Id.*

levels.<sup>117</sup> This approach assumes that agencies will not only cooperate effectively once the existing hierarchal structure is loosened, but that educating both the public and private sectors will make each party both amicable to such power sharing, and more likely to abide by decisions when they are made.<sup>118</sup> While the *Fednav*-based proposal that follows may seem similar to “modular environmental regulation,” a notable difference is the use of an oversight committee, of sorts, to ensure cooperation between the many actors involved.

## 2. Effecting a Better Solution

Taking the next logical step, the question becomes whether there exists a means by which the tenets of federal-state cooperation identified by the Sixth Circuit in *Fednav* can be met. The blueprint for such a solution already exists in the National Invasive Species Council (NISC).

In 1999, President Clinton established the NISC, which included the EPA, Department of Defense, and Department of Homeland Security,<sup>119</sup> among others.<sup>120</sup> Because no overarching law existed to control ANS, let alone ballast water regulations, the NISC was tasked with ensuring that each member agency followed its own guidelines for preventing the spread of ANS.<sup>121</sup> In order to meet the NISC’s broad goal of preventing the spread of ANS, members were required to consult and cooperate with the states and with pertinent industry actors as the NISC compiled its biennial National Invasive Species Management Plan (NISMP).<sup>122</sup> Establishing the NISC marked the first attempt to bring ANS controls under one broad framework of intertwined federal and state regulations. An oversight body similar to the NISC could help harmonize ballast water regulations that have yet to be enacted by the EPA under the CWA with those already in place under NISA, the MBWS, and other similar state statutes.

To this end, and in the spirit of cooperation recognized in *Fednav*, Congress could repurpose and expand the Aquatic Nuisance Species Task Force (Task Force). Originally established under NISA, the Task

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117. *Id.* at 876-77.

118. *Id.* at 877-89.

119. The Coast Guard was part of the Department of Transportation until February 25, 2003, when it was moved to the Department of Homeland Security. *Fednav*, 505 F. Supp. 2d at 386 n.5.

120. Boothe, *supra* note 4, at 417 n.82 (citing Exec. Order No. 13112, 64 Fed. Reg. 6183 (Feb. 3, 1999)).

121. Boothe, *supra* note 4, at 417.

122. *Id.*

Force was created to develop the USCG's ballast water treatment program in the Great Lakes region, and ensure that both state and federal goals were met.<sup>123</sup> The Task Force represented an attempt to bring all interested parties to the table,<sup>124</sup> and was directed to seek input from both state and local lawmakers.<sup>125</sup> Specifically,

[w]henver the Task Force determines that there is a substantial risk of unintentional introduction of an aquatic nuisance species by an identified pathway and that the adverse consequences of such an introduction are likely to be substantial, the Task Force shall, acting through the appropriate Federal agency, and after an opportunity for public comment, carry out cooperative, environmentally sound efforts with regional, State and local entities to minimize the risk of such an introduction.<sup>126</sup>

The Task Force could easily be expanded to oversee implementation and harmonization of all federal and state regulations, both present and pending, including any CWA-based regulations that will inevitably result from the Ninth Circuit's invalidation of 40 C.F.R. § 122.3(a) in *Northwest Environmental Advocates*.

For example, both the Senate and House are considering bills—the Great Lakes Collaboration Implementation Act of 2009<sup>127</sup> and Great Lakes Collaboration Implementation Act<sup>128</sup> respectively—either of which could be altered to specifically account for such an expansion of the Task Force. Both propose continuation of the NISC,<sup>129</sup> and could provide

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123. *Fednav*, 505 F. Supp. 2d at 386. See also 16 U.S.C. § 4721 (1996) (establishing the task force).

124. *Id.* at 386 n.6 (citing 16 U.S.C. § 4721(f) (requiring “[e]ach task force member” to coordinate ANS prevention planning with “other members of the Task Force, and regional, State and local entities.” (emphasis added))).

125. *Fednav*, 505 F. Supp. 2d at 393-94.

126. 16 U.S.C. §4722(c)(2) (1996).

127. S. 237, 111th Cong. (1st Sess. 2009) (referred to the Committee on Environment and Public Works).

128. H.R. 500, 111th Cong. (1st Sess. 2009) (referred to the Committee on Transportation and Infrastructure, and in addition to the Committees on Natural Resources, Science and Technology, and House Administration.)

129. S. 237, 111th Cong. §183 (2009) (proposing the NISC have oversight, by way of membership, of Department of the Interior, Department of Agriculture, Department of Commerce, Department of State, Department of the Treasury, Department of Defense, Department of Transportation, Department of Health and Human Services, with executive council membership for the each such Secretary); H.R. 500, 111th Cong. §163 (2009) (proposing the same oversight as the Senate bill, but including the Environmental Protection Agency and U.S. Agency for International Development on the council, and within NISC oversight). The House Bill seems most likely to bring into the fold

funding necessary not only to sustain the Task Force, but also give it teeth, so to speak.<sup>130</sup> Combining this inter-agency, interstate Task Force with a meaningful penalty structure for violators<sup>131</sup> would achieve not only the dual aims of safeguarding environmental and economic interests tied to a states environment, but could help offset the costs of maintaining enforcement. Presently, the House Bill remains tabled with the Committee on Transportation and Infrastructure, and the Committees on Natural Resources, Science and Technology, and House Administration, while the Senate Bill remains tabled for consideration by the Committee on Environment and Public Works.<sup>132</sup> While such a lengthy delay—coupled with the myriad other issues currently faced by Congress—likely mean both bills may well remain on the back burner for months to come, the bills nonetheless exhibit a willingness by at least a few members of both legislative bodies to push the issue forward. Future proposals would do well to take into consideration not only funding plans and cooperative schemes proposed by the current legislation, but also the congressional intent extrapolated by the court in *Fednav*.

## V. CONCLUSION

Like the environmental impetus behind the CWA, NANPCA, NISA, and MBWS, any future action will be driven by the clear need to prevent further spread of ANS via poor ballast water management systems. There is too much at stake for all parties involved, whether federal- or state-based. Ballast-born ANS continue to wreak havoc on the environment and economy alike. Current estimates put the yearly

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decisions by the EPA under the CWA, as a result of *Nw. Envtl. Assoc.* Furthermore, the House version of the bill proposes the creation of an Invasive Species Advisory Committee, which would specifically “recommend to the Council plans and actions at local, tribal, State, regional, and ecosystem-based levels to achieve the goals” of the NISC. *Id.* at § 166(a)-(c) (2009).

130. S. 237, 111th Cong. §§189, 201 (2009) (proposing initial expenditures of between \$2 and \$75 million, with the NISC to produce a budget by 2010); H.R. 500, 111th Cong. §§ 167, 201 (2009) (proposing initial technical expenditures of up to \$75 million on implementing coastal programs, with the NISC to produce a more detailed budget for 2010).

131. But not fees for permitting, as it would not be in the States’ interest to increase the likelihood that such permitting fees, as exist under the MBWS, could become more than *de minimis*.

132. H.R. 500, 111th Cong. preamble (2009); S. 237, 111th Cong. preamble (2009).

economic damage to the Great Lakes alone at \$500 million.<sup>133</sup> Beyond the zebra mussel, cholera-causing bacteria—which killed 10,000 people in one Peruvian outbreak<sup>134</sup>—are easily transported by ballast water. Similar bacteria cause red tide blooms responsible for up to 100,000 cases of poisoning annually, atop costing the New England shellfish industries an estimated \$3 million a week during prolonged blooms.<sup>135</sup>

Ultimately, no definitive solution to ballast-born ANS exists. Nonetheless, *Fednav* must be construed as clear judicial guidance that federal and state lawmakers must cooperatively regulate the growing ANS threat by implementing comprehensive, coterminous ballast water regulations.

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133. Great Lakes Collaboration Implementation Act of 2009, S. 237, 111th Cong. §2(5)(C) (2009).

134. Christopher J. Patrick, Note, *Ballast Water Law: Invasive Species and Twenty-Five Years of Ineffective Legislation*, 27 VA. ENVTL. L.J. 67, 72 (2009).

135. *Id.* at 73.